

# How to Manage a State Employee's Workers' Compensation Case

By

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## I. Introduction

North Carolina state employees have benefits available to them when they are entitled to workers' compensation that must be properly evaluated in order to provide the most complete remedy. While the major components of state employee benefits and the interaction with workers' compensation have been exhaustively documented in a paper appended to this document,<sup>2</sup> the attorney's management of the programs and benefits are complex. This paper explores some specific items to analyze and consider in the management of a state employee's workers' compensation case and should be read in conjunction with the larger paper.

## II. Determine if the employee is vested in the state retirement system

Employees vest, or become eligible for benefits, in the retirement system after five years of creditable service. These service credits are most often earned from work in the state system; however, work in certain other arenas may also qualify, such as local government employment.

While employees are allowed to purchase retirement credits in order to retire earlier in exchange for years worked in the military or in other states<sup>3</sup>, it is not possible to purchase credits in order to vest in the system.

### A. Determine if the employee is entitled to *Faulkenbury* benefits

A special structure exists for long-term employees of the state that have vested as of 1988. These employees have disability benefits that are not offset by either workers' compensation benefits or by social security benefits. It is important to choose correctly in the election of benefits; the employee who chooses long-term disability benefits likely will not be able to reverse the decision.

### B. Determine whether the employee will be eligible for short- and/or long-term disability benefits

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<sup>2</sup> "New Developments in the Interaction Between North Carolina State Employee Benefits and the Workers' Compensation System," *Workplace Torts and Workers' Comp*, 2007.

<sup>3</sup> "Your Retirement Benefits," *Teachers' and State Employees' Retirement System*, pp. 6-7.

The application is made with the agency or division that employed the employee or with the Retirement System. The application must be signed by a doctor and approved by the medical board. Disability benefits will be offset, dollar for dollar, for workers' compensation benefits received – unless for a rating under G.S. §97-31.

1. Short-term disability lasts up for a year: An employee is eligible if he or she has:
  - a. contributed to the retirement system for at least a year within the last three years;
  - b. been certified as unable to perform his or her usual profession; and
  - c. had the disability continually from the time of service.G.S. 135-105(a).

If the employee is eligible, and has not elected to receive disability retirement under *Faulkenbury*, it probably makes sense to apply for short-term benefits. The continued accrual of retirement credits may matter; if an employee is solely on workers' compensation leave, he or she will not accrue credits. However, a member who is receiving these benefits does not accrue credits toward vesting in the system.

There does not appear to be a statute of limitations on the application for short-term benefits.

2. Extended short-term disability benefits: If the employee is going to return to work, it may make sense to apply for the extended benefits available from short-term disability for up to one additional year. Employees who take long-term disability benefits must also resign from their employment.

3. Long-term disability: The employee must meet several requirements.
  - a. five years of credible service within the last eight years before the end of short-term disability;
  - b. apply within 180 days after the last receipt of any periodic workers' compensation, short-term disability, or salary continuation benefits;
  - c. pass the medical board's requirements; and
  - d. terminate their job.

Note that long-term disability benefits may discontinue: for employees who have not vested as of July 31, 2007, they will cease after 36 months unless the employee has been approved for social security disability, and will be reduced by the amount of the social security disability benefit if the employee has vested as of that date.

### III. Determine if the employee is eligible for salary continuation

Some employees will get one or two years of full salary after they leave work due to an injury. Law enforcement officers and certain other employees injured in the course of their official duties receive two years of full salary; teachers and other state

educational workers injured during an episode of violence receive one year of salary. No other periodic payments under G.S. 97-29 or -30 are payable during that salary continuation period. After the period ends, the employee will convert to the workers' compensation rate.

How to apply: Benefits available to the employee under this scheme may be given to the employee without the need for further action. However, if compensation is not automatic, the employee may need to request that she or he be awarded the salary continuation.<sup>4</sup> If the benefits are denied, they may be appealed via Form 33.

#### IV. Workers' compensation leave

An employee who is out of work because of a compensable injury must go on workers' compensation leave and choose whether or not to take accrued sick and/or vacation time to compensate for the waiting week. G.S. § 135-104; Personnel Manual § 6, at 11-12.

While out of work, an employee can use accrued sick and vacation leave to increase his or her weekly temporary total disability benefit according to a schedule published yearly by the Office of State Personnel.<sup>5</sup> The schedule is designed to approximate the employee's regular salary from the state. The employee will continue to accrue leave time at the same rate as if she or he were working.

Employees who must leave work for medical visits do not lose accrued leave for reasonable lost time.<sup>6</sup>

#### V. What about health insurance coverage?

The State Health Plan provides coverage for state employees and dependants. While an employee is on workers' compensation leave, the state continues to pay for the health insurance premiums for the employee.

Key Risk will notify the State Health Plan that the treatment for the compensable condition is being paid for under workers' compensation. The Plan excludes payment for charges rendered in conjunction with the compensable condition. It should be noted that the State Health Plan and its contractor, Health Management Systems, are considering more aggressive action against liable parties for the recovery of payments made in workers' compensation cases for covered dependants. State agencies already provide reimbursement to the plan under the provision excluding charges arising out of services furnished by the employer for compensable injuries or conditions. G.S. §135-40.7(4).

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<sup>4</sup> Appendix, Part B, sample letters to school board requesting salary continuation benefits and appeals decision.

<sup>5</sup> Appendix, Part C, Workers' Compensation Supplemental Leave Schedule, January 1, 2009.

<sup>6</sup> State Personnel Manual, "Workers' Compensation Administration," Employee Benefits and Awards, § 6, p. 13, Appendix, Part D.

While the State Health Plan's subrogation statute, G.S. §135-40.13A, has broad provisions for recovery from third parties and a lien on damages, the statute has not been applied in the workers' compensation context. Some have concluded that the provisions will not apply to a workers' compensation recovery because it is not pursuant to a policy of insurance;<sup>7</sup> however, there has been no definitive answer.

Absent a specific provision for future coverage, there is no guarantee that the State Health Plan will pay for treatment of the compensable condition following settlement. Consultation with the attorneys at the Tort Claim section specifically concerning the provision of medical benefits for the injury is advised when considering settlement.

VI. Is a settlement in the employee's best interest?

In 2009, the State faced a multi-billion dollar budget shortfall. Given the budgetary restrictions imposed by such a discrepancy, the first settlement question to ask could be this: Will the state ever obtain the necessary funds to settle the employee's claim?

As the State Personnel Manual declares, "[t]he State has a "self-insured" program and expenditures are paid from current operating budgets."<sup>8</sup> It is often difficult in the best of times to obtain enough money to settle a claim with lifetime benefits from a state agency. In the midst of a recession, prospects for settlement are even dimmer. However, it could be useful to propose a settlement that has payments in different fiscal years, or otherwise is creative in its structure.

In addition, the fact that compromise settlement agreements are currently not being offset by the amount of the lump sum may be an incentive to settle for less than the claim might otherwise be worth, because the continued receipt of short and long-term benefits will result in an increased benefit to the injured employee.

The attorney should consider the following questions when considering settlement:

1. Will the employee be able to draw short or long-term disability benefits?
3. Will the long-term benefits cease or be offset by the amount of the social security benefit after 36 months?
2. Is the employee close to being able to draw unreduced service retirement benefits? This may reduce the incentive to settle, as workers' compensation benefits continue after retirement, and short- and long-term benefits will cease.

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<sup>7</sup> Michael A. Jordan and Christopher Nichols, "Reimbursement Claims for Local and State Employees," *Disbursements 2008*, NCATL.

<sup>8</sup> State Personnel Manual, "Workers' Compensation Administration," Employee Benefits and Awards, § 6, p. 7, Appendix, Part D

## VII. Get to know Key Risk

Key Risk has been administering claims for the State of North Carolina since 1996. Because it presents a proposal for contract renewal to the Department of Administration, its claims procedures and performance standards are public.<sup>9</sup>

Key Risk provides not only claims administration, but also nursing and vocational rehabilitation services. Key Risk maintains a network of preferred medical providers. Claims administration services include training for agency workers' compensation services and utilization review processes.

The materials produced in the proposal indicate that utilization review processes, "objectively analy[zing] the appropriateness and necessity of treatment to ensure guidelines are met." All hospital admissions, surgical procedures and inpatient rehabilitation, among other treatments, are subject to review. Key Risk insists that few providers appeal denial decisions.<sup>10</sup> Although any denial is appealable according to Key Risk's guidelines, any treatment recommended by a treating physician may be compelled by the Industrial Commission pursuant to G.S. §97-25 and the medical motions guidelines.

Key Risk works closely with the Attorney General's office for the preparation of claims for hearing. "After the assigned attorney reviews a new file, the attorney calls the claim professional to discuss the case. At that time, the claim professional and the attorney review the Key Risk file review form and agree on the litigation issues and other information needed to strengthen our position."<sup>11</sup> Should the decision be made to pursue settlement, the person with authority's contact information is given to the attorney. The claims professional attends all mediations and participates in the selection of a mediator.

## VIII. Conclusion

The proper management of a state employee's claim is complex. Each benefit program should be considered in order to provide the most complete remedy.

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<sup>9</sup> A full set of Key Risk's proposal documents is appended to the "New Developments" paper, *NCATL Workplace Torts & Workers' Comp*, 2007. Proposals were submitted in March 2009 for a new contract term by Key Risk and /or a new claims administrator. As of April 2009, no contract had been awarded.

<sup>10</sup> Key Risk's Response to The State of North Carolina Request for Proposal, March 6, 2004.

<sup>11</sup> *Id.*, Answer to question 17.