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CASE LAW UPDATE

*Physician Prescription Not Necessary for
Attendant Care Award*

Leward Gainey was employed by Southern Flooring & Acoustical for the fourteen year period between 1969 and 1983 in a position that involved installing asbestos ceiling tiles. In decisions filed in 2003 and 2006, the Industrial Commission determined that he contracted asbestosis as a result of that employment and was permanently and totally disabled. However, Gainey also suffered from cirrhosis of the liver, which developed after he contracted hepatitis.

Shortly before the Commission filed its decision awarding Gainey permanent total disability benefits, he died. While the death certificate listed cirrhosis as the immediate cause of death, it also stated that his hepatitis, asbestosis and COPD were conditions "leading to [the] immediate cause." That led the executrix of his estate to file for death benefits. She also brought a separate claim of her own, seeking compensation for attendant care services provided to Gainey before he died.

After a hearing was held and testimony taken about the cause of death, the Commission determined that asbestosis was neither a cause nor significant contributing factor and it denied the death benefit claim. It also denied the attendant care claim because it found "insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of [Gainey's] compensable asbestosis." The executrix of his estate then appealed both rulings.

On April 19, in *Shackleton v. Southern Flooring & Acoustical Company*, the Court of Appeals affirmed the Commission's de-

nial of the estate's death claim, but at the same time, it has remanded the case back to the Commission for new findings of fact and conclusions of law on the issue of Southern Flooring's liability for attendant care.

In explaining its rationale for affirming the Commission's denial of death benefits, the Court noted that the medical evidence established that Gainey's cirrhosis rapidly worsened in the months leading up to his death, while his asbestosis remained stable. Dr. Clements, the gastroenterologist who treated him through his terminal illness, testified that the acute cause of Gainey's demise was the progression of his liver disease. While he also testified that Gainey's asbestosis was "one of the portions" involved in his death, he was unable to determine the degree to which it contributed and said that he would defer to the pulmonologists on that issue. But, the pulmonologists did not have information regarding the details of Gainey's death and were unable to state an opinion on the subject, except to say that they would not be surprised if asbestosis was a contributing factor. The Court held that this testimony was too speculative to support a finding of causal connection and, therefore, determined that the Commission did not err when it denied the death benefits claim.

When it turned to the attendant care claim, the Commission found that none of the doctors who saw Gainey in the months leading up to his death had prescribed attendant care. Therefore, the record "failed to establish that [his] incapacity to care for himself was the result of his compensable asbestosis." In support of its conclusion in that regard, the Full Commission cited one of its opinions from 2002, which in turn relied on a Virginia Supreme Court decision setting forth a four-part test for determining when attendant care services qualify as "reasonable and necessary treatment":

... [T]he employer must pay for the care when it is performed by a spouse if (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical attention is performed under the direction and control of a physician, that is, a physician must state home nursing care is necessary as a result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse; (3) the care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services performed by the spouse.

In reversing the Commission's denial of the executrix's attendant care claim, the *Shackleton* Court has rejected the "rigid framework" of this four-part test in favor of a "flexible case-by-case approach," noting that it had "... previously upheld awards from the ... Commission contrary to the proposition that a physician's prescription is required for an award of attendant care benefits." It has decided that a "flexible case-by-case approach" is more in keeping with the remedial purposes of the Workers' Compensation Act. Thus, it is proper for the Commission to consider "a variety of evidence, including but not limited to:

... a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.

The *Shackleton* defendants plan to file a petition for discretionary review with the Supreme Court, seeking to overturn the Court of Appeals' adoption of its new "case-by-case approach" to the attendant care issue and its remand to the Commission for new findings of fact and conclusions of law.

Expert Testimony on Increased Risk Not Necessary in Lightning Injury Cases

Kenneth Heatherly was injured when lightning struck close to where he was working as a construction worker on a new

home being built near the top of Ridge Mountain in Brevard, North Carolina. He was standing several feet from an electrical outlet and drop cord located in the house's unfinished garage, which was covered by a metal roof. Other lightning strikes outside the house had caused sparks to fly from the drop cord. At some point, Heatherly was struck by an "electrical charge or jolt from the lightning," the force of which threw him backwards through the air eight feet, causing injuries to his right hand and left foot.

The Commission initially found Heatherly's workers' compensation claim compensable, but his employer appealed and the Court of Appeals, in an opinion issued in 2008, *Heatherly v. Hollingsworth Co.*, reversed the resulting award of benefits and remanded the case for new findings of fact because the Commission had erroneously applied a "positional risk" test in resolving the compensability issue, rather than the "increased risk" test which the Supreme Court adopted for lightning strike cases in 1959 in *Pope v. Goodson*.

When the Commission applied the "increased risk" test to *Heatherly* on remand, it again found the claim compensable, concluding that "the work conditions at the time of Plaintiff's injury are consistent with several of the factors set forth in *Pope*," such that his "employment placed him at an increased risk of sustaining injuries due to lightning greater than members of the general public in that neighborhood ..."

The defendants disagreed and appealed once more, contending that it was error for the Commission to find in Heatherly's favor because he presented no expert testimony at all in support his claimed exposure to an increased risk. But, in a unanimous opinion filed on April 19, the Court of Appeals disagreed. It again affirmed the Commission's award of benefits and, in doing so, "decline[d] to establish a 'bright-line' rule requiring expert evidence in every workers' compensation case in order to establish that the employee's job exposed him or her to an increased risk of a lightning strike injury." While conceding that the *Pope* case *did* involve the use of expert testimony about lightning and its behavior, the Court held that it would be "unreasonable to read *Pope* as standing for the proposition that expert evidence is mandated in all workers' compensation cases to establish an increased risk of lightning strike injury when the majority of the cases relied upon by the

[Supreme] Court [in *Pope*] ... concluded that non-expert evidence was competent to support a determination on that issue."

The *Heatherly* Court then quoted with approval from Larson's treatise, *Workers' Compensation Law*, and held that the parties to a claim may rely on the "testimony of electrical experts or be prepared to show an increased risk that arises from specific work-related factors within the job description or environment of the injured worker," many of which the Court could take judicial notice because they are "matter[s] of common knowledge," such as working around metal objects or at high elevations.

The Court of Appeals also considered and ultimately rejected defendants' contention that the Commission erred when it awarded TTD during the six months Heatherly was out of work because he had failed to satisfy the *Russell v. Lowes Product Distribution* test for disability, as there was no evidence in the record that he was "physically or mentally unable to work in any employment as a result of his work-related injury."

While acknowledging that Heatherly had not seen a doctor after his initial visit to the emergency room because his claim had been denied, the Court held that "the Commission must consider not only ... physical limitations, but also [claimant's] testimony as to his pain in determining the extent of [any] incapacity to work and earn wages such pain might cause." Citing several of its own decisions, the Court found that "a plaintiff's testimony regarding his or her pain and its effect on the plaintiff's ability to work is sufficient to support a determination of disability under *Russell's* first method of proof." That being so, the Commission's award of benefits to Heatherly was affirmed.

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