



RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS

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MAJOR REFORM LEGISLATION

The North Carolina General Assembly is back in session and Representative Dale Folwell of Forsyth County has introduced a workers' compensation reform bill, House Bill 709 (H709), designed to address many of the issues that have been of particular concern to risk managers over the past several years. Entitled "Protect and Put North Carolina Back to Work," it includes the following significant changes to the Workers' Compensation Act:

Suitable Employment Redefined

A new subsection (22) would be added to N.C.G.S. § 97-2, the definitions section of the Workers' Compensation Act, so as to define "suitable employment" for those employees who have not yet reached maximum medical improvement as "any employment available that ... is within the employee's work restrictions including rehabilitative employment approved by the employee's treating health care provider." For employees who have already reached MMI, any "employment which the employee is capable of performing considering the employee's education, physical limitations due to the injury, vocational skills, and experience" would qualify as suitable employment. By removing wages and the opportunity for advancement as factors which must be considered in determining whether a post-injury job offer meets the definition of suitable employment, H709 effectively overrules the holding of the state's appellate courts in *Dixon v. City of Durham*.

A related provision would amend N.C.G.S. § 97-32 so as to provide that "nothing in this Article prohibits an employer from contacting the employee directly about returning to suitable employment." As a result, employers would be authorized to make post-injury job offers directly to their employees, rather than having to do so through the employee's attorney.

Cap on Total Disability Benefits

An especially significant component of the reform bill is found in its Section 8, which

would amend N.C.G.S. § 97-29 so as to cap the payment of total disability benefits at 500 weeks from the date of injury, except in those cases in which the employee loses the use of both hands, both arms, both feet, both legs or both eyes, or has suffered either a spinal injury involving paralysis or a severe brain injury. In such cases, a presumption will arise that the employee is permanently and totally disabled and entitled to lifetime benefits. Permanent and total disability will also be presumed whenever the employee suffers second or third-degree burns over 33 percent or more of his body, although employers will be given the opportunity to rebut that presumption, if they can establish that, despite his scarring, the employee is capable of returning to suitable employment.

The proposed amendments to N.C.G.S. § 97-29 also make it clear that once maximum medical improvement has been reached, the injured employee may not collect benefits for total or partial incapacity under N.C.G.S. § 97-29 or 97-30 and compensation for permanent partial disability under N.C.G.S. § 97-31. The amended statute would specifically provide that if the employee chooses to receive permanent partial disability benefits under N.C.G.S. § 97-31, the defendants are entitled to a credit for any wage loss benefits paid after MMI.

Temporary Partial Disability Cap Revised

Part of the bill's tradeoff for imposing a 500 week cap on total disability benefits under N.C.G.S. § 97-29 is that N.C.G.S. § 97-30 will be amended so as to authorize the payment of partial disability benefits for the same length of time, 500 weeks from the date of injury. At present, partial disability benefits are limited to 300 weeks.

Willful Misrepresentations While Applying for Work

H709 includes a new statute, N.C.G.S. § 97-12.1, that would bar injured employees from receiving compensation whenever the employer establishes that (1) the employee "knowingly and willfully made a false representation as to his physical condition" in his employment application, or while undergoing a post-offer medical examination; (2) the employer relied

on that misrepresentation; (3) its reliance was a substantial factor in deciding whether to hire the employee; and (4) the injury in question is causally connected to the employee's misrepresentation. In essence, the new statute adopts the so-called "Larson Test," overrules *Freeman v. J.L. Rothrock*, and provides employers with a defense to claims that arise as the result of an employee's active misrepresentation of his physical condition at the time he applied for work and was hired.

Higher Standard for Change of Physician

The reform bill also calls for N.C.G.S. § 97-25 to be amended so as to provide that an employee's application for a change of physician must be based upon "clear and convincing medical evidence." It would also prohibit the Commission, in ruling on such a motion, from considering the opinions of any unauthorized provider who may have evaluated the employee before the motion was filed. And, the bill reinforces the employer's right to direct medical care in cases of admitted liability by deleting in its entirety the last paragraph of the statute as it is currently written, i.e., the section that states "if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission."

Communications with Physicians

Among the most significant of the provisions found in H709 is its proposal to rewrite N.C.G.S. § 97-25.6, the statute that governs communications with physicians, so as to adopt "as the policy of this State" that all parties to a workers' compensation claim have "reasonable access to all medical records, reports, and information" pertinent to the claim. In its rewritten form, N.C.G.S. § 97-25.6 would specifically authorize defendants and their attorneys to communicate, both orally and in writing, with health care providers about not only the evaluation, diagnosis or treatment of the injury or disease at issue, but claimant's ability to return to work or perform suitable employment, so long as they notify the opposing party of the provider's response within 15 calendar days. The statute would also make it clear that there is no limit on the ability of employers, carriers and their attorneys to communicate with medical providers performing an IME for the purpose of offering expert testimony.

Independent Medical Examinations

At the same time, the reform bill would amend N.C.G.S. § 97-27 so as to make it clear that employees seeking workers' compensation benefits can be compelled to undergo an IME, even in cases in which liability has been denied. If the employee refuses to undergo such an examination, the employer would be entitled to suspend payment of compensation

until "the refusal or objection ceases." It would also supplement N.C.G.S. § 97-25.6 with a new subsection stating that when an injured employee seeks a second opinion regarding permanent partial disability, the IME doctor may only address the rating issue and the Commission must disregard any other opinion expressed by the doctor. This provision should help prevent employees from using their right to a second opinion on the issue of permanency to obtain more favorable opinions regarding work restrictions, future treatment options, and the like.

Commissioners and Deputy Commissioners

The bill would also amend N.C.G.S. § 97-77(a) so as to reduce the number of commissioners serving on the Full Commission from 7 to 5, two of whom "shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employers" and two of whom shall have a corresponding association with employees. While commissioners would continue to be selected by the Governor, their appointments will be subject to confirmation by joint resolution of the General Assembly, and they will no longer be permitted to serve more than two six-year terms, nor to hold over once their term has expired. To further discourage a hold-over situation, the bill also provides that if the Governor fails to timely appoint someone to fill a vacancy, the General Assembly would have the authority to make the appointment. It also contains a new statutory provision, N.C.G.S. § 97-78.1, which would make to make commissioners and deputy commissioners subject to the standards of judicial conduct and at risk for impeachment, if those standards are violated.

Burial Expenses and Death Benefits

H709 also calls for revisions to the death claim statute, N.C.G.S. § 97-38. The burial expense allowance would increase from \$3,500 to \$10,000 and the number of weeks of benefits payable for a compensable, work-related death would rise from 400 to 500.

Resignations and Releases

The reform bill also attempts to address and resolve concerns that have recently surfaced in the settlement context, by amending N.C.G.S. § 97-17 so as to authorize the parties to enter into "a separate contemporaneous agreement resolving issues not covered by [the Workers' Compensation Act]," thereby permitting them, when entering into a settlement, to include a resignation and release of employment rights as part of an overall resolution of the issues in dispute without fear that doing so will result in the settlement being voided.

The provisions of H709 that deal with resignations, releases, medical treatment, communications with doctors, and IME's will apply

to not only those claims that arise after the date of enactment, but pending claims as well. The remainder of the bill's provisions will become effective July 1 and will only apply to claims arising on or after that date.

An identical bill has also been introduced in the Senate (S544). Its full text and that of H709 can be found at:

<http://www.ncleg.net/gascrpts/BillLookup/BillLookup.pl?Session=2011&BillID=h709>

Risk Alert will continue to monitor the progress of this critically important reform of North Carolina's workers' compensation system and provide updates on its status as further developments occur, along with notice of any other workers' compensation bills which might be introduced in the current legislative session.

TCDG NEWS

College of Workers' Compensation Lawyers

TCDG's **Bruce Hamilton** was recently inducted into The College of Workers' Compensation Lawyers, an honor reserved for those attorneys who "have convinced their peers, the bar, bench and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise and leadership." He has also been listed in *The Best Lawyers in America* annually since 2001 and in *North Carolina Super Lawyers*, a national publication that recognizes attorneys who have attained a high degree of professional achievement and peer recognition, for six consecutive years.

National Workers' Compensation Defense Network

Melissa Cleary, previously recognized as a "Rising Star" by *North Carolina Super Lawyers*, has been elected to the Board of Directors of the National Workers' Compensation Defense Network, a national network of law firms specializing in the defense of workers' compensation claims. TCDG, the only North Carolina member firm in the NWCDN, will co-host its annual Symposium in Atlanta this October 5-7.

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