NC Workers' Comp NEWS

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# AI Expands its Role in Workers' Compensation

*By Moby Salahuddin*

With the current wave of machine-learning techniques, artificial intelligence is living up to its promise of replicating – and even improving - the perception, reasoning, learning, and problem-solving of the human mind, notes a report by McKinsey & Company, which adds "in this evolution, insurance will shift from its current state of "detect and repair" to "predict and prevent," transforming every aspect of the industry in the process."

Consumers are familiar with programmable drones, autonomous farming equipment, and enhanced robots, and expectations are high these will become widely available within the next decade. McKinsey, of course, is not the only observer foreseeing a revolutionary role for artificial intelligence as it reshapes claims, distribution, underwriting, as well as pricing.

For instance, One Call, a major player in the workers' compensation industry, is using AI-powered "sentiment care" to monitor and analyze telephone conversations between injured workers and care coordinators. "Sentiment software measures things like emotion and empathy that many might think are difficult to quantify using data. It monitors shifts in speech and tone of voice to determine if a particular interaction is going well," One Call notes in its recent white paper on the subject.

Sentiment software, also used by other players, looks for pre-programmed phrases and changes in inflection to evaluate the interaction. If an injured worker asks to speak with a supervisor, the system flags the occurrence. Such data is invaluable, says insurer Aon. "Assessing that sentiment can provide a view into the general rapport between the injured worker and the claims administrator. Such information can be useful in predicting litigation risk. If the sentiment is judged to be negative, there's a greater risk of litigation; if it's positive, the risk of litigation is less. Understanding that risk can help guide the employer's approach to the claim," it adds.

Indeed, Clara Analytics, a provider of artificial intelligence technology, claims it has been highly successful in predicting litigation. "Combining this detection algorithm with a tight process to handle "at-risk" claims can dramatically reduce the number of litigations. Claims at-risk of being high-cost trigger more involvement from senior claims handlers and help contain the damage before it goes towards legal action," the company says.

Government agencies are also enthusiastic. In a recent post, the *NIOSH Science Blog* reports researchers used auto-coding to determine the cause of 1.2 million workers' compensation claims. Essentially, researchers taught a computer to use an extensive and complicated data set to answer the question "What caused this injury?"

The claims were placed in one of three, broad categories: (1) ergonomic-related; (2) slips, trips, and falls; and (3) all other categories combined. "What took the revised computer program less than 3 hours to finish would have taken 4.5 years to manually code at an average manual coding rate of 2.2 claims per minute," NIOSH reports.

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# CASE LAW UPDATE

*By Lindsay Underwood*

## Revisiting the ***Pleasant*** Standard

## *Estate of Rodney Baker v. David W. Reinhart and Randy Reinhardt*

Every few years, a *Pleasant* claim makes its way to the Court of Appeals and almost always serves as a reminder that the facts must be particularly egregious to warrant such a claim. As a reminder, if an employee is injured on the job, filing a workers' compensation claim is typically the exclusive remedy for recovery. In most cases, the employee cannot file a separate personal injury claim against the employer.

However, there is an exception to that rule. The *Pleasant* case from 1985 established an exception to the exclusivity provision of the workers' compensation system that allows employees injured by the willful, wanton, and reckless negligence of a co-employee to sue that co-employee or employer directly. For a *Pleasant* claim to survive a 12(b)(6) Motion to Dismiss, there must be evidence of wanton and reckless behavior equivalent to an intentional act. The burden of proof is on the plaintiff to show that the behavior is "so gross as to be equivalent in spirit to actual intent." Our courts have held that even unquestionably negligent behavior rarely meets the high standard of "willful, wanton or reckless' negligence." Thus, the plaintiff faces a high standard and a difficult burden in these claims.

The most recent case from the Court of Appeals revisiting the *Pleasant* standard is *Estate of Rodney Baker v. David W. Reinhart and Randy Reinhardt*. In this case, the plaintiff worked as a bandsaw operator. On March 17, 2020, Plaintiff, without direction or instruction from the employer, was cleaning around a machine when he stepped into a partially enclosed area. After entering this area, an OSHA report later revealed that Plaintiff "was crushed between the Machine's lower table arm and a steel support structure on the side of the building, suffering trauma to his chest."

Plaintiff sustained significant injuries, and ultimately passed away from his injuries. During OSHA's investigation, other employees reported they were aware of the dangers of stepping into that specific area, were aware of the machine's guarding hazard, and knew they could not be in the area where Plaintiff was found when the machine was running. OSHA cited the employer with a serious violation for failing to provide "one or more methods of machine guarding" which could have prevented the accident.

Plaintiff argued that the plant manager knew of the hazard, admitted in the past that the area would result in life-threatening harm, and claimed to be too busy to complete the necessary fencing that could have prevented injury. The claim against the plant manager was ultimately dismissed, and the Court of Appeals upheld the dismissal. The Court looked to the employer's award-wining safety program, quarterly briefings, and well-documented and explicit instructions to turn machines off and come to a complete stop before bending over and cleaning around the machine. The Court also noted that in the 15 years of operation, all of which occurred during Plaintiff's employment, (1) nobody was injured on the machine or its predecessor; (2) OSHA issued no violations related to the same; and (3) Defendant-Employer received no safety complaints from staff about the machines. Further, the defendants did not request or direct the plaintiff to clean around the machine.

This case continues to demonstrate that a plaintiff has a high burden to meet to survive a Motion to Dismiss when it comes to asserting a *Pleasant* claim. Even with the high standard and burden for plaintiffs, it is worthwhile to note some of the factors the Court considered in this claim. Specifically, employers should document and analyze any concerns regarding dangerous areas, machines that need safety improvements, or other hazards. Employers should then take the necessary steps to educate employees on the areas or machines at issue, provide PPE/remedy areas of concern, and provide sufficient ongoing trainings.

The Court will also examine the employer/co-worker's knowledge of the level of danger of the activity, whether the employer/co-worker was present at the time of such injury, and/or whether the employer/co-worker directed the employee to engage in the dangerous activity. The Court will also take past OSHA violations and safety records into account. Out of the above, it appears the most persuasive is the employer's willingness to provide ongoing training/experience.

*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*

# *Two Inexorable Trends?*

In this issue of ***NC Workers' Comp News***, we report on two trends infiltrating the workplace and which may end up altering it before very long. I am referring to the rise of artificial intelligence and the seemingly unstoppable trend towards wider use of marijuana in the workplace.

Artificial intelligence seems poised to spread to every aspect of our lives, changing both work and the workplace. We may soon experience the truth of the saying people expect too much of one year and too little of ten years. Until very recently, artificial intelligence seemed vague and even other-worldly but give it another decade or so and . . .

As regards marijuana use, one need not speculate what the future holds. Is there an easier prediction than to say we will continue to see increasing use of marijuana in the workplace? Quest Diagnostics reports that between 2012-2022, post-accident marijuana positivity increased 204.2%. Also on the rise: use of amphetamines, which increased 15.4% between 2021 and 2022. As in the case of marijuana, the percentage increases in this case may give an inaccurate impression since the overall number of users is very small. But the trend is unmistakable.

It is clear we are not sure if increased drug use is a problem. More states, more employers, have already decided to go with the flow, loosening laws and dropping requirements. Perhaps in a few years we may recoil at today's restrictive laws, just as it seems unreal that as late as the 1970s possessing marijuana in Texas, for one, carried a potential life sentence.

What does this mean to you? What are you seeing in your workplace? I would love to know what you are experiencing in your workplace.

Stephanie Gay

# *Marijuana use Increases in Workplace*

Annual surveys by Quest Diagnostics, one of the nation's largest drug-testing companies, show a slow but seemingly inexorable trend toward greater marijuana use in the workplace.

Earlier this year, Quest reported the percentage of employees in the general U.S. workforce testing positive for marijuana following an on-the-job accident increased to its highest level in 25 years in 2022. In 2022, post-accident marijuana positivity of urine drug tests in the general U.S. workforce was 7.3%, an increase of 9% compared to 6.7% in 2021. Over the last 10 years, post-accident marijuana positivity increased 204.2%.

Quest notes states that have legalized recreational and medical marijuana use report higher positivity rates than the national average. Also, post-accident and pre-employment positivity test rates among the federally mandated, safety-sensitive population have always been lower, suggesting the expectation of testing may be a deterrent.

Nevertheless, more than two-thirds of U.S. states have legalized recreational or medicinal use of marijuana and more employers are questioning whether to keep testing for the drug, as they weigh safety risks and legal liabilities.

The ***Wall Street Journal*** quotes Scott Pollins, an employee-rights lawyer in Philadelphia, as saying the country's patchwork of rules makes employer oversight a minefield. Workers might live in areas where marijuana is allowed and still be subject to federal testing requirements, or they may work for a company with a policy that subjects employees to testing. Employers should be careful about punishing workers based on a positive marijuana test, he added.

Another problem reported by the newspaper: because some drug screens can detect drug use that goes back days, if not weeks, a positive marijuana test may not indicate on-the-job use, according to Katie Mueller, a senior program manager at the National Safety Council. Also, the newspaper adds, wider acceptance of marijuana use has prompted Amazon, staffing-firm Manpower Group, and Butterball Farms, among others, to drop testing for the substance. Last year, roughly 33% of Manpower's 11,000 drug tests on job candidates excluded marijuana, up from 18% the prior year.

Separately, various media outlets have noted the National Basketball Association, Major League Baseball, and the National Hockey League have dropped testing for marijuana.

# coming up

**Wednesday, March 27- Friday, March 29, 2024**
**NCASI Annual Conference 2024** **Lumina on Wrightsville Beach**
***Make reservations by February 25, 2024 to get the discounted rate***

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## *NC Industrial Commission Update*

*By Tracey L. Jones*

**Philip A. Baddour was confirmed by the General Assembly to serve a second term as a commissioner.**

The 28th Annual North Carolina Industrial Commission Workers' Compensation Educational Conference will be held October 4 through 6, 2023 at the Raleigh Convention Center.

**New Mediation Rules Regarding Participation**

The Supreme Court of North Carolina has approved amendments to the *Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*, which went into effect May 1, 2023. Among the amended Superior Court mediation rules is Rule 4, which governs attendance at Superior Court mediations.

Attendance at Industrial Commission mediations is governed by Rule 104 of the Industrial Commission's mediation rules (11 NCAC 23G .0104). Paragraph (b) of Rule 104 provides that the attendance method for Industrial Commission mediations shall be the same as the attendance method set forth in Rule 4 of the *Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*. Therefore, the Rule 4 amendments affect the way the attendance method will be determined in Industrial Commission mediations beginning May 1, 2023.

Under the Rule 4 amendments, if all parties and the mediator agree on the mediation attendance method (which can be remote, in-person, or a hybrid of the two where some parties are participating remotely while others are together in-person), then the mediation will be held using the agreed-upon attendance method. If an agreement on the attendance method cannot be reached, **then attendance will be in-person** unless the mediator has designated in the Dispute Resolution Commission's Mediator Information Directory that he or she will only conduct remote mediations.

However, in all cases, a party who is required to attend the mediation may file a motion with the Industrial Commission Dispute Resolution Coordinator asking that a different method of attendance be ordered. For example, a party who wishes to participate remotely but does not object to others participating in-person may file a motion requesting an order allowing a hybrid of remote and in-person attendance at the mediation.

This is a change to the rules in that the previous default method of attendance when agreement could not be reached was remote. This new change makes the default attendance in person. It is too early to tell how the Industrial Commission will rule on Motions submitted from either side regarding remote attendance.

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