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It's the Experts, Stupid

By Julia Dixon

In 2011, North Carolina passed the largest piece of consensus legislation in the country that reformed the Workers' Compensation Act. The 500-week cap on temporary total disability was critical. The Republican legislature did not have a veto-proof majority; therefore, the Democratic governor mandated an exception to the cap for employees who do not qualify for permanent total disability but are seriously injured and cannot work in any job. Thus, "extended compensation" was born.

"An employee may qualify for extended compensation in excess of the 500-week limitation on temporary total disability . . . only if (i) at the time the employee makes application to the Commission to exceed the 500-week limitation on temporary total disability . . . 425 weeks have passed since the date of first disability and (ii) . . . the employee shall prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity." G.S. 97-29(c). The 425-week condition precedent was important. If the benefits had been awarded earlier, the extended compensation exception would have swallowed the 500-week rule and there would not be an effective cap on temporary total disability. The critical factor was placing the burden of proof on the employee to show a "total loss of wage-earning capacity" to qualify for extended compensation.

The Industrial Commission awarded extended compensation ten years later. The employee in Nobles v. NCDHHS/ Central Regional Hospital (I.C. File No. X51195 1/25/21) was a health care technician who fell to the ground unconscious after being struck in the head while breaking up a fight between inmates. He later complained of mental health conditions. Deputy Commissioner Robert Harris awarded extended compensation, but the Full Commission reversed. The Full Commission held there were no work restrictions related to the compensable injuries and employee had not proven his mental health was caused by the assault. The Full Commission gave greater weight to two independent medical examiners rather than the treating physician who relied solely on employee's subjective reporting—rather than diagnostic tests and objective evidence.

The Commission has decided twelve more extended compensation claims since Nobles. The Commission relies on medical and vocational evidence when deciding extended compensation claims. Thus, it is important to secure medical testimony about an employee's ability to return to work in some capacity and vocational evidence that there are jobs available.

Deputy Commissioners awarded extended compensation in six of eight claims that were not appealed to the Full Commission. In one case, the employee had not reached MMI. The other five claims involved two employers that did not retain a vocational rehabilitation professional (VRP) and three claims where the VRP relied on incomplete or faulty data. For example, in Roberts-Drake v. NCDPS (I.C. File No. 13-717400 2/13/23), the employee's VRP testified last and attacked the flawed opinions of the employer's VRP who had located jobs in the wrong geographic area. Medical experts also opined the employees were

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CASE LAW UPDATE

By Lindsay Underwood

Update on COVID-19 Claims

We have finally received some insight, though still minimal, regarding how the Commission will view compensability of COVID-19 claims. Prior to November and December 2022, no opinions had been issued on COVID-19 claims, and both sides were left without much guidance on how the Commission would treat the claims. Several decisions have been previously filed under the N.C. Gen. Stat. § 143-166.1 *et seq* for death benefits for public safety employees, but this is a different standard than what is required to provide compensability under the Workers' Compensation Act. Thus, though illustrative, those decisions were not binding on our Commission.

For a COVID-19 claim to be a compensable occupational disease, a claimant has the burden of proving: (1) their employment placed them at an increased risk of contracting the virus when compared to members of the general public; and (2) there was a causal connection between their specific infection and their employment. In other words, the claimant must prove they were infected while at work, as opposed to by an outside exposure. Further, the claimant's employment must have placed them at an increased risk of contracting COVID-19.

In both decisions, *Britney McNeair v Owens Illinois, Inc./O-I Glass* (Deputy Commissioner Anne R. Harris; November 21, 2022) and *Tony Esai Chambers v North Carolina Department of Public Safety* (Deputy Commissioner Mary Claire Brown; December 22, 2022), the Deputy Commissioner determined that the claimants failed to meet their burden of proof to establish a compensable occupational disease claim. The claimants in both claims could not prove by a greater weight of the evidence that they actually contracted COVID-19 from their employment. One claimant was employed as a Crew Leader of a glass manufacturing line and another worked as a Corrections Officer. In addition, it was determined that neither one of their positions placed them at an increased risk of contracting COVID-19 over the general public. I would note that the claimant in the *McNeair* decision asserted an injury by accident claim (rather than an occupational disease claim), but it was denied as well. Both of the claimants in these decisions were unrepresented.

The decisions give as at least some in indication of what the Commission will look at when it comes to establishing a compensable COVID-19 claim. The claimants here contracted COVID-19 in different years (2020 versus 2022), each contracted different variants, and both contracted COVID-19 during times when varying levels of safety protocols were in place and observed. However, the different sets of facts presented to the Deputy Commissioner did not seem to influence the ultimate conclusions, as both claims were denied. Though both claimants were employed in occupations where there was frequent contact with co-workers, those facts alone were not enough to establish the increased risk element needed to prove a compensable claim. Finally, these decisions demonstrate the importance of a thorough initial claim investigation. In both decisions, contact tracing and investigation into personal activities and event attendance, in conjunction with work schedule and potential work exposures, were important when determining whether COVID-19 was actually contracted in the workplace and in showing a lack of increased risk due to the work.

The decisions in these cases lend some support to the argument defendants have been making since the onset of COVID-19: that it should be treated like an ordinary disease of life to which the public is generally exposed, such that most employees (barring some exceptions) are at the same risk as any individual in any employment. What is clear from these decisions is that potential exposure in the workplace is not enough to prove compensability, even where there is a high level of contact with a high number of co-workers. For an employee to show exposure at work, the evidence will have to be fairly clear that the specific job puts the employee at a higher risk than any other specific job, and that there was little to no potential for outside exposure.

Lindsay Underwood is a partner at Teague Campbell representing employers, insurance companies, and third-party administrators in workers' compensation claims.

President's Note

Ready for the Conference

We are looking forward to seeing you in a few weeks for our upcoming annual conference, scheduled for March 29-31 at the Holiday Inn Resort in Wrightsville Beach. There is still time to register, and we have a few booths left for exhibitors. You may sign-up online or by contacting our executive director Moby Salahuddin at mobysal@outlook.com.

Planning a three-day conference remains a challenge as we always aspire to offer at least 12 credit hours of continuing education for adjusters. I am pleased to report we have again been approved for 12 hours and have already begun exploring topics for our 2024 conference. We are looking for speakers under three broad categories – workers' compensation and case-law developments, medical topics, and issues of specific concern for employers. Please contact me or Moby Salahuddin if you are interested in making a presentation.

Our self-insurers' association is the only group in North Carolina exclusively devoted to workers' compensation. If you want to know what's going on in workers' compensation, or if you want to make an impression, want to be known in the workers' compensation community, our conference is the ideal venue for you. We look forward to seeing you.

Stephanie Gay

NCASI legal advisor

Hamilton Retires, Moves to Mediation

By Moby Salahuddin

After nearly 15 years as legal advisor to the association and 25 years exclusively as a workers' compensation attorney, Bruce Hamilton began a new career this year as a mediator handling workers' compensation cases.

He says he began thinking about retirement in 2020 and moved up the timeline when he was diagnosed with prostate cancer last year. "The surgery went well, and the cancer is gone, but it did prompt me to look at my life beyond law. I enjoyed being in the office at Teague Campbell, and I will miss mentoring young lawyers. On the other hand, I set my own schedule now – I usually know it two weeks out – and my schedule is a lot more flexible. When I have a day off, I go play golf," he adds.

"The biggest substantive difference between being a lawyer and a mediator is realizing my role at mediation is to help the parties reach a mutually agreeable resolution. In some cases that means that I need to look at the case the way the parties view the case, rather than analyzing it the way I would have handled it or litigated it. I am not the attorney in the case anymore so what I think about the case really doesn't matter. That is a big change from being the attorney of record and having significant control over the settlement value of a case and/or the strategy on how or if a case should be litigated," Hamilton says.

Another adjustment he's had to make is doing all the office/clerical work himself. "I used to have a great support staff. Now, I am my own IT department, and it is not very good," he joked. Since he had been with Teague Campbell for nearly 30 years and had a number of long-term clients, initially he had concerns about leaving a void. "However, all of those clients have been developing their own independent relationships with the younger attorneys at Teague, so the transition has been very easy and comfortable," he says.

Hamilton graduated from Tulane in 1983 and the University of Virginia School of Law in 1986. "Mediation came to workers' compensation in the mid-1990s. Initially there was a lot of resistance to the entire concept but that resistance went away quickly and both the plaintiffs' bar and defense bar have embraced mediation as a much quicker, cost-effective way to resolve cases.

"It is also a successful program with about 75% of all mediations resulting in a settlement either at mediation or right after mediation. Since 2020, most mediations are now done remotely via Zoom or another program, so it has become even more accessible than it was before".

"You don't have to be a lawyer to be a mediator but it helps. The basic requirement is that mediators must take a 40-hour course, which covers various topics and issues such as ethics, use of technology, listening skills, etc. There's a steady influx of lawyers coming into mediation."

"I don't know if there will be more mediations, but there almost certainly won't be fewer mediations in the next several years," he adds.

coming up

March 29-31, 2023

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

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The employers' voice in workers' comp

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incapable of work. In cases where Deputy Commissioners denied extended compensation, treating physicians testified that the employee was capable of some work and VRPs performed a transferrable skills analysis (TSA) and a labor market survey (LMS) showing work available.

In addition to Nobles, the Full Commission has decided four more claims. In Tyson v. O'Berry Center/NCDHHS (I.C. File No. X72421 5/4/22), the employer hired a VRP who performed a LMS noting available jobs. The treating physician reviewed the LMS and opined that several jobs were appropriate. The Full Commission upheld the Deputy's decision to deny extended compensation and no appeal was filed.

There are three extended compensation claims on appeal at the Court of Appeals. Two claims were denied by the Full Commission. In both Betts v. NCDHHS—Cherry Hospital (IC File No. X59367 2/1/22) and Sturdivant v. NCDPS (I.C. File No. Y18418 2/28/22), medical experts testified that the employee could perform work in some capacity and a VRP performed a LMS and testified that work was available. The most problematic case is Messick v. Walmart Stores, Inc. (I.C. File No. X45404 & X82412 7/26/22), where a 63-year-old employee sustained a knee injury. Doctors deferred to the employee's VRP regarding return-to-work issues. The employee's VRP completed a TSA, LMS and opined no jobs were available and the employee could not be retrained. The employer did not retain a VRP to refute those opinions. The Deputy and Full Commission awarded extended compensation and the employer appealed.

Practice tips:

- Secure medical evidence the employee can return to work in some capacity
- Retain an expert if the treating physician's opinion relies on subjective evidence
- Provide accurate and complete medical and vocational evidence to a retained VRP performing a TSA and LMS
- Ask medical experts to testify about the appropriateness of available jobs in a LMS
- Depose defense witnesses after employee witnesses since employee bears the burden of proof.

Julia Dixon, J.D., M.P.A, is a NCDR certified superior court mediator and an attorney with Holder Padgett Littlejohn + Prickett.