

## Rules target opioid prescriptions

The North Carolina Industrial Commission is proposing rules that specify protocols healthcare providers should follow when prescribing opioids and related pain medications.

Specifically, providers must document the need for an opioid, and prescribe medication not to exceed a five-day supply, or seven-day post-surgery. Also, providers are asked to use the lowest effective dose, not to exceed 50 MME/day, using one-short acting opioid only.

The proposed rules specify healthcare providers are not to use transdermal, transmucosal, or buccal opioids without documenting that oral dosing would be inadequate. In chronic pain management, the rules propose administering a presumptive urine drug test.

“The provider has discretion regarding prescribing opioid while waiting for confirmatory UDT results. After the first UDT, administer 2-4 UDTs per year within the provider’s discretion using the same protocol,” the rules state.

The Industrial Commission has included provisions about prescribing benzodiazepines, carisoprodol, opioid antagonists, as well as non-pharmacological pain treatment and dependence or addiction referrals.

A public hearing is scheduled for March 2, 2018 at 2:30 p.m., and the Commission will accept written comments until March 19, 2018. The earliest effective date of the proposed rules, if approved by the Rules Review Commission and adopted by the Industrial Commission, would be May 1, 2018.

The agency adopted a labor-intensive, comprehensive process in developing the guidelines. Chairman Charlton Allen appointed a multi-disciplinary task force in February 2017 and the task force met regularly over several months. The Commission also reviewed rules and policies followed by 15 or so states. Meredith Henderson, executive secretary at the agency, will discuss the proposed rules in an hour-long presentation at the upcoming annual conference of the North Carolina Association of Self-Insurers.

The task force included representatives from public health, TPAs, the North Carolina Hospital Association, Pain Society of the Carolinas, the North Carolina Society of Anesthesiologists, and attorneys for injured workers and employers, among others. Stephanie Gay, vice president of the North Carolina Association of Self-Insurers, also served on the task force.

As has been amply documented, the U.S. is grappling with an opioid crisis. According to a 2014 study from the Centers for Disease Control and Prevention, North Carolina is among the dozen or so states where there may be more prescriptions than people (between 96-143 prescriptions per 100 people.) A 2012 report from the CDC noted that physicians nationwide had written 259 million prescriptions for opioid pain medication, enough for every adult in the United States to have a bottle of pills.

Observers have also pointed out that not only are too many physicians prescribing opioids for injured workers when alternatives are available, they are often not monitoring their patients as called for in various guidelines. In its study of longer-term opioid use, The Workers Compensation Research Institute found only 4% - 9% of injured workers received psychological evaluations and only 3% - 8% received psychological treatments.

“Even in states with the highest use of these services, only one in three injured workers with longer-term opioid use had a psychological evaluation and one in seven received psychological treatment,” WCRI reported.

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## CASE LAW UPDATE

By Kyla Block



### Third party subrogation liens

Employers' subrogation lien rights have received attention in recent years in the appellate courts. The North Carolina Supreme Court recently issued an opinion in *Easter-Rozzelle v. City of Charlotte* which clarified the impact of a third-party settlement made without the written consent of the employer on the workers' compensation claim, claimant's entitlement to benefits, and the employer's resultant lien.

David Easter-Rozzelle sustained compensable injuries while working for the City of Charlotte (hereinafter "the City"). The City requested he obtain an updated work note; on the way to pick up the note, Mr. Easter-Rozzelle sustained injuries in a motor vehicle accident. After the accident, Mr. Easter-Rozzelle notified his supervisor and reported the accident to the City's personnel office.

Mr. Easter-Rozzelle hired a personal injury attorney and settled the personal injury claim. The settlement proceeds were disbursed without any reimbursement to the City. Likewise, there was no Superior Court order eliminating the City's lien and no Industrial Commission Order allowing distribution of the funds, as required under N.C.G.S. §97-10.2. Additionally, Mr. Easter-Rozzelle's personal injury attorney alleged he was not "at work" when he sustained his injuries and the personal health insurance carrier should be responsible for those bills.

At the worker's compensation mediation, Mr. Easter-Rozzelle's workers' compensation attorney first learned Mr. Easter-Rozzelle was injured while traveling to see his authorized treating physician. The attorney ultimately requested a hearing due to the City's denial of the accident on the grounds that the City did not have notice of the accident and because Mr. Easter-Rozzell reached a settlement with a third party and distributed funds without preserving the City's lien.

The Deputy Commissioner found for the City, holding Mr. Easter-Rozzelle had no right to recover additional compensation from the City when the third-party settlement funds had already been disbursed. The Full Commission reversed, concluding that the City had sufficient actual notice of the accident and subsequent injuries, and should have "at a minimum" investigated whether the accident was compensable under the Act.

The Full Commission also found the City was entitled to a statutory lien on recovery from the third-party proceeds of the personal injury claim, once the subrogation amount was determined by the parties' agreement or by a Superior Court judge.

On appeal to the Court of Appeals, the City argued the Full Commission erred in concluding Mr. Easter-

Rozzelle was entitled to recover additional compensation from the City for injuries sustained in the third-party accident when the settlement amount had already been disbursed in violation of N.C.G.S. § 97-10.2. The Court agreed, holding where an employee is injured in the course of his employment by the negligent act of a third party, settles with the third party, and the proceeds of the settlement are disbursed in violation of N.C.G.S. § 97-10.2, the employee is barred from recovering compensation for the same injuries from his employer in a proceeding under the Workers' Compensation Act.

The Supreme Court reversed, finding the Court of Appeals erroneously relied upon cases that had been superseded by statute and as such, misinterpreted the Act. The Supreme Court held that an employee who: (1) had been injured at work; (2) was on his way to see his approved treating physician; (3) was injured again in an auto accident during the trip; (4) notified his employer of the new accident; and (5) settled with the third-party tortfeasor without notifying his employer was not barred from receiving workers' compensation benefits.

The Court noted that an employer's lien interest in third-party proceeds is mandatory, so there was no windfall to the employee because the employer is entitled to recover the amount of its lien by means of a credit against the employee's ongoing workers' compensation benefits. The Court noted that N.C.G.S. § 97-10.2(j) contains no temporal requirement, and that either party may apply to the Superior Court judge to determine the amount of the employer's lien.

The Court further highlighted that the City received actual notice of the accident, and as a result, had an opportunity to promptly investigate the claim and determine its compensability. Had the City done so, it would have discovered Mr. Easter-Rozzelle had suffered compensable injuries, and it could have participated in the settlement process.

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*Kyla Block is a partner in Teague Campbell's Raleigh office.*

## *President's Note*

### **Another brisk start to the conference**

For the second year in a row, our annual conference is off to a wonderful start. With another six weeks or so before the start of the event, we already have received nearly 100 registrations, booked 20 exhibitors, and received support from a half-dozen sponsors. We are updating the numbers almost every day.

And once again we have a terrific program on each day of the conference, thanks to a long list of speakers and moderators who have so graciously agreed to volunteer their time. As I keep reminding our readers, we are always looking for presentations on timely topics, and we start planning the conference a year in advance. So, it's not too early for you to send in suggestions for the 2019 conference.

I am also pleased to report that our association played a key role in two initiatives mentioned in this newsletter. Stephanie Gay, our vice president, was a member of the opioid task force which helped the Industrial Commission in developing protocols

for opioid and pain medications. Our association also funded and was a part of the large coalition employers and insurers pulled together to achieve victory in the lawsuit initiated by surgery centers, as we explain below.



Both of the initiatives mentioned above have far-reaching implications for employers and North Carolina's workers' compensation system. We are proud to demonstrate what we mean when our association bills itself as the *Employers' Voice in Workers' Comp.*

With very best wishes,

Jay Norris

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### **Employers prevail over surgery centers**

In a unanimous opinion filed on November 21, 2017, the state Court of Appeals handed a major victory to employers in their tussle over reimbursement with ambulatory surgery centers.

The court ruled the Industrial Commission had indeed followed proper procedures when in 2015 it established a maximum-fee schedule, based on Medicare fees, for healthcare providers. The surgery centers had sued the Commission, arguing the General Assembly had mandated new fee schedules only for hospitals and physicians and, because the surgical centers are legally distinct from hospitals, the Industrial Commission does not have statutory authority to impose new fee schedules on them.

The surgery centers won an initial victory in Wake County Superior Court. But the Court of Appeals reversed that decision in November, noting the lower court erred in defining the term "hospital," and erroneously concluded that "hospitals are separate and legally distinct entities from ambulatory surgical centers."

A lot is at stake in this bitterly contested fight, which may yet end up at the state Supreme Court. According to the N.C.

Industrial Commission, the surgery centers are demanding 210% of current Medicare outpatient hospital rates for dates of services in 2016, and 200% of current Medicare outpatient rates in 2017 and beyond.

The commission warns rate increases of that magnitude would raise workers' compensation premiums in North Carolina by anywhere between \$21 million and \$28 million. The surgery centers' initial victory spurred employers and insurers to fund a collective amicus brief with the goal of overturning the original decision.

The North Carolina Association of Self-Insurers was a member of that coalition which included the North Carolina Chamber, North Carolina Farm Bureau and Affiliated Companies, North Carolina Home Builders Association, North Carolina League of Municipalities, North Carolina Manufacturers Alliance, North Carolina Retail Merchants Association, and Forestry Mutual Insurance Company, and other major insurers.

# coming up

Mar. 21-23, 2018

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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[www.ncselfinsurers.com](http://www.ncselfinsurers.com)

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*The employers' voice in workers' comp*

## At the Industrial Commission

Deputy Commissioner Myra Griffin was appointed by Gov. Roy Cooper to fill the unexpired term of former Commissioner Linda Cheatham. She has been serving as a Deputy Commissioner since February 2005. Commissioner Cheatham took a position as deputy director of the Employment Security Commission.

Deputy Commissioner Griffin's appointment is subject to confirmation by the North Carolina General Assembly. It is anticipated that the General Assembly will take up the appointment when legislators return for their regular short session in May.

The Commission will operate with five Commissioners until the General Assembly confirms Commissioner Cheatham's replacement. In the meantime, the Commission will likely use some Deputy Commissioners to fill in on certain panels as needed.

The Industrial Commission has published its proposed Rule Amendment regarding Rules for the Utilization of Opioids, Related Prescriptions, and Pain Management Treatment in Worker's Compensation claims. A link to the proposed Rule Amendment is here. <http://www.ic.nc.gov/Proposed10M.Notice-011618.pdf>

A news release regarding the proposed Rule is here. <http://www.ic.nc.gov/011618opioidreulesnewsrelease.pdf>

The Industrial Commission has also proposed an amendment to Rule .0107 regarding the computation of time when providing service to the IC by electronic mail or US mail. Proposed rule is here. <http://www.ic.nc.gov/proposed10A0107Notice-011618.pdf>

Deputy Commissioners Melissa Grimes and Leigha Sink, who were both headquartered in the Charlotte area, have left the Industrial Commission to return to private practice. Their positions have not yet been filled.