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## *Workers' Compensation Reform: Governor Perdue Signs House Bill No. 709, and "Puts NC Back to Work."*

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**June 24, 2011**, Governor Beverly Perdue signed House Bill 709 (HB-709), also known as the "Protect and Put NC Back to Work Bill", passing the first significant Workers' Compensation reform bill in more than a decade.

**Medical Access** Effective for all claims pending on or after June 24, 2011, employers are no longer limited to the medical status questionnaire provided by the Industrial Commission. In accepted claims, employers may obtain medical records or contact providers in writing directly without the employee's express consent to obtain relevant information not available in the records. Employers may request information on the employee's diagnosis, course of treatment, the anticipated time out of work, how the employee's condition will affect their employment, whether permanent impairment will result, and future work restrictions resulting from the condition.

In addition to written communication, employers may also now communicate orally with health care providers to obtain relevant medical information not otherwise available through written communication or not contained in

the employee's medical records. Employers, however, must give the employee notice of their intent to communicate with the provider and also provide, within 10 days, the employee with a summary of the oral conversation with the provider.

#### **Indemnity Compensation**

The new law also extends the length of time disabled workers can receive temporary partial disability benefits from 300 to 500 weeks. For temporary total disability benefits, the number of weeks is now capped at 500 weeks, starting from the date of disability, unless the employee meets the criteria for extended compensation. The new law further provides when an employee is entitled to permanent and total disability following the loss of limbs, spinal injury, severe burns, or severe brain or closed head injury. These sections apply to claims arising on or after June 24, 2011.

Other notable reforms include:

- A workable definition of "**suitable employment**." Defined as employment offered to the employee prior to reaching maximum medical improvement (MMI) within the restrictions imposed by the treating physician; OR employment offered after reaching

MMI taking into consideration the employee's skill, experience, education, and any pre-existing limitations and injuries. The employment must also be located within 50 miles of the employee's place of residence at the time of their injuries, unless some legitimate reason for relocation is present.

- **Willful misrepresentation** of an employee's physical condition made before employment starts or at the time of hiring may bar compensation. In that instance, the employer must prove: 1) that the employee knowingly & willfully made a false representation; 2) the employer relied upon that false representation; and 3) the connection between that false representation and the employee's injury or condition.
- **Death benefits** paid when an employee dies as a result of work-related injury, increased from 400 to 500 weeks. Burial expenses paid by the employer, are increased from \$3,500 to \$10,000 payable to the decedent's dependents and heirs.

These sections apply to claims arising on or after June 24, 2011. To view the entire House Bill 709, visit: [www.ncgs.state.nc.us](http://www.ncgs.state.nc.us).

## *House & Senate Vote to Over-ride Governor Perdue's Veto of Senate Bill No. 33.*

**Senate Bill No. 33 (S-33)**, a Medical Malpractice Tort Reform bill, will likely be passed into law later this year following votes in both the House and Senate to over-ride the Governor's veto of the Bill earlier this summer.

As covered in our last quarterly publication, S-33 provides for a series of changes to the medical malpractice field. The bill imposes a \$500,000 monetary cap on non-economic damage awards and requires plaintiffs to meet stricter eviden-



tiary standards of negligence against providers. For instance, where the health care provider is treating an emergency medical condition, there must be a finding that the physician deviated from the standard of care, constituting gross negligence, wanton conduct, or an intentional wrongdoing for liability to attach.

Proponents of the bill, including the NC Medical Society, praise S-33 for its potential to lower malpractice rates and attract medical practitioners to the state's rural areas where needs are greatest. They also reject the idea that juries should decide damages awards, fearing the unreliability of their decision-making.

Opponents of S-33, such as the NC Advocates for Justice argue that the decision on damage awards should remain with the jury and not legislators.

S-33 was sent to the House on March 22, 2011, and like many other states proposing such medical malpractice tort reform, the Bill was met with strong opposition. Governor Perdue vetoed the bill in June arguing that the bill as presented left the catastrophically injured at risk.

Senate Republicans voted to override the Governor's veto on July 13th, and the House followed with its own veto vote on July 25, 2011.

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### ***Practice Areas***

Our practice covers a range of services for professional clients, the insurance industry, businesses and individuals. Our services include:

Insurance Defense Litigation  
Commercial Litigation  
Insurance Law  
Professional Negligence  
Products Liability

Medical and Dental Malpractice  
Workers' Compensation  
Trucking and Transportation  
Premises Liability  
Appellate Law

## General Liability Reform: House Bill 542 Signed into Law by Gov. Perdue

**June 24, 2011.** In a series of tort reform bills recently signed into law by Governor Beverly Perdue, House Bill 542, NC Rule of Evidence 414, made sweeping changes to general liability practice in North Carolina. The new bill heightens evidentiary standards for tendering expert witnesses; imposes new burdens on plaintiffs to prove compensable medical expenses; and codifies landowner liability in actions against adult trespassers.

### Expert Witnesses

In 2004, the North Carolina Supreme Court handed down its decision in *Howerton v. Arai Helmet, Ltd.*, and thereafter required expert witnesses in NC to qualify based on its three-part test for reliability. According to *Howerton*, the proffering attorney had to prove the sufficiency and reliability of their expert's method of proof; the expert must be qualified as an expert in that particular area based on their skill, knowledge, education, experience, and training; and the expert's testimony must be relevant. With the passage of HB 542, this standard has changed to mirror the more popular "Daubert Standard" first applied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and adopted by a number of states. Accordingly, experts must now prove that their testimony is based on sufficient facts and data; the testimony is the product of reliable procedures and methods; and the witness applied those principles and methods reliably to the facts of the case.

### Past Medical Expenses—Rule 414

The NC Legislature enacted a new rule of evidence, Rule 414, which limits the amount of past medical expenses a plaintiff can introduce into evidence. The limitation applies to both paid and unpaid past medical expenses. If the past medical expenses have already been paid, the plaintiff is now limited to introducing evidence of the amounts actually paid to satisfy the medical expenses (as opposed to the

amounts charged by the medical providers).

As our clients know, the amounts charged by medical providers are almost invariably higher than the amounts actually paid to satisfy the medical providers' bills. If the past medical expenses have not yet been paid, the plaintiff is now limited to introducing evidence of the amounts actually necessary to satisfy the medical expenses, again as opposed to the amounts charged by the medical providers.

The collateral source rule remains in effect, thereby barring the defendant from introducing evidence that the plaintiff's medical expenses, or any portion of them, have been paid by some collateral source, such as the plaintiff's health insurer.

Rule 414 becomes effective on October 1, 2011, and applies to actions arising on or after October 1, 2011.

### Attorney's Fees

HB 542 increases the damages recovery award for plaintiff's where attorney's fees may be awarded from \$10,000 to \$20,000, while also capping awards of fees granted by the trial court to \$10,000. Additionally, according to the bill, when the judge determines to award attorneys fees, he must issue findings of fact to support this finding, showing an unwarranted refusal to negotiate or pay the claim by the defendant-insurance company and setting forth the amount of the highest offer made 90 days or more before trial.

### Landowner Liability for Trespassers

The Trespasser Responsibility Act provides that "A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury to a trespasser." Landowners will remain liable for trespasser injuries under these circumstances:

- Intentionally causing harm to a trespasser, except where reasonable force is used to repel the trespasser.
- For harm caused to trespassing children by artificial conditions on their land under North Carolina's "attractive nuisance doctrine." Under this doctrine, a landowner may be liable for harm to trespassing children the landowner knew, or should have known, were likely enter onto his land based on their age, inability to perceive the harm, and the presence of an artificial condition on the land.
- For trespasser injuries if they discovered the trespasser in a position or peril or helplessness, but failed to exercise ordinary care not to injure the trespasser.

The Trespasser Responsibility Act applies to causes of action arising on or after October 1, 2011.

The remaining laws covered by HB 542 become effective on October 1, 2011 and applies to actions commenced after that date.

To read the bill in its entirety, visit [www.ncgs.state.nc.us/](http://www.ncgs.state.nc.us/) (House Bill 542)



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