

# RISK/ALERT

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## CASE LAW UPDATE

### *Supreme Court Affirms Commission Decision to Disregard Doctor's Opinion Due to Conversation with Rehabilitation Professional*

In a *per curiam* decision issued on March 3, the Supreme Court reinstated a Full Commission decision assigning no weight to the treating physician's opinion that claimant was able to return to work, saying that the rehabilitation nurse may have exerted "undue influence" on the doctor. ***Jenkins v. Public Service Company of North Carolina***.

After claimant suffered an initially disabling injury, he returned to work in a light duty position as a meter reader for approximately one week. Contending that the residual effects of his injury caused him to be unable to continue in that job, claimant subsequently completed a Form 28U ("Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work") and took it to his physician, Dr. Hicks. Claimant testified that he thought Dr. Hicks was going to sign the form, but before the doctor did so, he talked to the rehabilitation nurse outside claimant's presence and then refused to sign it. Dr. Hicks later testified that shortly after they first discussed returning to work, claimant's test results began suggesting symptom magnification. He felt that the meter reader position was "appropriate" and that there was no medical reason for claimant to stay out of work. Therefore, he refused to sign the Form 28U.

Claimant then took it to Dr. Rodger, who had not seen him in nearly two years. Dr. Rodger signed the Form 28U, but when claimant's case was heard, the Deputy Commissioner ruled that he was employable. The Full Commission reversed, giving no weight

to the opinion of Dr. Hicks, finding that he "left at least the appearance of undue influence" by conferring with the rehabilitation nurse outside claimant's presence.

As reported in the January 2000 edition of *Risk/Alert*, the Court of Appeals reversed the Full Commission, the majority opinion finding that the Full Commission had erred by treating the RP as an agent of the defendants and applying the *Salaam* rule against *ex parte* communications. The majority found that RPs have ethical obligations to their clients and that, absent contrary evidence, the courts will not assume them to be agents of the employer.

In its opinion, however, the Supreme Court reversed for the reasons stated by Judge Wynn in his dissent, who found support for the Commission's decision in the testimony of the two medical witnesses other than Dr. Hicks. Noting that our appellate courts are required to leave the Commission's findings undisturbed whenever there is any evidence to support them, the Supreme Court reinstated the Full Commission decision.

Because neither Judge Wynn's dissent nor the Supreme Court's *per curiam* opinion specifically addressed the question of what contacts between RPs and doctors are permissible, the continuing validity of the Court of Appeals' holding that RPs are not prohibited from *ex parte* communications with treating physicians is unclear. Members of the plaintiff's bar have argued, both at the public hearing held by the Commission to discuss proposed rehabilitation rule revisions on March 30 and in related correspondence, that (1) RPs must now be viewed as agents of employers as a matter of law and (2) as a result, the continuing viability of the Commission's rehabilitation rules is in question.

**Risk Handling Hint:** While awaiting further word from the Commission on the effect, if any, that the *Jenkins* decision will have on its revised rehabilitation rules, risk managers are cautioned to instruct RPs to be careful in all communications with physicians, so as to avoid the appearance that undue influence is being exerted on the doctor. Further, a growing number of plaintiff's attorneys are requesting copies of e-mail communications between claims personnel and RPs. Because the Commission's rules require copies of all communications to be provided to claimants and their attorneys, risk managers should be aware that even electronic communications are most likely discoverable and subject to review by claimant's attorney.

At the same time, risk managers should be aware of the potential that *Jenkins* can be used as a basis for arguing that if claimant's attorney meets with the treating physician on an *ex parte* basis, the doctor's opinions might be subject to attack because of "undue influence." Such an argument is most likely to be successful if the doctor has rendered one opinion in writing and then changes it after meeting with claimant's attorney.

*Defendants Sanctioned for Terminating Employee's Benefits on the Basis of Inadequate Surveillance Evidence*

In *Lewis v. Sunoco Products Company*, claimant suffered a compensable injury and began receiving benefits pursuant to a Form 21 agreement. Her weekly checks were subsequently terminated after defendants filed a Form 28T, which stated that claimant had returned to work for another employer. After she requested a hearing, defendants offered evidence showing that she was assisting her husband in his small landscaping business. Claimant was videotaped cutting lawns. However, she insisted that she received no compensation for her services and was only helping out because she was tired of sitting at home.

The Commission found insufficient evidence to establish claimant's ability to return to gainful employment. It rejected defendants' argument that even if claimant may not have actually returned to gainful employment, there was sufficient evidence to show that she was *capable* of returning to work and had *wage earning capacity*. The Commission found that since the defendants had terminated claimant's benefits pursuant to a Form 28T, the only issue was whether she had actually returned to work. If the defendants wanted to argue claimant's wage earning capacity, they should have filed a Form 24 application or a request for hearing. The Commission awarded claimant \$1,000 in attorney's fees and \$3,500 in costs. The Court of Appeals affirmed the Commission's decision in all respects, including the award of sanctions.

**Risk Handling Hint:** Risk managers are cautioned to be very careful when terminating benefits on the basis that claimant has returned to work. Often, claimants fail to disclose that they have resumed working despite overwhelming evidence that a Form 28T is justified. The result reached in *Lewis* underscores the importance of a careful investigation to establish and document an actual return to work. If possible, risk managers and their investigators should obtain direct confirmation from the new employer, if such can be done without jeopardizing further investigative efforts.

## RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ The Commission has not yet published the final versions of its new fraud rules or of its revised general and rehabilitation rules. We will continue to monitor developments in that regard and advise you as those rules are finalized. The Commission has announced that as soon thereafter as is practicable, The Michie Company will issue an updated edition of the annotated North Carolina Workers' Compensation Act.

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