

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CONCERNING THE  
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NEWSLETTER

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## CASE LAW UPDATE

*Form 18 Put Defendants on  
Notice of Claim Despite Erroneous  
Date of Injury*

On February 5, 1999, Jody Crane was changing a tractor tire on his employer's backhoe, when a lug nut broke loose, "jerking" him. At first he only felt stiffness in his back, but he later began to experience increasing back and right hip pain.

Crane continued working until February 11, when he felt a "pop" in his back while climbing out of a dump truck. He then reported both incidents to his supervisor, who sent him home and arranged a doctor's appointment for the following Monday. Over the weekend, Crane went to the emergency room, where he reported a recent worsening of a back and hip injury suffered at work a week earlier.

While Crane was consistent in telling his doctors that he was injured while breaking lug nuts loose changing a tire, he told one of them it occurred on February 5 and another February 11. His employer's Form 19 attributed the injury to "working with a tractor," but it gave a third date of injury, February 12. Crane's Form 18 also described the tire changing incident, but it stated that February 11 was the date of injury.

After Crane's claim was denied by his employer's carrier, a hearing was held. The Deputy Commissioner ruled for Crane, finding he had suffered injuries

by accident on both February 5 and 11. On appeal, the Full Commission modified the deputy's Opinion and Award, finding that while Crane had not filed a claim for the February 5 incident, he was entitled to benefits anyhow, since his disability arose out of the February 11 incident.

On April 5, in *Crane v. Berry's Clean-Up and Landscaping, Inc.*, the Court of Appeals reversed, agreeing with the defense that there was no evidence to support a finding that Crane's disability had arisen out of the February 11 incident. At the same time, however, it determined that the Commission had erred in concluding that Crane did not file a claim for the February 5 incident, as his Form 18 alleged an injury to his back while changing a tractor tire. The Court felt that to hold the Form 18 insufficient to constitute a claim for an otherwise compensable injury simply because it had the wrong date on it would be inconsistent with prior case law governing specific traumatic incidents, including *Fish v. Steelcase*, in which it held that while "N.C.G.S. § 97-2(6) requires ... [proof of] an injury at a cognizable time, this does not compel ... plaintiff to allege the specific hour or day of the injury."

Since Crane's Form 18 described the specific incident at issue, "it was sufficient to constitute a claim for benefits arising out of the accident occurring when Mr. Crane was changing the tractor tire." Therefore, although the

Commission incorrectly concluded that the medical evidence proved Crane's disability resulted from the February 11 incident, it "may have been acting under a mistaken understanding of the law." So, the case was remanded to the Commission for further findings and to determine whether Crane's disability was caused by a work-related accident.

**Risk Handling Hint:** The Court of Appeals' decision in *Crane* provides risk managers with a useful reminder that technical flaws on a Form 18 will not normally be sufficient to defeat a claim on the basis that it was not timely filed. At the same time, however, the Court of Appeals acknowledged in *Crane* that such an error would raise a credibility issue for the Commission to address.

*10% Penalty Assessed for  
"Nonserious" OSHA Violation*

After Vonda Brown, Kroger's deli and bakery manager, tripped on an extension cord and fell to the floor, injuring her right shoulder, knee and elbow, lumbar area and sacrum, she filed a complaint with the North Carolina Department of Labor, Division of Occupational Safety and Health (NCDL/DOSH), which later cited Kroger for four "nonserious" occupational safety and health code violations.

Two months later, Brown fell at home while walking down a flight of stairs, injuring her right ankle and left knee. She filed a claim for disability resulting from both falls, contending that the second injury occurred when her right leg gave way as a result of the first.

After Brown's claim was denied by Kroger, a hearing was conducted by Deputy Commissioner Garner, who found the initial injury compensable, but denied the second, as he believed claimant's testimony regarding her fall at home lacked credibility. He also denied a 10% penalty claim

Brown brought under N.C.G.S. § 97-12, in which he alleged that Kroger had violated a safety statute.

The Full Commission reversed, however, finding that both falls were compensable. It also concluded that Brown was entitled to the 10% penalty because of Kroger's "willful failure ... to comply with a statutory requirement reprimand by OSHA."

On April 5, in *Brown v. Kroger*, the Court of Appeals affirmed the Commission's award in both respects, including the 10% penalty assessed under N.C.G.S. § 97-12. In doing so, it rejected Kroger's contention that while it had willfully stretched an extension cord across a hallway, it did not willfully violate the North Carolina Occupational and Safety Health Act, which prohibits "obstruction[s] across or in aisles that could create a hazard." And, the Court also held that N.C.G.S. § 97-12 was not unconstitutionally vague, as Kroger was on sufficient notice regarding OSHA's safety rules, since both the federal and state regulations are published and available to employers, thereby erasing any uncertainty as to what safety measures are required in the work place.

**Risk Handling Hint:** Risk managers should be aware of the fact that the *Brown* decision will likely result in an increase in motions for 10% penalties under N.C.G.S. § 97-12. At the same time, however, before claimants seeking an increase in benefits under this statute can succeed, they will need to establish occupational safety and health code or other statutory violations. Risk managers facing such claims should immediately initiate thorough, contemporaneous investigations into all alleged safety violations, interviewing available witnesses and gathering appropriate documentation for use as needed in the future, rather than delaying action and then trying to collect such information years later.

# TCDG NEWS

## TCDG ATTORNEYS AMONG BEST LAWYERS IN AMERICA

Having conducted its annual peer-review survey of the legal profession, *The Best Lawyers in America* recently notified four members of TCDG, George Dennis, Dayle Flammia, Linda Stephens and Bruce Hamilton, that they have once again been found to be among the country's best workers' compensation defense attorneys, and as such, will be listed in *Best Lawyers'* 2005-2006 edition. George and Linda have been so recognized by *Best Lawyers* for ten or more years, and Dayle is also listed in its personal injury and civil litigation section.

## TCDG ATTORNEY ELECTED TO 3-YEAR TERM

Tracey Jones has been selected to serve a three year term on the Council of the Workers' Compensation Section of the North Carolina Bar Association, the professional organization which monitors legislation and other developments in the area of workers' compensation law and conducts an annual continuing legal education program for workers' compensation practitioners.