

## WCRI analysis

### ***NC Fares well on Medical Payments for Comp***

Between 2016-2021, medical payments per claim in North Carolina changed less than one percent per year for claims with more than seven days of lost time at 12, 24, 36, and 48 months of experience, according to a recently updated analysis from the Workers Compensation Research Institute.

For 2021 claims at 12 months of experience, the average medical payment per claim in North Carolina was 27% lower than the median in the 17 states included in WCRI's analysis. For 2019 claims at 36 months of experience, medical payments were 32% lower in North Carolina.

The 17 states in the study – Arkansas, California, Florida, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin – represent about 60 percent of the nation's workers' compensation benefit payments. The analysis titled *CompScope™ Medical Benchmarks for North Carolina, 24th Edition* is available for purchase at <https://www.wcrinet.org/reports/compscope-medical-benchmarks-for-north-carolina-24th-edition>.

Looking narrowly at hospital outpatient payments, WCRI found a marked favorable impact from medical fee schedules implemented in North Carolina in 2013, and on a staggering basis starting in April 2015. Payments decreased 25% between 2014/2015 and 2015/2016, and 9% between 2016/2017 and 5% in 2017/2018. In most states included in WCRI's analysis, hospital outpatient payments were growing or stable and not decreasing as in North Carolina.

As a result of these large drops, hospital outpatient payments per claim in North Carolina were lower than in other states. Prior to 2013, hospital outpatient payments per claim were higher in North Carolina than in the other states included in the analysis. The fee schedules also led to a drop in payments per claim to Ambulatory Surgery Care facilities – ASC facility payments per claim were 34% lower than typical in North Carolina.

Among other findings, WCRI reports that between 2016-2021 the proportion of surgical and nonsurgical inpatient cases remained stable in North Carolina, while the overall surgery rate decreased 2-4 points, depending on claim maturity. Since 2019, the overall surgery rate has decreased in most states for claims at 12 months of experience. Also, the average prescription payment per claim for 2020/2022 claims with more than seven days of lost time was 22% higher in North Carolina than the median for the other states in the study. WCRI attributes that to a higher number of prescriptions per claim in North Carolina and slightly higher payments per prescription.

Separately, in looking broadly at country wide medical costs for workers' compensation, the National Council on Compensation Insurance reports that between 2012 and 2021, medical costs increased at 2% per year. The Southeastern and Midwestern regions grew the fastest at 2.3% and 2.0%, respectively. NCCI's most recent medical data show drug costs are declining, physician costs are up slightly, and facility costs are rising.

## INSIDE THIS ISSUE

CASE LAW UPDATE	TWO
FIXING STURDIVANT	THREE
REMOTE WORK	THREE

## CASE LAW UPDATE

By Lindsay Underwood



### ***Legislature Acts to Clarify Extended Benefits***

By: Lindsay Underwood

The topic of extended benefits in workers' compensation claims remains a hot topic in the industry in light of recent Court of Appeals rulings and a new legislative amendment. The 500-week cap on TTD benefits went into effect in 2011, which means that the Courts did not have an opportunity to discuss the issue of entitlement past 500 weeks until claimants started bringing their extended benefits cases in 2020.

The first landmark case to address extended benefits was Sturdivant v. North Carolina Dep't of Pub Safety, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (April 2023). In Sturdivant, the North Carolina Court of Appeals held that the standard for "total loss of wage-earning capacity," as noted in N.C.G.S. § 97-29(c) was the same standard for "total disability," as defined in N.C.G.S. § 97-29(b). Although the Court found that the employee still has the burden of proof to show they sustained the loss, the standard for disability does not change when an employee applies for benefits beyond the 500-week cap. The Court further noted the employee could receive extended benefits even if not medically restricted from all work, if the employee shows there were no jobs available to the employee.

Similarly, in a more recent decision, the Court of Appeals held in Mary Betts v. North Carolina DHHS and CCMS, \_\_\_ N.C. App. \_\_\_ S.E.2d \_\_\_, (July 2023) that, consistent with the Court's holding in Sturdivant, "total disability" under N.C.G.S. § 97-29(b) and "total loss of wage-earning capacity" under N.C.G.S. § 97-29(c) are synonymous, and the burden is the same.

Because of the Court's interpretation of the extended benefits statutory language, the defense bar and the plaintiffs' bar met and agreed to a legislative fix. On September 22, 2023, the

North Carolina General Assembly passed House Bill 259 which amended G.S. § 97-29 (c) of the Workers' Compensation Act. Specifically, the Amendment clarified the meaning of "total loss of wage-earning capacity" related to a plaintiff's entitlement to benefits past the 500-week cap provided in the 2011 reform. The Amendment to G.S. § 97-29(c) expressly states that, "[f]or the purposes of this subsection only, the term "total loss of wage-earning capacity" shall mean the complete elimination of the capacity to earn any wages. "Disability" as defined by G.S. 97-2(9) and "suitable employment" as defined by G.S. 97-2(22) shall not apply to this provision.

The Commission may consider preexisting and injury-related physical and mental limitations, vocational skills, education, and experience in determining whether the employee has sustained a total loss of wage-earning capacity." House Bill 259 became law on October 3, 2023.

Despite the Sturdivant decision and 2023 Legislative Amendment, our recommendations for handling extended benefits claims remain the same. We recommend that defendants be prepared to retain credible experts (both medical and vocational), investigate the plaintiff's job search, hobbies, and non-work related activities and participation, obtain a detailed understanding of the plaintiff's job history and educational background, and make sure the vocational expert meets with the plaintiff to identify possible jobs and explore work history.

*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*

### ***Fixing the Sturdivant Decision***

The NC self-insurers association, in unison with several business groups, has petitioned the Supreme Court of North Carolina to step in and remove the uncertainty created by the Court of Appeals ruling in *Sturdivant v. N.C. Dep't of Pub. Safety*. The department of public safety has appealed the ruling, and we have requested the supreme court to allow us to file an amicus brief given the potentially ruinous impact of the Sturdivant ruling.

Specifically, we believe the Court of Appeals erred in concluding the burden of proof for "total loss of wage-earning capacity" is the same as the burden for "total disability." We contend the burden of proof is higher for an injured worker claiming total loss of wage-earning capacity. The worker must satisfy a higher burden of proof for compensation beyond 500 weeks.

The court's ruling is contrary to the intent of the legislature when it passed HB 709 in 2011 to bring North Carolina's comp benefits in line with other states. Indeed, earlier this year under HB 259, the General Assembly clarified that an injured worker must meet a different, higher standard of proof when seeking compensation beyond 500 weeks. We are filing the amicus brief to address potential constitutional challenges to the retroactivity

of HB 259, and to emphasize to the supreme court how critical it is that all claims since the 2011 reform legislation are handled consistently.

If the Court of Appeals' idiosyncratic ruling is not overturned, North Carolina employers would have to reassess their cost of claims and address potential premium shortfalls for the past 12 years. Understandably, our concerns are shared by the other parties to the amicus brief - North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and the North Carolina Chamber Legal Institute.

Given the wide-ranging ramifications of the *Sturdivant* ruling, we have asked several knowledgeable attorneys to discuss it at length at our upcoming conference in March. We look forward to seeing you there and hearing your views on the matter.

Stephanie Gay



### ***Remote Work becoming Permanent Feature***

Working from home is becoming entrenched, especially for women and college-educated workers, according to a recent survey by the U.S. Bureau of Labor Statistics and the Census Bureau which asked Americans how they spent the past 24 hours of their lives.

The survey revealed that on an average day 34% of employees worked from home in 2022, compared to 24% in 2018. Working from home "is a permanent shift. "We're now seeing many companies start as remote-first companies," says Julia Pollak, chief economist at ZipRecruiter, in an interview with the *Washington Post*.

HR professionals and labor economists note remote work is beneficial for both employers and employees, as it improves retention and allows employers to recruit from a broader pool of applicants. Plus, employers can save money on office space and offer lower wages in exchange for offering remote work. Job-seekers polled by ZipRecruiter said they'd be prepared to take a 15% pay cut to work remotely. Parents with young children said they'd be willing to take as much as a 20% cut in pay to work from home.

Surveys have shown that employers are not nearly as enthusiastic about remote work as their employees. "The number

one downside of remote work employers cite is difficulty observing and monitoring employees," ZipRecruiter says. Before the pandemic, employers relied on desk visits and peer monitoring - co-workers observing and commenting on each other's work - but there is no clear replacement for that in a remote setting. Although demand for employee monitoring software has skyrocketed since 2020, companies still haven't figured out how to effectively measure remote workers' performance.

Nevertheless, it adds, about three in four employers with office jobs that could conceivably be done remotely currently allow employees to work remotely at least two days per week. Even among companies that have called employees back to the office and restricted remote work in the past year, only 14% have a five-day office week.

ZipRecruiter reports among the subset of companies that have reduced remote work, 72% say they lost valuable employees as a result, and 63% say they lost quality candidates who dropped out of the hiring process because they wanted more flexibility. On average, jobs posted on ZipRecruiter that are remote currently receive more than three times as many applications as similar roles that are in-person.

# 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. Please use this link: [NCASI 2024 Conference](#)

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](mailto:mobysal@outlook.com)

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## NC Industrial Commission Update

By Tracey L. Jones

With the North Carolina Industrial Commission Educational Conference over, there have not been a lot of changes or information updates from the Commission since our last quarterly report. The most important announcements are as follows:

- The Industrial Commission has received several inquiries about the procedure for requesting an expedited hearing in a case that does not involve an expedited medical motion under G.S. §97-25(f)(2) and does not involve an appeal of a Form 23 or Form 24 decision by the Executive Secretary's Office. In such a case, the proper procedure is for the party filing the Form 33 Request for Hearing to file, via EDFP, a Motion to Dispense with Mediation with the Dispute Resolution Coordinator. As with all motions in workers' compensation claims, the Industrial Commission's Motions Practice rule (11 NCAC 23A .0609) applies.
- Additionally, the Industrial Commission announced the promotion of April Gladkin to Full Commission Chief Administrative Officer and Lead Counsel. In her new role, Ms. Gladkin serves as the Section Head of the Full Commission Section (akin to the Executive Secretary and Chief Deputy Commissioner), as well as the Full Commission's Lead Counsel. Ms. Gladkin's responsibilities include managing the daily operations of the Full Commission, supervising other Full Commission Legal Counsel, managing and coordinating the Full Commission's dockets, and serving as the primary liaison and contact for public inquiries regarding docketing, case management, and other Full Commission issues.
- Finally, the Industrial Commission announced Liza Nordstrom as its Budget Manager. Ms. Nordstrom has a background in finance and accounting. Most recently, Ms. Nordstrom served as the Controller of Durham Technical Community College for over seven years. Prior to that, she worked as a Systems Accountant for the North Carolina Community College System and as an Internal Auditor for the North Carolina Department of Health and Human Services.

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