

CHAIR, WORKERS'
COMPENSATION GROUP
Eric Proser
Atlanta, GA

OFFICE HEAD,
NC OFFICE
Randy Loftis
Winston-Salem, NC

EDITOR IN CHIEF
Robin Shea
Winston-Salem, NC

CHIEF MARKETING
OFFICER
Victoria Whitaker
Atlanta, GA

Client Bulletin #446

THEN AND NOW: North Carolina Workers' Comp Reform Makes Things Better for Employers

By Ranchor Harris
Winston-Salem Office

This June, North Carolina Gov. Beverly E. Perdue signed into law the **first significant reforms to the state Workers' Compensation Act** since 1994. The changes have received a **"thumb's up" from the state Chamber of Commerce** because they are positive for employers. Some of the changes are effective immediately, and others apply to workers' compensation claims that arise after the effective date. The following is a summary.

"Suitable Employment":

Then: This was never defined in the old statute. Case law molded a definition that included employment within the employee's medical restrictions at essentially the same wage, benefits, and opportunity to advance as in the prior position. As a practical matter, it was extremely difficult for employers to meet this standard.

Now: "Suitable employment" is defined differently, depending on whether the employee has reached maximum medical improvement. Pre-MMI, "suitable employment" is employment within the employee's medical restrictions, period. Post-MMI, "suitable employment" takes into account the employee's injury-related limitations, but also his education and experience, and whether the employment is within a 50-mile radius of the employee's residence.

"Willful Misrepresentation" in applying for employment:

Then: This was not addressed at all under the old Act.

Now: "Willful misrepresentation" provides a complete defense for the employer in a workers' compensation claim when an employee at the time of hire (1) makes a false statement as to his physical condition, (2) which the employer relied upon and was a substantial factor in the hiring decision. There must also be (3) a causal connection between the false statement and the injury.

Dispute over medical treatment and supplies:

Then: The employer had to pay for medical compensation. The statute sloppily provided that the employer and employee would have to go the Industrial Commis-

Atlanta
•
Asheville
•
Austin
•
Birmingham
•
Boston
•
Chicago
•
Columbia
•
Dallas
•
Fairfax
•
Greenville
•
Jacksonville
•
Kansas City
•
Lakeland
•
Los Angeles County
•
Macon
•
Madison
•
Nashville
•
Port St. Lucie
•
Princeton
•
St. Louis
•
Tampa
•
Ventura County
•
Winston-Salem

September 8, 2011

sion when a dispute arose without imposing any burden of proof on the employee as to why a change in the course of treatment should occur.

Now: The employee now has to request in writing a second opinion, and if it is denied the care issue can be submitted to the Industrial Commission. The Act now places the burden of proof on the employee to show by a preponderance of the evidence the need to change the course of treatment.

Reasonable access to medical providers:

Then: The old Act had no provision for this.

Now: The employer has direct line of communication to the healthcare providers in accepted and denied claims, and can ask for relevant medical information relating to the injury or the employee's ability to return to work. Such requests can be made in writing or orally. There are notice requirements which must be complied with, but alas, communication with medical providers is permitted in NC.

Rates and duration of compensation for total incapacity:

Then: There were and still are payment durations for permanent partial disability, but there never was a cap on temporary total disability. In practice, if an employee was never capable of finding suitable employment, his injuries morphed into permanent and total.

Now: The Act places a hard cap of 500 weeks on injuries unless they meet the criteria for being permanent and total. Permanent and total injuries are limited to loss of both hands, arms, feet, legs, eyes, or any two thereof; paralysis; severe brain injury; or second- or third-degree burns covering the entire body. A permanent and total injury allows an employee to lifetime compensation including medical, regardless of whether he can return to work.

The reforms also give the Industrial Commission until December 31, 2012, to revise or affirmatively readopt its existing rules, which are in the North Carolina Administrative Code. Any regulations not changed or readopted by that date will become void.

If you have questions about the North Carolina Workers Compensation Act or its reforms, please contact the Constangy attorney of your choice, or **you may contact me directly.**

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.