

RISK/ALERT

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CASE LAW UPDATE

Commission Award Holding Multiple Employers Jointly Liable Affirmed

Claimant sustained a compensable injury in 1993, resulting in a bleeding ankle ulcer while defendant Liberty was her employer's carrier and developed two more compensable ankle ulcers in 1994, after defendant Casualty's coverage began. In 1995, without a new injury, her ankle "re-ulcerated, spontaneously rupturing." The treating doctor testified that all three injuries were significant factors in the ulcer which spontaneously erupted in 1995 and that any attempt to apportion causation among them would be pure speculation.

The deputy commissioner found the two carriers "jointly and severally liable" and ordered each to pay "at least 50%" of claimant's TTD. Claimant and Liberty then settled for \$3,500. Casualty appealed and the Full Commission affirmed the award against Casualty, refusing to grant a credit for the \$3,500 paid by Liberty.

On August 1, the Court of Appeals affirmed the Full Commission, rejecting Casualty's apportionment argument because "apportionment is not proper where the evidence . . . renders an attempt at apportionment between work-related and non-work-related causes speculative or where there is no evidence attributing a percentage of the claimant's . . . incapacity to her compensable injury, and a percentage to the non-compensable condition." *Royce v. Rushco Food Stores*.

The Court also rejected Casualty's request for a credit equal to the \$3,500 paid to claimant by Liberty, noting that (1) there is "no specific statutory provision addressing contribution between insurance carriers" and (2) although N.C.G.S.

§ 97-42 grants the Commission authority to deduct payments made by the employer to the employee during disability which were not due and payable under the Workers' Compensation Act when made, the deputy commissioner's award required Liberty to pay "at least 50% of the compensation due." Therefore, concluded the Court, Liberty's \$3,500 payment was "due and payable" when made, rendering N.C.G.S. § 97-42 inapplicable.

Although it is anticipated that claimants will cite *Royce* as authority for finding defendants jointly and severally liable in future cases, the issue of whether the deputy commissioner properly applied that concept to a workers' compensation claim was not actually before either the Full Commission or the Court of Appeals because of the settlement reached in the interim between claimant and Liberty. However, the Court's denial of a credit to Casualty for Liberty's payment implies that Liberty was also responsible for the benefits owed, thereby indirectly sanctioning application of joint and several liability to workers' compensation claims.

Risk Handling Hint: Risk handlers should carefully review claims involving multiple injuries to anticipate attempts by claimant attorneys to elicit the kind of multiple injury medical causation testimony presented in *Royce* and to identify cases in which the *defense* may be able to develop such evidence, thereby spreading to other employers and carriers liability for a portion of the benefits owed.

Civil Suit Against Employer for Intentional Infliction of Emotional Distress Sanctioned

In *Groves v. Travelers*, claimant alleged that the defendants forwarded a job function videotape to his treating physician which failed to depict all his work duties, causing the doctor to

change his opinion regarding compensability. After claimant settled his workers' compensation claim, he sued his employer and its carrier in superior court, alleging intentional infliction of emotional distress, bad faith, unfair and deceptive trade practices and civil conspiracy. The trial court dismissed his suit based on the exclusive remedy doctrine and *Johnson v. First Union* (see the March 2000 edition of *Risk/Alert* for a detailed discussion of *Johnson*).

An August 29, the Court of Appeals held that all claims asserted, except for intentional infliction of emotional distress, were barred by *Johnson* and the exclusive remedy doctrine. In her dissent, Judge Linda McGee did not dispute the existence of that exception, but felt even that claim was subject to dismissal in *Groves* because claimant did not allege the kind of "extreme and outrageous conduct" which "exceeds all bounds usually tolerated by decent society" sufficient to give rise to such a claim. Because Judge McGee's dissent creates an automatic right of appeal, it is anticipated that the Supreme Court will eventually decide the fate of this alleged exception to the exclusive remedy doctrine.

Risk Handling Hint: By insuring that job duty videotapes accurately depict all regular work duties, risk handlers can minimize the risk of (a) having to defend civil actions for emotional distress and (b) substantial awards of compensation should the Commission conclude that the defense attempted to mislead the treating physician about return to work issues.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ New Chairman Buck Lattimore has appointed Steve Gheen as Chief Deputy Commissioner, and together, they have announced major procedural changes effective August 3, including:

1. Implementation of 60 day deadlines

for (a) setting hearings after unsuccessful mediations; (b) taking all depositions, closing the record, submitting transcripts and filing written contentions after a hearing; and (c) issuance of the deputy commissioner's Opinion and Award after the record is closed. In complex occupational disease, but not carpal tunnel, cases this 60/60/60 time line may be extended to 90 days.

2. Pretrial Orders will be standardized, require that all depositions be scheduled prior to the hearing date, and be displayed on the Commission's website. All future calendars will be distributed via fax without an attached Pretrial Order.

3. In pending cases, the parties will be directed to take necessary steps to close the record within 30 days and all deputy commissioners will have 30 days to bring their caseloads current.

4. The parties will be allowed no more than one continuance, except for "compelling reasons," and no continuances on the date of hearing, except under "extraordinary circumstances."

5. No clinchers will be "walked through" the Commission or considered ahead of pending agreements. All clinchers will be approved within 5 to 7 days. Emergencies requiring special attention must be directed to Chief Deputy Commissioner Gheen.

6. All Commission employees, including the deputies and commissioners, will work a regular schedule and eight hours per day.

7. Meetings of the Commission's Advisory Council will be resumed within 30 days.

✓ Registration forms for the Fifth Annual North Carolina Workers' Compensation Educational Conference, scheduled for December 13-15, are in the mail. For further information, visit the NCIC website at www.comp.state.nc.us or contact IWCF at 904-304-1993.