

## *Pandemic was Profitable for Comp Insurers*

*By Moby Salahuddin*

Workers' comp insurers warned of impending doom last year, but it turns out the slow-down in economic activity was very profitable for the industry, according to a recent report from the National Council on Compensation Insurance.

"While net written premium dropped significantly during the recession, other financial metrics remain favorable, at or near historic highs. We have seen fewer COVID-19 claims than originally anticipated," notes Donna Glenn, NCCI's chief actuary.

"We feared that it could be devastating for the workers' compensation system and it was not," she said during the group's recent annual symposium, held virtually.

The workers' compensation calendar year 2020 combined ratio for private carriers was 87% - the third-lowest workers' compensation combined ratio since the 1930s. This is the seventh consecutive year the workers' compensation line of business has posted an underwriting gain. As of year-end 2020, private carriers had \$14 billion more in reserves than needed to pay claims.

Workers' comp remains profitable even though rates have dropped in recent years. Of the 38 jurisdictions that report data to NCCI, only five are expected to increase rates in 2021 and several states have instituted double-digit rate decreases. A recent analysis by **FitchRatings** notes thanks to years of profitability, workers' compensation is the only major commercial-lines segment not experiencing significant premium rate increases.

Among other favorable trends: greater use of telemedicine in case management, more prevalent work-from-home arrangements, and reduced employee travel activity. However, Fitch cautions employers will likely see more claims as business activity picks up pace in 2021.

Average lost-time claim frequency across NCCI-states declined by 7% in 2020, offsetting the loss of premium because of job losses. The economic shutdown meant less premium, but it also resulted in fewer claims because fewer workers were on the job.

The hardest-hit segment was the Leisure and Hospitality sector, which accounted for 40% of all job losses. States that suffered the biggest losses are in the Northeast, Midwest, and on the West Coast, plus North Carolina, Alaska, and Hawaii. NCCI reports the time-path of job losses is similar: huge job losses in April and May but followed by recovery to year-end. States that suffered the biggest job losses in April remained those with the biggest job losses in December, and vice versa.

According to NCCI, comp insurers received approximately 45,000 COVID-related claims last year, nearly 95% of those for less than \$10,000. About 75% of all claims were filed by those employed in nursing homes, other healthcare facilities, and by first responders. Other essential workers—mainly those in restaurants, building operations, distribution systems, and retail—accounted for an additional 15% of COVID-19 claims.

The agency also reports the pandemic caused treatment times to slow during the first surge of the virus but time to treatment quickly recovered to pre-pandemic levels.

Longer time to treatment is not always bad, according to the NCCI. For instance, the agency adds, longer time to surgery does not affect outcomes for some injuries, such as cruciate ligament tears. And for certain injuries, such as herniated discs, longer time to surgery may be associated with better outcomes.

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## CASE LAW UPDATE

By Lindsay Underwood



### *Early Trends in North Carolina Extended-Benefits Cases*

The Commission has recently issued decisions in the first extended benefits cases, in which plaintiffs are arguing entitlement to benefits past the 500-week cap provided in the 2011 reform. The cases have only been heard at the Deputy Commissioner level but give some additional insight into how they may be treated in the near future while we await inevitable appeals to the Full Commission and Court of Appeals.

As a reminder, to obtain benefits beyond the 500-week cap, the injured employee must request a hearing and present evidence supporting an allegation of a total loss of wage-earning capacity. The employee is only eligible to request a hearing on this issue after 425 weeks have passed from the first date of disability. In the cases below, the decisions are split.

The first case, Milton Nobles v. North Carolina DHHS and CCMCI, was issued by Deputy Commissioner Robert Harris on January 25, 2021. The plaintiff in that case had no formal education but did have a high school diploma. He had work experience primarily as a health care technician. On June 26, 2011, he was working for a hospital and sustained injury while breaking up a fight. He experienced a significant beating, which ultimately resulted in headaches, PTSD, and depressive disorder.

Deputy Commissioner Harris determined that he was entitled to extended benefits beyond the 500 weeks. The Deputy found that plaintiff had long-term chronic PTSD and chronic major depression and that he had satisfied the requirements under N.C. Gen. Stat. § 97-29(c), and he has proven by the preponderance of the evidence in view of the entire record that he “has sustained a total loss of wage-earning capacity.” Thus, he was entitled to extended benefits. The plaintiff presented expert evidence that the plaintiff was totally disabled from any employment and the defendants presented medical evidence that the plaintiff was not disabled at all. The case basically hinged on which medical expert was found to be most credible.

The next case, Mary Betts v. North Carolina Department of Health and Human Services and CCMCI, was issued on March 12, 2021, also by Deputy Commissioner Robert Harris. The plaintiff in that case graduated from high school and had CNA qualifications. She was a certified EMT, but her certifications had elapsed. Plaintiff worked as a health care technician and sustained her injury on August 12, 2011, while trying to restrain a combative patient. She sustained injury to the ankle which resulted in multiple surgeries.

Plaintiff had sedentary work restrictions. Evidence showed that plaintiff remained involved with the Girls Scouts as a troop leader and summer camp director, volunteered with PTA, cut her own grass, and does crafts. The vocational expert testified that plaintiff’s

condition prevented her from being employable.

The Deputy found that plaintiff had proven by the preponderance of the evidence in view of the entire record that she “has sustained a total loss of wage-earning capacity” because of this compensable long-term ankle condition. As such, Plaintiff was entitled to extended compensation.

The third case, Michelle Brown v. NC Department of Public Instruction/Surry County Schools and Sedgwick, was issued on May 4, 2021, by Deputy Commissioner Jesse Tillman, III. The plaintiff was working as a teacher’s assistant at a high school on February 24, 2012 when she sustained injury. Plaintiff worked for the County in multiple capacities in the past, including bus driver, substitute teacher, tennis coach, band director, and had experience as a CNA, truck dispatcher, cashier, food preparation, a line worker, and phlebotomist. Plaintiff had permanent sedentary work restrictions.

Plaintiff testifies that she rides a motorcycle a few times during the summer, uses a riding lawnmower, can walk 1-2 miles without issue, bowls twice a week, cares for multiple animals, and actively swims. A vocational expert provided a labor market survey that showed the availability of jobs within plaintiff’s work restrictions. Plaintiff presented no evidence that she continued to suffer a total loss of wage-earning capacity. The Deputy found that plaintiff could at least work a part-time, sedentary job. Plaintiff’s claim for extended benefits was denied.

The last new case is Martin Strudivant v. North Carolina Department of Public Safety and CCMCI. The decision was issued by Deputy Commissioner Erin F. Taylor on May 5, 2021. Plaintiff sustained a compensable back injury on July 23, 2013. He was a high school graduate and had completed some post-graduate courses. He was certified to dive a forklift, had training in blueprint reading, and had CPR experience. Plaintiff had been on his church’s Board of Trustees since 2008. On the date of his injury, plaintiff was working transporting inmates.

Four of plaintiff’s physicians testified plaintiff could work and noted he could perform many of the essential functions of his prior job as a correctional officer. Defendants’ vocational expert also testified that plaintiff had capacity for work. It was determined that plaintiff could not show a “total loss” of wage-earning capacity and that the plaintiff’s wage earning capacity had not been destroyed. Thus, plaintiff could not show entitlement to compensation beyond the 500-week cap on benefits.

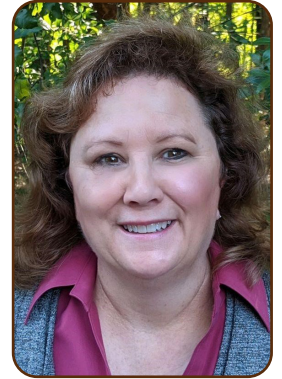
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## *President's Note*

### *Conference 2021*

As this newsletter was going to press, we had all but wrapped up the program for this year's conference. Thank you to our volunteer-speakers who stepped up to share their experience and insights. We will be calling on our membership again later this fall when we begin planning the program for our 2022 conference.

Now that businesses have begun to emerge from the fog of fear and uncertainty created by the COVID-19 pandemic, we see that though much has changed, much remains the same. Workplace safety remains paramount, and already there are warnings from NCCI and other groups that claims are likely to increase as the nation resumes full business activity. As the Employers' Voice in Workers' Comp, we also remain vigilant for new issues, new legislation in the General Assembly that might be injurious to employer interests.



Most of you are aware this year's conference will be a shorter one since we expect to get back to our normal schedule next year. We will begin the 2021 conference around noon on Tuesday, September 7 and conclude by 3:00 p.m. the next day.

To mark our 30th anniversary, we are offering a spectacular deal: registration fees of \$30 per person for members and exhibitor fees of \$300 per booth. For non-members, registration rates will be \$450 per person and \$750 for an exhibition booth.

I am looking forward to seeing you at the conference. Let's make it a special one!

Stephanie Gay

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### *More Workers Using Weed*

Marijuana-positive tests among U.S. workers increased 3.8% between 2019 and 2020 and were 12.2% higher than in 2016. Specifically, 5.3% of workers tested positive in 2019 compared to 5.5% in 2020, according to Quest Diagnostics, one of the largest drug-testing laboratories in the U.S.

While positivity for ecstasy increased by 25% (0.008% in 2019 versus 0.010% in 2020) and has demonstrated small, year-over-year increases, the positivity rate remains very low at 1 in every 10,000 (0.010%) tests.

Positive marijuana tests have climbed among American workers as more states have allowed marijuana for medical and recreational use in recent years. "Our data suggest that marijuana positivity has increased sharply nationwide since states began to legalize marijuana in 2012. However, it appears that states where medical marijuana use alone is legal are not experiencing much higher rates of increase than states where neither medical nor recreational use is legal," Dr. Sample noted.

The *Wall Street Journal* reports some employers are dropping marijuana testing to more easily recruit workers. Hospitality Ventures Management Group, which operates primarily Marriott- and Hilton-branded hotels in 17 states, used to test job candidates seeking salaried positions for a standard

panel of several drugs. While opening a Colorado property in 2015, it stopped screening for marijuana nationwide, making it a more competitive employer, said Susan M. Sanders, the company's chief human resources officer.

"It was part of the practical nature of wanting to be an attractive employer in that downtown Denver market," she commented to the newspaper, adding ideally, marijuana can be "part of what people do when they're not working that isn't going to carry over into the workday."

The newspaper notes among hospitality and restaurant-industry workers who were tested for drugs last year, 6.3% were positive for marijuana—one of the highest rates for any industry. "Now, as the hospitality sector emerges from the pandemic, and many restaurants and bars are struggling to fill a surge in open positions, more are easing drug-testing requirements," the newspaper says.

Employment agencies say some candidates are backing away from job opportunities upon learning a prospective employer requires a drug test.

# coming up

September 7-8, 2021

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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## NC Industrial Commission Update

By Bruce Hamilton

### Wanda Blanche Taylor confirmed as Commissioner

Wanda Blanche Taylor was confirmed by the North Carolina General Assembly to serve as a Commissioner replacing former Commissioner and Chair of the Commission, Charlton Allen. Commissioner Taylor's term begins immediately and runs through June 30, 2026.

### Adrian A. Phillips Confirmed as Commissioner

Attorney Phillips will join the Full Commission replacing current Commissioner Christopher Loutit and her appointment will run through April 30, 2027.

### Mike Mackay Joins Commission as Director of Claims Administration

Mike MacKay was recently hired as the Director of Claims Administration at the IC. Attorney MacKay has extensive experience in Worker's Compensation. Most recently, he was the managing attorney of the Worker's Compensation Department at the Law Offices of James Scott Farrin and had previously represented defendants in Worker's Compensation and personal injury cases at the law firm of Cranfill Sumner.

### Wes Saunders Appointed to Serve as Deputy Commissioner

Wes Saunders, most recently an Assistant Atty. Gen. at the Department of Justice handling Worker's Compensation cases, was appointed as a Deputy Commissioner and is assigned to the Commission's Raleigh office.

### Celeste Harris Appointed to Serve as Deputy Commissioner

Celeste Harris was recently appointed as a Deputy Commissioner and assigned to the Winston-Salem regional office. Attorney Harris has represented injured individuals for over 30 years in the areas of Worker's Compensation, personal injury and Social Security disability. She is also a North Carolina State Bar Board Certified Specialist in Worker's Compensation law and a North Carolina Certified Mediator.

*Bruce Hamilton, NCASI's legal advisor, is a Partner in Teague Campbell's Raleigh office.*

## Early Trends

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As you can see, the four decisions that have been issued to date have been a 50-50 split on entitlement to extended benefits. The cases are also very fact specific. What is clear from the decisions where entitlement to extended benefits has been denied is that the testimony from medical providers and a vocational rehabilitation specialist are necessary to support a finding that a plaintiff has wage earning capacity.

Defendants should make sure to have good experts secured prior to the hearing, along with possible surveillance and a labor market survey. It is also helpful to have a complete picture of the plaintiff's job history, educational background, and other activities outside of work or education, like the ability to exercise, do yardwork, or maintain positions on boards or as a volunteer.

*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.*