

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Denial of Continuing Award of TTD Affirmed in Lightning Strike Case

Jennifer Perkins, a flight attendant for U.S. Airways, was helping passengers deplane when lightning struck nearby, causing her to experience a "hot poker feeling" and "pins and needles" in her right arm. After being treated by paramedics at the scene, she was told to follow up with her personal physician if she experienced further problems. U.S. Airways admitted liability on a Form 60, and for the next ten months she continued to perform her regular duties as a flight attendant.

At the time of her injury, Perkins was already under the care of neurologist Dr. Jerry Williams for a preexisting condition which caused her to suffer "spells." She saw him again within a week of the injury, but only complained of tightness in her right side. And, when next seen three months later, her only symptoms were right arm and shoulder pain. At neither appointment did she complain of neck problems.

Dr. Williams eventually diagnosed an "electric shock injury" and wrote Perkins out of work. At that point, U.S. Airways initiated TTD and referred her to Dr. Roger Hershline, whose initial diagnosis was cervical strain or a disc bulge. He referred her to Dr. Nicholas Grivas, a neurosurgeon, who found no neurological deficits consistent with either degenerative disc disease or a ruptured disc, nor any evidence that she was suffering from thoracic outlet syndrome or another surgically correctable abnormality.

While Perkins also complained of memory problems, Dr. Hershline observed that she was able to answer his standard clinical memory tests correctly. And, with regard to her complaints of neck, shoulder and arm pain, he noted that her recent home remodeling efforts had required greater physical exertion than her prior duties as a flight attendant.

After Dr. Hershline released Perkins to return to work without restrictions, her list of claimed symptoms expanded dramatically and she sought treatment from a whole series of additional medical

providers, including Dr. Rebecca Holdren, whose initial diagnosis was reflex sympathetic dystrophy (RSD). But, after a bone scan came back negative, Dr. Holdren changed her mind, agreed with Dr. Hershline that the RSD diagnosis was incorrect, and released Perkins to return to work.

At that point, U.S. Airways filed a Form 24, contending that Perkins was no longer disabled. Special Deputy Commissioner Myra Griffin agreed and entered an order terminating TTD. Perkins then visited a "lightning strike survivor's Internet website," from which she learned of a clinic in Maryland. She was seen there by a psychiatrist, Dr. Nelson Hendler, who diagnosed a variety of conditions, including thoracic outlet syndrome and "nonfatal lightning injury with brain damage," and by a neuropsychiatrist, Dr. Sheldon Levin, who felt that she presented a mixed pattern of symptoms normally suggestive of a somatization disorder, a psychiatric condition characterized by numerous complaints for which no underlying physical problem can be identified. However, in deference to Dr. Hendler's opinion that Perkins was in fact suffering from a physical illness, he ultimately chose not to make that diagnosis.

Dr. Hendler also referred Perkins to a neurologist, Dr. Donlin Long, who, despite normal EMG and cervical imaging studies, performed a spinal fusion. When that procedure failed to eliminate Perkins' complaints, Dr. Hendler made yet another referral, this time to Dr. Avraam Karas, who performed several more operations, including multiple rib resections and thoracic outlet syndrome surgeries.

After those procedures and additional treatment received from numerous other medical providers failed to reduce Perkins' complaints of continuing pain, she requested a hearing, which was conducted by Deputy Commissioner Adrian Phillips, who found claimant's physical symptoms and "severe depression and psychiatric illness" related to the lightning strike and awarded her ongoing TTD.

U.S. Airways appealed to the Full Commission, which reversed after determining that the testimony of Drs. Hershline, Holdren, Grivas and Williams should be given greater weight than that of Dr. Hendler and the other physicians claimant

saw upon his advice. The Full Commission observed that Dr. Hendler had relied on Perkins' subjective complaints even when they were contradicted by documentation provided by her previous physicians, and that, in turn, Drs. Levin, Long and Karas had deferred to the opinions of Dr. Hendler even though they were contradicted by the objective evidence.

The Full Commission also concluded that as of the date U.S. Airways' Form 24 was filed, claimant was capable of returning to full duty work without restrictions and, therefore, was not entitled to further TTD. It also held that to the extent the lightning strike might have been a "precipitating" or "triggering" event for her somatization disorder, that alone was insufficient to establish causation.

Claimant appealed to the Court of Appeals, which on April 18, in *Perkins v. U.S. Airways*, affirmed. In doing so, it rejected claimant's argument that the Commission erred in failing to give greater weight to the testimony of those of claimant's doctors who had "experience treating patients with lightning strike injuries," as it is well-settled that the Commission is entitled to give greater weight to the testimony of some doctors over others and that questions of weight and credibility lie solely within the purview of the Commission. Further, in response to claimant's argument that "[t]o afford greater weight to a doctor with no experience in an area who has unabashed loyalty to the defendants when there are physicians treating the patient with extensive experience, is unfair and unjust," the Court stated "[t]hat argument was for the Commission to assess and is not a proper subject for appellate review."

The Court also rejected claimant's assertion that the Full Commission erred in failing to find her totally disabled. She argued that because she asked U.S. Airways for a light duty position and was not offered one, she satisfied the second prong of the *Russell v. Lowes* test of disability, having produced evidence that while she might have been capable of some work, she had been unable to obtain employment after a "reasonable effort." However, the *Perkins* Court was unable to find any authority which required U.S. Airways to offer claimant such a position. Rather, in the absence of evidence that Perkins had made other attempts to obtain employment, her single contact with U.S. Airways was "insufficient to establish ... a reasonable effort to obtain employment" under *Russell*.

Risk Handling Hint: The key to the outcome of Jennifer Perkins' claim was the Commission's finding that her somatization disorder was only "triggered" or "precipitated" by the lightning strike, rather than *caused* by it. In 1984, in *Brewington v. Rigsbee Auto Parts*, the Court of Appeals found such evidence insufficient to establish the requisite causal link. Commissioner Bolch dissented in *Perkins*, arguing that "regardless of the semantics employed by the majority or the physicians who testified ..., it is clear ... that but for the lightning strike ..., plaintiff would not have suffered from somatization disorder." Had a majority of the Full Commission accepted Commissioner Bolch's interpretation of the various experts' testimony,

the Court of Appeals would have been bound by that finding, regardless of how they might have viewed claimant's rather bizarre complaints.

PRACTICE TIP

All too often, risk managers experience the frustration of sending an employee for an FCE to assess work restrictions and permanent impairment, only to have the report come back invalid as a result of sub-maximal effort on the employee's part. Clearly, an employee's failure to put forth his best effort at an FCE is no different than refusing to cooperate with medical treatment. TCDG has had recent success using such an argument to support a motion to compel compliance with medical treatment pursuant to N.C.G.S. § 97-25. In one such case, the Executive Secretary entered an order directing the employee "to present himself for a second [FCE] ... and to fully comply in the testing and evaluation." That same order went on to state that "plaintiff shall not demonstrate self-limiting behavior, inappropriate pain behavior or any other conduct which could produce an invalid result ... or might otherwise hinder the administration of a valid evaluation." An order to that effect lays the groundwork for a Form 24 application to suspend compensation, should the second FCE also come back invalid. Hopefully, we will continue to receive favorable rulings on such motions whenever it is clear that the employee has misrepresented his physical abilities during an FCE.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

Public Hearing to be Held on Amendments to Workers' Compensation Rules

On May 17, the Commission will conduct a public hearing to consider a series of proposed, mostly non-controversial, amendments to Rules 104, 404A, 501, 502, 601, 701, 702 and 903.

If amended as proposed, Rule 104 will be modified to require the Form 19 to prominently state on its face it is *not* a claim for benefits and that to assert one, the employee must complete, sign and submit a Form 18 "within two years ... of ... injury or ... the date your doctor told you that you have a work-related disease."

The amendment to Rule 404A clarifies what qualifies as a "medical only" claim, *i.e.*, one in which the employee is absent from work for no more than one day *or* medical expenses are less than the amount periodically established in the Commission's "Minutes," currently \$2,000.

The proposed revision to Rule 501 would bring it in line with a recent amendment to the Workers' Compensation Act, which now requires the parties to submit all *material*, rather than all

relevant, medical and vocational records known to exist before a Form 21 or 26 agreement for PPD will be approved. At the same time, the new rule will specifically authorize the Commission to seek additional documentation from the parties, if and when necessary.

In a similar vein, it is proposed that Rule 502, which currently mandates that *all* of an employee's medical, vocational and rehabilitation records be filed with a clincher agreement, be amended to only require submission of *material* records. At the same time, unless the defense has agreed to pay all related medical expenses through the settlement date, the revised rule will require the clincher to include a list of all known medical expenses related to the employee's injury, including those in dispute. And, if there are unpaid medical expenses which the defense has agreed to pay, the clincher agreement must contain a list of them.

The most significant change would be to Rule 601, which will be rewritten to comply with a recent amendment to N.C.G.S. § 97-18 providing that the deadline for investigating and either admitting or denying claims or commencing the payment of compensation is "the earliest practical time." And, of particular interest to risk managers, the revised rule will specifically provide that the defense may *not* be sanctioned unless it fails to act within 30 days of *notice* from the Commission that a claim has been filed (or within 90 days after notice that a disease is being alleged from a workplace exposure to "chemicals, fumes or other materials or substances"). There is also a provision giving the Commission discretionary authority to grant additional time, when appropriate.

The proposed amendment to Rule 701 would limit Full Commission briefs to 35 pages, excluding attachments; new Rule 702(a) specifies the procedure when claims are remanded to the Commission following action by an appellate court; and it is proposed that Rule 903 be modified so as to permit defendants to send a Form 90 to the attorney of record for the employee, rather than directly to the employee.

A very controversial change to Rule 407 suggested by the plaintiffs bar, but strongly opposed by TCDG and others, which in essence would have required the defense to authorize and pay for *any* treatment ordered by an authorized treating physician, regardless of considerations such as reasonableness or medical causation, was ultimately found by the Commission to be too controversial. As a result, it will *not* be a part of the upcoming public hearing.

A complete set of the proposed amendments to the Commission's rules can be obtained from its home page, www.comp.state.nc.us/. Those wishing to make an oral presentation not exceeding 10 minutes may submit a written request or call Christina Kessler (919-807-2510) by May 9. Written comments may be submitted via fax (919-715-0283) by June 17.