NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

fall 22

From WCRI

Primer Highlights Psychosocial Factors in Recovery

A recently published guide by WCRI highlights the role of psychosocial factors in recovery after an injury, along with enumerating screening tools and treatment modalities that can help workers return to the workplace.
"The COVID-19 pandemic put a spotlight on the importance of behavioral health," notes John Ruser, president and CEO of the Cambridge-based Workers Compensation Research Institute. "In particular, workers' compensation stakeholders recognize that unaddressed behavioral health issues might delay a worker's recovery and return to work and increase medical costs," he adds.

The guide written by Vennela Thumula and Sebastian Negrusa is free for WCRI members and available to others for a nominal fee. Follow this link for more information: https://www.wcrinet.org/reports/a-primer-on-behavioral-health-care-in-workers-compensation.

In broad terms, psychosocial factors are characteristics that shape an individual psychologically and/or socially; they include protective factors and risk factors, which improve or worsen the individual's physical and mental health. The authors explain that psychosocial factors include an array of elements such as poor recovery expectations after an injury, fear of pain from movement, catastrophizing, distress, perceived injustice, job dissatisfaction, or lack of family or community support systems. Other behavioral health conditions relevant for workers' compensation include well-understood factors such as chronic pain, depression, anxiety, and substance use disorders.

The association between behavioral health and physical health is well-documented. Several studies show poor behavioral health increases the likelihood of developing physical conditions and vice versa. Medical treatment guidelines contain detailed recommendations on comprehensive psychological and psychiatric assessments for specific cases, including for workers with chronic pain, delayed recovery, PTSD, or acute stress disorders, and before initiating some treatments such as chronic opioid therapy.

Among the widely used screening tools for psychosocial factors are the 25-item self-reported questionnaire called the Orebro Musculoskeletal Pain Screening Questionnaire (OMPSQ) and its shorter 10-item version. Other commonly used screening tools to identify psychosocial risk factors include the Keele STarT Back Screening Tool (SBST) and the Functional Recovery Questionnaire (FRQ).

"Early identification of psychosocial factors is key for ensuring that these factors do not affect the worker's recovery. If, with the help of the early screening tools from above, a worker is identified as having psychosocial risk factors, health and claims personnel administering the tools may use the information on risk factors to provide brief interventions, such as educating the patients about psychosocial factors and teaching them self-management strategies, or direct them to specialists," the authors note.

WCRI's guide is based on interviews with mental health care professionals and other health care providers in workers' compensation, employers, labor advocates, and workers' compensation insurers. The authors also performed a review of select national-level and state-specific occupational medical treatment guideline recommendations related to behavioral services, as well as a literature review of behavioral health services provided in workers' compensation systems.

INSIDE THIS ISSUE

CASE LAW UPDATE

By Lindsay Underwood

Recent Return-to-Work Decisions

Two decisions from the North Carolina Court of Appeals are helpful in determining how the Court is examining disability issues.

Geraldine Cromartie v. Goodyear Tire & Rubber Co., Inc., involved a machine operator who sustained a laceration to the hand. The worker returned to work but because of ongoing pain saw the authorized treating physician, Dr. James Post. He eventually assessed Claimant at MMI and assigned restrictions of no lifting over 20 pounds and no repetitive forceful gripping or grasping.

Defendants ended up getting an IME and soon after identified a job they argued was within Claimant's work restrictions. The job required driving a truck to and from building stations over a 12-hour shift, rarely lifting up to 25 pounds, and 30 pounds of force, which could be split between each hand thereby requiring 15 pounds lifting and 15 pounds pushing. Defendants requested the IME provider review and approve the position, which he did, and Defendants offered same to Claimant.

Claimant refused to return. Through the Form 24 process, opposing counsel sent Claimant to a plastic surgeon who assigned 10-pound lifting restrictions. As usual, the Form 24 Application was denied in the administrative setting. This denial led Defendants to send Claimant to another physician and that physician approved the job. Claimant refused to return. The Full Commission found Claimant was disabled, assigning greater weight to testimony from the original authorized treating physician. The Court of Appeals agreed, holding the Full Commission correctly found the job offered to Claimant was not suitable.

The Court of Appeals focused on the definition of suitable employment and concluded the job, unless modified, was not within Claimant's physical limitations and therefore not suitable post-MMI employment. The Full Commission gave greater weight to Dr. Post's testimony and determined the offered position exceeded the restrictions prescribed by him.

In *Richards v. Harris Teeter*, a truck driver sustained a compensable low back injury and was terminated because he had violated a safety procedure during the incident. Because of the termination, Claimant was not eligible for rehire pursuant to policy. A defense witness testified Harris Teeter has a mandatory return to work program and numerous temporary light-duty positions were available. However, since Claimant was not eligible for rehire, Harris Teeter would not offer him a position. Defendants declined to provide vocational rehabilitation to aid in Claimant's job search.

Claimant's authorized treating physician testified he would have approved a position with Harris Teeter had he not been terminated. Defendants argued that Claimant constructively refused suitable employment because he was terminated for cause and, but for that termination, would have remained employed at pre-injury wages.

The Court of Appeals disagreed, noting Defendants were essentially asking the Court to impose a for-cause bar to recovery of benefits when the employee is terminated for causing the accident resulting in injury and is unable to find work elsewhere. The Court indicated this was incompatible with the workers' compensation system which deliberately eliminated negligence from its calculus, and also noted gross negligence was not a defense except in limited exceptions, like intentionally inflicted injuries and intoxication. Even a violation of a safety rule does not bar recovery. Defendants argued fault should have a place in the system when it comes to determining whether an employer may terminate benefits. However, the Supreme Court considered similar concerns in *McRae* and noted the risk for abuse if an employer was allowed to evade payments simply because Claimant was terminated.

Though Defendants have numerous options for return to work, these cases illustrate difficulties when it comes to job approval and strict adherence to company policy. The first case is another reminder the Full Commission, and subsequently the Court of Appeals, which cannot reweigh evidence, will generally give greater weight to the authorized treating physician. Even though Defendants had two physicians stating the position was suitable, the testimony from the original authorized treating physician was found more probative.

In the second case above, Defendants abided by their company policy and terminated Claimant for violating a safety rule. Unlike other safety violations that lead to a for-cause termination, the Court distinguished this case noting Claimant committed the violation during the work injury, and Defendants were essentially trying to argue Claimant's negligence led to his termination. Though you can terminate a claimant for cause due to violations, the Court made it clear that it cannot have occurred at the same time as the work injury. The Court equated Defendants' argument to trying to read a contributory negligence theory into the Workers' Compensation Act.

Though strict adherence to a company policy is encouraged, here it resulted in a significant amount of past-owed TTD benefits and a failed constructive refusal argument. This suggests employers are better off agreeing to re-hire an employee who violates a safety rule during the injury by accident in which he or she was injured. Depending on the severity of the violation, employers may have no choice but to terminate the employee but must recognize exposure for TTD is a possibility.

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

A Negotiated Truce

As some of you may be aware, for several years the NC Association of Self-Insurers and other business organizations have signed a Stakeholder agreement with the Advocates for Justice, essentially to prevent either side from going rogue and introducing workers' compensation legislation. This has proven to be a very worthwhile agreement as it makes both sides communicate with one another on issues they believe need to be addressed legislatively.

We have entered into an agreement again for 2023-2024 and I anticipate everything will be finalized by the end of October, and pretty much along the lines of earlier negotiations. The crux of the agreement is the parties will neither initiate nor support changes to North Carolina's Workers' Compensation Act unless the parties have reached agreement on consensus legislation.

Of course, we recognize and acknowledge it is the sole prerogative of members of the North Carolina General Assembly to introduce legislation affecting workers' compensation, but we hope members will give deference to our agreement. We all agree there have been substantial changes to the Workers' Compensation Act in recent years and that a period of stasis is desirable to allow these changes in the law to fully develop.

Once again our agreement specifies that if legislation is proposed or initiated by an entity that is not a party to this Agreement (including any legislator), the parties would agree to meet and review the legislation to determine if consensus between the parties can be achieved. If consensus cannot be achieved, the parties agree that they will not support but may remain neutral or oppose such legislation.

By mutual consent, the parties have traditionally excluded a number of provisions from their agreement, including court decisions or rules and forms promulgated by the Commission.

We look forward to seeing you soon.
Stephanie Gay

Another Season of Uncertainty

Will there be a COVID-19 wave in the fall and winter? Will the flu make a big comeback as mask mandates are relaxed? Will the U.S. economy slip into a recession even earlier than projected?

Federal officials say they are anticipating a possible COVID wave in the fall, peaking around the first week in December, but there is optimism the surge will be mitigated because of recently approved boosters and a buildup of immunity among the population. **Nature** journal reports that multiple research teams collaborating in the initiative called the COVID-19 Scenario Modeling Hub conclude the U.S. could get off lightly, provided vaccine-booster campaigns are successful and new variants don't emerge.

But those are big assumptions. "Booster uptake so far has been underwhelming. Of the 62 million people over the age of 50 who are eligible for a second booster, only 22 million have received it so far, according to CDC data. Of the 95 million people between 18 and 49 who are eligible for their first booster, only 38 million have availed themselves of it," the **Washington Post** reports.

"My forecast is that you can't really forecast," Dr. Anthony Fauci, the president's chief medical adviser on the pandemic, told the newspaper. "It is such an unpredictable virus in the sense that we've been fooled before, and we likely will continue to be fooled," he adds.

CDC's first full FluView report of the 2022-2023 flu season shows that while flu activity is relatively low overall, there are early increases happening in most of the country. Flu activity is highest and increasing the most in the southeast and south-central parts of the United States. This increased activity could signal an early start to flu season, according to the agency

CDC notes "while the timing and severity of the upcoming flu season cannot be predicted, the United States has experienced little flu for the past two seasons. Reduced population immunity, particularly among young children who may never have had flu exposure or been vaccinated, could bring about a robust return of flu."

On another bright note, the U.S. is forecast to enter a recession in the coming 12 months as the Federal Reserve battles persistently high inflation, the economy contracts, and employers cut jobs in response, according to the latest survey of economists by the **Wall Street Journal**.

On average, economists put the probability of a recession in the next 12 months at 63%, up from 49% in July's survey. Former Treasury Secretary Larry Summers, who has been proved prescient in his warnings about inflation, recently tweeted "consensus has now moved to the view a recession is likely next year." He says the unemployment rate is likely to reach 6%, much higher than the peak of 4.5% forecast by the Federal Reserve Board.

coming up

March 29-31, 2023

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

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 mobysal@outlook.com

www.ncselfinsurers.com

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

NC Industrial Commission Update

By Tracey L. Jones

Revised Guidelines for In-Person Industrial Commission Hearings

The Industrial Commission has revised its in-person hearing guidelines to reflect the most recent guidance from the Centers for Disease Control (CDC).

Important Memo from Emily Baucom, Clerk of the Industrial Commission, to All Carriers, Third-Party Administrators, and Self-Insured Employers: Rule 11 NCAC 23A.0109(d) Requirement to Provide Commission with General Email Address for Service of Claim-Related Documents

Pursuant to Rule 11 NCAC 23A.0109(d), all carriers, third-party administrators, and self-insured employers are required to provide the Commission with an email address for service of claim-related documents in cases where the Commission does not have email contact information for a specific representative assigned to the claim. The Rule requires a general email address for receipt of letters and notices related to claims when the Commission has NOT been advised of a specific person handling the claim. Once the Commission has been advised of a specific representative assigned to the claim, correspondence regarding the claim will be sent directly to that person.

Other Noteworthy Initiatives at the Commission

1) A modernized Industrial Commission hearing room with ADA-compliant renovations is close to completion. The new hearing room provides disabled claimants, witnesses, lawyers, Industrial Commission judicial officers, and hearing observers full and equal access to Commission hearings.

2) The Commission completed a large-scale scanning project that digitized all files dating back to 2010 involving Full Commission appeals. The digital images of documents that were previously at risk of deterioration, or possible destruction due to a natural disaster, are now securely stored.

3) The Commission's Mediation Section implemented new procedures that improve efficiency and reduce costs. Appointment of Mediator Orders and Report of Mediator Invoices are now emailed, when possible, thus reducing agency paper, printer, and postage costs. Additionally, emailing the invoices to defense counsel facilitates the prompt payment of Report of Mediator fees that help fund the Commission's receipt-supported operations.

Tracey L. Jones is a senior workers' compensation partner and co-leader of the Workers' Compensation practice group at Teague Campbell Dennis & Gorham LLP.