

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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LEGISLATIVE UPDATE

Workers' Compensation Reform Act Goes Into Effect

On September 29, 2005, Governor Easley signed into law House Bill 99 (HB 99), legislation which significantly modifies the North Carolina Workers' Compensation Act and holds promise for additional positive changes in the future. Bruce Hamilton of TCDG was one of three defense attorneys who consulted with industry representatives and members of the General Assembly as HB 99 proceeded through the legislative process.

While aggressive lobbying by the plaintiffs' bar eventually caused it to be amended so as to eliminate some of its more ambitious provisions, nevertheless HB 99 as finally constituted (1) provides for appointment of a study commission to analyze return to work issues and the wisdom of imposing time limits on the payment of indemnity benefits; (2) improves the ability of employers, carriers and TPAs to communicate with physicians about workers' compensation injuries and claims; (3) limits the Commission's ability to default defendants for failing to admit or deny claims within a specified period of time; (4) creates a rebuttable presumption

of impairment from the use of alcohol or controlled substances in certain circumstances; (5) improves the fraud statute so as to preclude claimants convicted of fraud from benefiting from their unlawful conduct; and (6) rescinds obligations recently imposed by our appellate courts that the parties submit *all* of claimant's medical records when seeking approval of a form agreement for PPD and *all* of claimant's medical bills when approval of a clincher agreement is sought in cases of admitted liability.

Study Commission

One of the primary objectives of the coalition of business and industry groups that came together to push for passage of legislation aimed at improving the workers' compensation climate in North Carolina was setting a limit on the maximum length of temporary total disability awards. Currently, claimants are entitled to receive weekly compensation for so long as they remain disabled, potentially for their lifetime. At the same time, most of our neighboring states have placed finite limits on the length of time TTD may be received, except in catastrophic cases.

Thus, a 500 week cap was included in the original version of the Reform Act, then known as Senate Bill 984. While agreement could not be reached on this issue prior to passage of the final version of the bill, its sponsor, Senator David Hoyle, insisted that a study commission be appointed to investigate whether a reasonable cap on benefits, such as at retirement age, should be adopted in the future before he allowed the bill to be brought to a vote and passed into law.

As reported in *North Carolina Lawyers Weekly* on September 5, "Raleigh defense attorney Bruce Hamilton, who participated in the negotiations, said the study commission was the key to reaching an agreement acceptable to all sides. 'These are improvements but there is still more work to do,' said Hamilton. 'The most contentious issues, such as capping the length of benefits, and return to work changes, were thrown to the study commission. Things like that just proved to be too difficult to negotiate. The key from the defense perspective was making sure that those issues wouldn't die,' Hamilton said. 'They were admittedly contentious, so from my perspective I am pleased they are still on the table.'"

Employer, carrier and industry representatives interested in providing information or other input and support to the study commission as it proceeds forward are encouraged to contact Rolph Blizzard of the North Carolina Citizens for Business and Industry at rblizzard@nccbi.org.

Communications with Physicians

Among the major improvements in administering North Carolina

workers' compensation claims which will result from passage of HB 99 is that existing rules prohibiting or severely restricting communications between defense representatives and treating physicians have been dramatically altered.

As reported in past editions of *Risk Alert*, the Industrial Commission and our appellate courts have consistently limited the defense's ability to communicate with treating physicians over the last few years, beginning with the holding in *Salaam v. N.C. Department of Transportation*. A disturbing recent example of this trend is the decision of the Full Commission in *Mayfield v. Parker Hannifin* (see *Risk Alert*, October 2004), in which a letter from defense counsel to the treating physician, simultaneously copied to claimant's attorney, which did no more than ask the doctor to address basic questions regarding maximum medical improvement, PPD and work restrictions, was found to be an improper *ex parte* communication, resulting in the doctor's testimony being stricken from the record.

HB 99 will change the result in such cases. It provides that employers and insurers paying medical compensation are entitled to obtain an injured worker's medical records without the employee's express authorization. In all other circumstances, such as denied claims and cases still under investigation, employers and their insurers are now authorized to obtain records directly from medical providers, if they relate to the injury for which compensation is being claimed, so long as the employee or his attorney is given written notice of the request when it is made. And, HB 99 also requires employees themselves to furnish the defense

with those medical records which relate to any injury for which compensation is sought.

Further, in cases in which compensation is being paid, either because the claim has been admitted or because benefits are being paid "without prejudice," employers and their insurers are now authorized to communicate in writing with medical providers in the form of specific questions to be promulgated by the Commission regarding, among other issues, the employee's diagnosis, necessary treatment, anticipated lost time, work restrictions and their anticipated length, his permanent impairment, the types of employment for which he might be eligible, and the relationship, if any, between his injury and the resulting condition. When the defense seeks additional information in this way, the employee is entitled to receive a copy of their inquiry by the same means of transmittal as it is sent to the medical provider.

In "Minutes" adopted on October 18, the Commission has published guidelines aimed at implementing the medical information release provisions of HB 99. It has also indicated that it plans to promulgate the specific written questions employers and insurers paying for medical care have been authorized by HB 99 to send to medical providers without obtaining written authorization. It is anticipated that the Commission will be developing a new form for that purpose.

HB 99 also contains a specific acknowledgement that other forms of communication with medical providers are permissible, if authorized by either "a valid, written authorization voluntarily

given and signed by the employee,” agreement of the parties, or order of the Industrial Commission.

Risk Handling Hint: Even after passage of HB 99, the most fool-proof way for risk managers to avoid litigation over their communications with medical providers is to obtain a signed authorization to do so. But, where claimant either refuses to provide a written authorization or later rescinds it, employers and their insurers now have the option of communicating with medical personnel in the various ways authorized by HB 99.

Claim Denials

Among the other significant accomplishments of HB 99 is that it has eliminated the risk claims will be deemed compensable and the defense precluded from contesting compensability if there is an intentional or inadvertent delay in determining whether to admit or deny a claim.

As noted in the April 2004 edition of *Risk Alert*, some of the more aggressive members of the plaintiff’s bar and a segment of the Industrial Commission have interpreted the provisions of N.C.G.S. § 97-18(c) to require that all workers’ compensation claims be admitted or denied within either 14 or 90 days of the date of injury. And, those same individuals have contended that unless a formal, written, claim denial is issued within the applicable time limitation period, the defendants should be forever barred from contesting compensability.

However, in HB 99, the Legislature has now ended that debate by amending the statute which covers claim denials. While

the new statutory provision, N.C.G.S. § 97-18 (j), encourages defendants to either expeditiously admit or deny claims or initiate payment of benefits “without prejudice,” by directing them to “promptly investigate each injury reported or known to the employer and at the earliest practical time ... admit or deny the employee’s right to compensation” and it also authorizes the Commission to impose “reasonable” sanctions if a claim is not admitted or denied “within 30 days following notice from the Commission of the filing of the claim,” it specifically provides that “reasonable” sanctions do *not* include barring the defense from either contesting compensability or denying liability for the claim.

Not only does this new statutory provision make it clear that claims cannot be deemed compensable simply because they were not denied within any particular time frame, but the triggering mechanism for starting the period of time during which employers and their insurers must decide whether to admit or deny a claim is not the date of injury, but the date on which they received actual notice of the claim from the Industrial Commission.

Risk Handling Hint: Thus, while N.C.G.S. § 97-18 as amended retains the requirement that “when the employer or insurer admits the employee’s right to compensation, the first installment ... shall become due on the fourteenth day after the employer has written or actual notice of the injury,” the *de facto* deadline for defendants to admit or deny claims without being subject to sanctions is 30 days from actual receipt of notice of the claim from the Industrial Commission. As such, risk managers are advised to closely monitor all correspondence

and other documents received from the Commission which might be interpreted as giving notice of a claim, such as a Form 18 or 33 or any other communication which asserts that a claim for benefits is being made under the Workers’ Compensation Act. Receipt of such a document from the Commission triggers the 30 day deadline for an admission or denial, which if not met subjects the defense to “reasonable” sanctions.

At the same time, this new subsection of N.C.G.S. § 97-18 contemplates that there may be times when the defendants do not have sufficient information to determine the compensability of a claim within that relatively short period of time. In such circumstances, the amended statute specifically authorizes the Commission to grant additional time to the defendants, even after the 30 day deadline has already run, to complete their investigation and decide whether to admit or deny the claim. And, perhaps even more importantly, in those cases in which the final deadline for action is missed, the most likely consequence will be imposition of a monetary sanction against the defendants, not entry of a default on the issue of compensability.

Drug and Alcohol Defenses

HB 99 also includes an amendment to N.C.G.S. § 97-12, the statutory provision which bars compensation to employees whose injuries are “proximately caused” by alcohol intoxication or being under the influence of controlled substances.

This amendment modifies the statute by defining “intoxication” and “under the influence” to mean that “the employee shall have consumed a sufficient quantity of intoxicating

beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.” In addition, as amended, N.C.G.S. § 97-12 now provides that “a result consistent with ‘intoxication’ or being ‘under the influence’ from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable ... law ... shall create a rebuttable presumption of impairment”

As such, N.C.G.S. § 97-12 now affords the defense two options for successfully resisting claims involving the use of alcohol or drugs. First, if the defendants can show that the employee consumed either alcohol or a controlled substance, benefits will not be owed if they can also prove that use of the substance in question caused an “appreciable impairment” of the employee’s normal faculties. The most likely source of such evidence will be testimony from co-workers or other eyewitnesses regarding claimant’s actions prior to, at the time of, or immediately after his injury, thereby demonstrating the extent to which claimant’s use of the substance in question actually impaired his faculties.

The second option for the defense under the amended version of N.C.G.S. § 97-12 would be to prove through a blood test or other measurement the amount of alcohol or controlled substance in claimant’s system at the time of injury. As a blood alcohol level exceeding .08 is sufficient to constitute intoxication under state law, test results at or above that level will create a rebuttable presumption of impairment.

Risk Handling Hint: In such cases, risk managers are advised to ensure that any drug or alcohol testing they choose to commission be aimed at more than merely detecting the presence of an offending substance in the claimant’s body. Rather, it is imperative that their testing go a step further, so as to document the precise level of the intoxicating substance in the employee’s system.

At the same time, risk managers should remain cognizant of the fact that N.C.G.S. § 97-12, even as amended by HB 99, still obligates the defense to establish proximate cause. That is, even if they are able to show that claimant was impaired by alcohol or a controlled substance at the time of his injury, the defendants still have the burden of proving that his impairment was its proximate cause.

Settlement Agreement Approval Procedures

HB 99 also eases existing requirements related to the submission of medical records with both clinchers and form agreements for payment of PPD.

First of all, the existing requirement that copies of all known medical bills accompany clincher agreements when they are submitted for approval in accepted cases has been eliminated. Likewise, it is no longer necessary for clinchers and Form 21 and 26 agreements for PPD to be accompanied by “a full and complete medical record.” Rather, the amended statute now only obligates the parties to submit *material* medical and vocational records.

Similarly, it is no longer a requirement in cases of accepted

liability that the parties provide the Commission with a list of all known medical expenses, so long as the clincher agreement specifies that the defendants have agreed to pay all injury-related medical expenses through the date of settlement.

Both the plaintiff and defense bars saw the statutory revisions which accomplished these procedural changes as a way to expedite settlements by reducing the often unnecessary production of medical reports and bills required by existing settlement review procedures. At the same time, defendants will benefit in another way by virtue of these amendments, as it will now be more difficult for claimants and their attorneys to have clinchers and form agreements for PPD set aside on the basis that not all of the employee’s medical records accompanied them when they were submitted for approval, since there is no longer a requirement that settlement agreements be accompanied by “a full and complete medical report.” Only *material* medical and vocational records need be submitted. Thus, among its other consequences, HB 99 has effectively reversed the holding of the Court of Appeals in *Atkins v. Kelly Springfield Tire Co.* (see *Risk Alert*, December 2002 and July 2004).

Employee Fraud

And, finally, HB 99 has amended the fraud provisions of the Workers’ Compensation Act, found in N.C.G.S. § 97-88.2, by adding a new subsection which specifically authorizes the Commission to enter such orders as are necessary to ensure that persons convicted of fraud do not benefit from their misconduct.