

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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THE ATTORNEYS AT
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WITH QUESTIONS
CONCERNING THE
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NATIONAL WORKERS' COMPENSATION DEFENSE NETWORK SELECTS TCDG

The National Workers' Compensation Defense Network (NWCDN) has selected TCDG as its designated firm for the State of North Carolina. The NWCDN is a national network of law firms specializing in the defense of workers' compensation cases. Its selective admission process requires that member firms have not only the highest possible rating from Martindale-Hubbell (AV), but documented expertise in handling workers' compensation claims. The NWCDN's member firms, which are located in thirty-six states and also include the largest law firm in Canada, are comprised of the leading workers' compensation defense attorneys in each jurisdiction, not only in defending individual claims, but as reflected by their active involvement in the legislative process, shaping state laws regarding workers' compensation issues, and appearing at all levels of the court system responsible for the ultimate resolution of workers' compensation disputes.

TCDG will be among the host firms at NWCDN's upcoming multi-state workers' compensation defense seminar, which will be held at the Weston Atlanta North at Perimeter in Atlanta on October 12. Although attendance is free for all attendees, registration is required. Additional information, including registration materials, can be obtained at www.nwcdn.com. Among the subject areas to be covered are the effect of undocumented workers on the workers' compensation system and how to handle claims in which they are involved. The program will also include an update on Medicare and MSA issues from a CMS representative, and a presentation from Dr. Thomas Boll, a neuropsychologist, regarding the handling

of brain injuries from a medical perspective, including diagnostic, treatment and prognosis issues, and how to identify malingering and symptom magnification.

In addition to formal presentations from the program's speakers, specific times have been set aside during the seminar for adjusters and other risk managers to meet with representatives from as many as thirty-three different states to discuss specific claim issues, general legal theories for each jurisdiction, and other related matters. This conference will offer a unique opportunity for risk managers who handle claims in multiple states to confer with experienced workers' compensation practitioners from each of their individual jurisdictions in one setting. Lunch will be provided as part of the conference and a formal state breakout session is planned from 12:00 to 1:30 p.m., during which defense attorneys from each of the represented states will be available to discuss emerging issues in their jurisdictions. There will also be multiple breaks throughout the day to allow for additional one-on-one meetings, as needed.

For additional details regarding the upcoming seminar, please contact Bruce Hamilton, Tracey Jones or Ed Schenk of TCDG or visit the NWCDN website, www.nwcdn.com. For those who will be attending from out of town, hotel rooms at the Weston have been set aside at a discounted rate. The Weston's telephone number for reservations is 888-627-8407.

CASE LAW UPDATE

Ongoing Benefits Awarded Despite Intervening Non-Work-Related Accident

William Davis, whose job duties as a "games performance technician" at Harrah's Cherokee Casino included performing preventative

maintenance on and the repair of gaming machines, injured his low back in May 2001, while lifting a 35 pound monitor out of a slot machine. He did not report his injury at the time, but instead, kept working for a month, at which point he first sought medical attention from a chiropractor. Later, after an MRI revealed a herniated disc, he came under the care of Dr. John Silver, who performed disc surgery on September 7, 2001.

Davis returned to work at Harrah's on October 31, 2001 and continued to work there until December 27, 2001. In the interim, he called Dr. Silver's office complaining of pain in his left leg and was prescribed a steroid medication. Later, a second MRI was performed, which showed scar tissue around a nerve and "some degenerative changes."

During the course of a follow-up visit with Dr. Silver, Davis admitted that he had slipped and fallen onto his back while walking up a ramp at home. He also acknowledged that, since his fall, he had experienced a significant amount of pain in his back and down both legs. At that point, Dr. Silver wrote him out of work for five weeks. Later, in April 2002, a second back operation was performed, during which Dr. Silver decompressed nerves in Davis' spinal canal, which had become narrowed.

Following that procedure, Davis was kept out of work long enough to exhaust the leave to which he was entitled under the Family Medical Leave Act (FMLA). Later, he was fired for failing to return to work. At that point, he filed a claim for additional workers' compensation benefits and requested a hearing.

The deputy commissioner who heard Davis' claim concluded that while he sustained a compensable injury in May 2001, he had failed to show that his ongoing back problems after October 2001 were causally connected to that injury. On appeal, however, the Full Commission reversed, concluding that Davis' second operation was, indeed, a consequence of his initial on-the-job injury, and that while his slip and fall at home in December 2001 had aggravated his condition, the pain and medical difficulties he experienced thereafter were a "natural progression" of the original work-related injury, entitling him to additional compensation.

On August 1, in *Davis v. Harrah's Cherokee Casino*, the Court of Appeals, in a 2-to-1 decision, affirmed the Full Commission's award

of benefits, finding that claimant was entitled to ongoing TTD even after he fell at home. In reaching that result, the Court's majority pointed to those portions of Dr. Silver's surgery notes which indicated that, during the second operation, he removed scar tissue related to the first operation. And, it cited as authority for its decision to affirm the Commission's resolution of the causal connection question in claimant's favor *Horne v. Universal Leaf Tobacco Processors*, in which the Court held that "the aggravation of an injury is compensable if the primary injury arose out of and in the course of employment, and the subsequent aggravation of it is a natural consequence that flows from the primary injury. Unless the subsequent aggravation is the result of an independent, intervening cause attributable to a claimant's own intentional conduct, the subsequent aggravation of the primary injury is also compensable."

Applying that principle to William Davis' claim, the Court's majority held that the disability he suffered following his second operation was compensable because it was the result of a subsequent aggravation of the original injury and since "there was no allegation that plaintiff's slip and fall was in any way a result of his own conduct." Therefore, the majority found, the Commission's award of ongoing weekly benefits after the second operation was proper under the holding in *Horne* and claimant is entitled to compensation for so long as he remains disabled. Since he has also been approved for Social Security disability, the net effect of the Commission's award is that the defendants in *Davis* are at risk of being held liable for permanent and total disability benefits.

However, former TCDG partner and now Court of Appeals Judge Linda Stephens entered a vigorous and well-reasoned dissent in *Davis*, in which she compared the facts in *Horne* with those which were before the Court in *Davis* and distinguished the two cases. In *Horne*, the injured worker had undergone two surgical procedures on this back. While still out of work and recovering from the second of them, he was involved in an automobile accident. He subsequently underwent a third operation, which the Court found compensable as a result of the uncontradicted testimony of the treating surgeon, whose opinion was that, prior to his motor vehicle accident, Horne was already suffering from a recurrent disc rupture, and while that condition had been aggravated by the collision, all of the pathology which led to the

need for another operation stemmed from the original, work-related accident.

On the other hand, noted Judge Stephens, the injured worker in *Davis* had not only recovered from his initial surgery, but returned to work at full wages before he fell. And, at the same time, the medical evidence he had offered was legally insufficient to support the Commission's finding that there was a causal connection between the initial, work-related injury and his second operation, which did not occur until after his fall. As a consequence, Judge Stephens felt there was "no basis for the Commission's conclusion, under *Horne*, that Plaintiff's 'pain and medical consequences [after the fall] were a natural progression of the earlier injury.'" Therefore, it was "not necessary to reach the issue of whether Plaintiff's fall was a result of his own intentional conduct."

Judge Stephens also took exception to the fact that the majority had sanctioned the Full Commission's action in selecting information from claimant's medical records as support for its conclusion that there was a causal relationship between claimant's injury at work and his second operation. Noting that Dr. Silver "unequivocally testified that he performed the second surgery to relieve narrowing of the spinal canal, and that the narrowing was caused by degenerative changes," not scar tissue or post-surgical changes, Judge Stephens objected to the fact that the majority had allowed the Commission to "ignore the expert's uncontradicted and unequivocal testimony, and to instead substitute its interpretation of the medical records to arrive at a different opinion than the expert," in violation of the clear directives of *Click v. Pilot Freight Carriers*, in which the Supreme Court held that "in cases involving complicated medical questions, 'only an expert can give competent opinion evidence as to the cause of the injury.'"

Risk Handling Hint: The ultimate resolution of the *Davis* case has the potential of significantly impacting future claims involving aggravation issues. At least since *Horne* was decided in 1995, claimant attorneys have argued that intervening accidents do not affect their clients' ongoing entitlement to weekly benefits, unless the subsequent event was caused by claimant's own intentional conduct. And, of course, those situations in which second injuries can be attributed to a claimant's intentional conduct are the exception, not the rule. Consequently, in almost every case involving intervening

accidents, the plaintiffs' bar can be expected to argue that the subsequent event should have no impact on their client's entitlement to ongoing benefits.

The *Horne* rule, although actually mere *obiter dictum*, has the potential, if followed in future cases involving successive accidents, of creating situations in which workers who suffer minor work-related injuries are eventually awarded compensation for disability caused by subsequent, more serious, accidents. That, in turn, can and will lead to even more unreasonable results, such as employer liability for future surgical procedures and all related periods of disability, potentially for the remainder of the employee's lifetime. Admirably, Judge Stephens' dissent in *Davis* contains a reminder not only that one of the core principles underlying the Workers' Compensation Act is the rule of causal relationship, but that unless the Commission and our appellate courts require proof of a direct causal relationship between an on-the-job injury and the worker's ongoing disability, the Workers' Compensation Act will be converted into a general health insurance benefit.

As a result of Judge Stephens' dissent, the defendants in *Davis* are entitled to have the Full Commission's opinion reviewed by the Supreme Court, and it is anticipated they will exercise that right. We will continue to monitor developments in this case and report on them as they occur. In the meantime, risk managers facing claims in which an intervening accident follows a work-related injury are advised to look for evidence of a clear break in the causal relationship between the original injury and an intervening accident.

RUMLINGS AT THE INDUSTRIAL COMMISSION

Carrier Sanctioned for Adjuster's E-mails to Vocational Consultant

Peggy Porter, a dental hygienist employed by James A. Whitley, D.D.S., sustained an admittedly compensable injury to her neck in November 1999. After a failed course of conservative treatment, she underwent a cervical fusion performed by Dr. Kenneth Rich, followed eighteen months later by a two-

level cervical foraminotomy performed by Dr. Michael Haglund of Duke University Medical Center.

When Porter was released with physical restrictions that precluded her return to work as a dental hygienist, the defendant-carrier, Liberty Mutual, assigned Anissa Rice of Cascade Rehabilitation to provide vocational job placement services. Cascade is a wholly-owned subsidiary of Liberty Mutual.

While she was providing job placement and other vocational services to Porter, Ms. Rice received several e-mails from the Liberty Mutual adjuster handling the claim. On one occasion, when Rice advised the adjuster that a meeting with Porter would be rescheduled after Porter returned from a Thanksgiving vacation with her family, the adjuster responded by e-mail as follows:

"... Voc does not accommodate holidays. There is no such thing as vacation time when you are collecting WC We need to remain aggressive on this file and if she fails to show I want to know immediately because I plan to terminate her benefits. This will force her to settle because she will not have time to comply and that is the objective here. Settle or be terminated!"

Rice subsequently provided Porter's attorney with a copy of this and several other e-mails from the adjuster regarding Porter's claim and Cascade Rehabilitation promptly fired her.

Porter's claim was scheduled for hearing before Deputy Commissioner Theresa Stephenson to resolve disputes which had arisen over the extent of claimant's disability and reimbursement of certain medical expenses. At that hearing, Porter's attorney attempted to offer into evidence the e-mails which had passed between Rice and the Liberty Mutual adjuster, but Deputy Commissioner Stephenson did not allow them to be admitted into evidence. However, she did permit Porter's attorney to make an offer of proof. She then found in claimant's favor and ordered that the adjuster be removed from the case.

The defendants appealed to the Full Commission, which allowed the contested

e-mails into evidence. And, in a scathing opinion filed on June 26, 2006, the Full Commission not only affirmed Deputy Commissioner Stephenson's award of benefits, but it referred the matter to the North Carolina Department of Insurance for investigation of possible violations of the unfair claim handling and settlement practices provisions of Chapter 58 of the North Carolina General Statutes.

The Full Commission also assessed an attorney's fee against the defendants, on the grounds that "their interference with the independence of the vocational consultant and their attempts to manipulate this case under the guise of rehabilitation" constituted an unreasonable defense and a willful failure to comply with known rules of the Commission. The Full Commission also found that Liberty Mutual "has intentionally interfered with plaintiff's assigned vocational consultant to encourage what appears to be set-up tactics under a rehabilitative guise with the intention of ending this claim for their own financial advantage"

RISK HANDLING HINT: While there is no prohibition against *ex parte* communications with rehabilitation professionals, the contents of all such communications, whether oral or written, are discoverable. And, after the Full Commission's decision in *Porter*, the plaintiff's bar will most assuredly begin to routinely request in discovery copies of all e-mails and other written communications between adjusters and both medical and vocational case managers. Risk managers are strongly advised to remain cognizant of this fact and avoid any communications with case managers which might be interpreted as "set-up tactics" or evidence that the defense has attempted to interfere with the rehabilitation professional's exercise of his or her independent judgment.

Moreover, risk managers need to be aware of the fact that if e-mails from defense counsel are forwarded to the case manager, doing so waives the attorney-client privilege. Those communications are then discoverable. And, under such circumstances, even if both parties to the e-mail have deleted it, the Commission may require them to use all available technologic means to retrieve and produce it.