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THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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RUMBLINGS AT THE INDUSTRIAL COMMISSION

In its June edition, *Risk Alert* reported that an announcement was expected from the Industrial Commission at any time about changes to its rules. On August 9, Chair Pamela Young issued a "Public Notice of Rulemaking," giving formal notice of a public hearing the Commission plans to hold on September 15 regarding the new rules it intends to adopt and existing rules it plans to amend. The most significant of the proposed changes are discussed below. Their complete text has been posted on the Commission's website, www.ic.nc.gov/ncic/pages/ProposedRuleChanges.pdf.

Proposed Changes to Existing Rules

Rule 502(2)(b) currently provides the Commission with discretionary authority in appropriate cases to waive its general requirement that defendants pay all unpaid medical bills when a denied claim is clinched. The proposed amendment to this rule would tie the Commission's hands by prohibiting it from waiving that requirement whenever the claimant is not represented by counsel. Amending Rule 502(2)(b) in this way will guarantee increased litigation of contested claims involving unrepresented claimants, to the detriment of all involved, including the Commission.

Another proposed amendment to Rule 502(2)(b) would permit the parties to provide in their settlement agreements that the defendants may issue payment for any unpaid medical bills to the trust account of the injured claimant's attorney, rather than directly to the unpaid medical providers.

One further amendment to Rule 502 would add a new subsection (7) prohibiting compromise settlement agreements and mediated settlement agreements from containing provisions "regarding extraneous issues unrelated to the workers' compensation claim."

Despite the absence of statutory authority for assessing attorney fees against either party in any circumstances other than those specifically identified in N.C.G.S. § 97-88 and N.C.G.S. § 97-88.1, the Commission has proposed that Rule 604(2) be amended so as to allow it to tax the employer or its insurer with a fee for any attorney who serves as the guardian *ad litem* for a minor or incompetent.

Among the proposed revisions to Rule 610 is a provision that would obligate defense attorneys to submit, within 10 days of the deposition of any expert witness, including those arranged by counsel for the claimant, a request that the Deputy Commissioner who heard the case approve the expert's witness fee, apparently even in the absence of an invoice or any other basis for setting the witness's fee. It has also been proposed that this rule be further amended to provide that "failure to make prompt payment to an expert witness following the entry of a fee order will result in the assessment of a 10 percent penalty." Precisely what would qualify as a "prompt payment" is not specified in the amended rule as it is currently worded.

The subject matter of Rule 614 is the attorney-client relationship. The Commission has proposed that a new subsection (4) be added to this rule that obligates attorneys seeking to withdraw from representing a party who wishes to appeal an order, decision or award to the Full Commission to file a Form 44 Application for Review on behalf of their client either before or with the attorney's motion to withdraw.

Rule 701(4) deals with appeals to the Full Commission. It currently allows the parties to stipulate to a 30 day extension of time to file their briefs and a Form 44. The proposed amendment to this rule would limit either party to a single 15 day extension of time, with cumulative extensions not to exceed 30 days.

Rule 703 addresses the process of reviewing administrative decisions. The Commission is proposing that a new subsection (4) be added which states that orders entered by a single Commissioner, including those that either dismiss an appeal to the Full Commission or deny the right of an immediate appeal to the Full Commission, are not themselves immediately appealable to the Court of Appeals. This new provision asserts that the appropriate vehicle for reviewing such an order is either a Motion for Reconsideration addressed to the Commissioner who filed it or an appeal to a Full Commission panel within 15 days after receipt of the order from which the appeal is being taken. Whether our appellate courts will agree that such an appeal is interlocutory in nature and not immediately appealable to the Court of Appeals remains to be seen.

The Commission has also proposed a series of changes to its mediation rules, including amendments to Rule 2 that would (a) require the parties to mediate their claim within 120 days after receiving an order to mediate from the Commission and (b) eliminate the parties' right to use as their mediator "a person who, in the opinion of the parties, is ... qualified by training or experience to mediate ... the issues in the action." The latter provision would bar the parties from utilizing the services of anyone who has not been certified by the Dispute Resolution Commission, no matter how qualified that person might be to help the parties settle their differences.

The Commission has also proposed that Rule 7 be revised to increase mediators' minimum hourly charges from \$125 to \$150, raise their minimum administrative fee from \$125 to \$150, and increase postponement fees from \$225 to \$300, if a mediated settlement conference is postponed "without good cause" seven or fewer days before it is scheduled, and from \$125 to \$150 if it is postponed more than seven days in advance. As amended, Rule 7 would also provide that settlement of a case at least 14 days prior to mediation will be considered "good cause."

Proposed New Rules

New Rule 105 would authorize the implementation of guidelines aimed at facilitating electronic payment of costs assessed by the Commission.

New Rule 302 would require insurers, third party administrators and self-insured employers to designate a "primary contact person for workers' compensation issues" and provide the Commission with that person's direct telephone and facsimile numbers and his or her current mailing and email addresses.

Proposed new Rule 609A sets forth in great detail the series of procedures that are to be followed when addressing expedited and emergency medical motions.

New Rule 617 calls for the Commission to establish guidelines for the electronic submission of documents.

New Rule 4A calls for a foreign language interpreter to attend any mediation that involves "a person who does not speak or understand the English language." Those purporting to need an interpreter's services will be required to so notify the Commission and the opposing party at least 21 days prior to mediation, at which point the employer or insurer "shall retain" an interpreter and will be required to pay his fee, absent a showing that the request for an interpreter is unfounded. The statutory authority for the cost-shifting requirement of this new rule is unclear.

Those persons who are interested in speaking at the upcoming public hearing, which is scheduled to begin at **9:00 am on September 15** and will be held in the Utilities Commission Hearing Room of the Dobbs Building at 430 N. Salisbury Street in Raleigh, **must submit a written request to Meredith Henderson on or before September 7.** Written comments may also be submitted to Ms. Henderson no later than

September 29. She can be reached by mail at 4336 Mail Service Center, Raleigh, NC 27699-4336, or at meredith.henderson@ic.nc.gov.

CASE LAW UPDATE

Slip and Fall Found Noncompensable

Jenkins Cleaners operates its business in leased space in a shopping center. At approximately 7:15 am on January 23, 2008, one of its employees, Judy Cardwell, was walking in the shopping center's parking lot when she slipped, fell and broke her wrist on "black ice" about three feet from the store's back door. Cardwell's claim for workers' compensation benefits was denied under the "going and coming rule," which provides that injuries which occur while an employee is traveling to or from work do not arise in the course of employment.

The deputy commissioner who heard the case after Cardwell filed a request for hearing agreed that the going and coming rule applied and held that her claim was noncompensable. So, too, did the Full Commission, which acknowledged that there are well-recognized exceptions to the going and coming rule, one of which provides that it has no application to injuries that occur on premises owned or controlled by the employer, but found that Cardwell had "not even reached the back door" when she slipped and fell and, therefore, was not on her employer's premises at the time.

Cardwell appealed again, this time to the Court of Appeals, which in a 2-to-1 decision filed on August 3, *Cardwell v. Jenkins Cleaners, Inc.*, affirmed the Commission's denial of benefits. The Court's majority agreed with the defendants, the deputy commissioner, and the Full Commission that Cardwell's claim was governed by the going and coming rule because she had not yet reached her employer's premises at the time she slipped and fell.

The Court was not persuaded by claimant's argument that the Commission improperly narrowed its focus when it found that the sole issue for determination was whether the injury took place on her employer's premises. It disagreed with claimant's contention that the Commission should have taken into consideration not only her location at the time she fell, but also what she was doing. Although claimant contended that her injury was compensable because she was in the process of unlocking the back door and, as a consequence, was going about the duties of her employment, the Commission specifically found otherwise when it determined that claimant had "not even reached the back door" at the time and, therefore, "cannot have been in the process of unlocking it."

The Court also found no merit in claimant's argument that the Commission erred when it failed to find that opening the back door of the business before 7:30 am was a requirement of her job. Because the record contained evidentiary support for the Commission's finding that she had not yet reached the door when she fell, the Court held that any uncertainty about whether her job duties included unlocking the door

was irrelevant to the question of whether her injury was compensable.

The Court then considered claimant's contention that her claim was compensable under *Hunt v. State*, in which it was held that "a reasonable margin must be allowed [the employee] to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided." Claimant argued that at the time she fell she was "in the doorway" to her employer's premises, rather than in the parking lot, because the area by the back door was graded on a different slope than the parking lot and was separated from it by a cement area and curbing. However, the Court noted, claimant admitted in her testimony that her slip and fall took place in the cement area, which was not part of her employer's premises. And, likewise, her interrogatory answers included a further admission that she was "about three steps from the door" when she fell. Because there was nothing in the record to suggest that her employer provided the area where claimant fell as an "access to the premises," as in *Hunt*, the Court's majority concluded that the Commission had correctly determined that claimant's slip and fall was noncompensable.

Chief Judge Martin saw it otherwise. In his dissenting opinion, he agreed that there was competent evidence of record to support the Commission's finding that claimant's employer "neither had exclusive control of the parking lot nor cleaned or maintained the parking lot ... and the lease did not otherwise grant defendant-employer any rights or control over the parking lot," but he was of the opinion that because claimant fell in "the cement access area in front of the employee-only entrance door of defendant-employer's business," it was "in such proximity and relation to defendant-employer's premises so as to be 'in practical effect a part of employer's premises.'"

Risk Handling Hint: Chief Judge Martin's dissent gives the claimant in *Cardwell* an automatic right of appeal to the Supreme Court, which in its prior decisions in *Hunt v. State* and *Bass v. Mecklenburg County* recognized the compensability of injuries which occur "on some access to the [employer's] premises" or "in such proximity and relation [to the employer's premises] as to be in practical effect a part of the employer's premises" Whether the Court will extend those concepts to the fact pattern found in *Cardwell* remains to be seen. *Risk Alert* will continue to monitor developments in *Cardwell* and report on them as they occur.

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