

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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## CASE LAW UPDATE

### *Per Diem Payment Included in Employee's Average Weekly Wage*

In June 2003, Kevin Greene, a construction worker living in Wendell, North Carolina, responded to an advertisement by Conlon Construction Company for a job in Georgia. Greene spoke with Conlon's human resources supervisor several times before agreeing on the terms of his employment, including the health benefits Conlon would be providing to him, his job description, starting date and hourly wage, and the *per diem* payment he would receive when he was required to work out-of-town.

Under Conlon's *per diem* policy, whenever Greene was working outside the State of North Carolina, he would be paid a weekly stipend over and above his normal hourly rate of pay. He did not have to submit receipts establishing what his actual meal and lodging expenses were in order to receive the *per diem* payment. Rather, an additional \$320 was automatically included in his paycheck, whether or not he actually incurred any meal or lodging expenses.

Greene began working for Conlon at a job site in Athens, Georgia on July 14, 2003. Six weeks later, he sustained an injury to his leg and back. Conlon's insurer accepted liability for the injury under Georgia workers' compensation law, but later refused to pay for surgery recommended by Greene's treating physician.

At that point, Greene filed a Form 18, seeking further medical and disability benefits. After Conlon and its insurer denied liability, the case went to hearing before Deputy Commissioner Hall. In his

subsequent opinion and award, Deputy Commissioner Hall resolved the liability issues in Greene's favor and included the weekly *per diem* payment in calculating claimant's average weekly wage.

On appeal, the Full Commission affirmed Deputy Commissioner Hall in all respects, including his calculation of average weekly wage. Conlon then appealed to the Court of Appeals, which, in a unanimous opinion filed on July 3, ***Greene v. Conlon Construction Company***, held that the Commission did not err in finding that Conlon's *per diem* payments to claimant qualified as an allowance paid "in lieu of wages." As a consequence, ruled the Court, they were properly included in the calculation of claimant's average weekly wage.

In explaining the legal basis for its holding, the Court noted that N.C.G.S. § 97-2(5) states that "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Conlon had argued, consistent with the 1996 holding of the Court in ***Greenman v. Pony Express***, that Greene should have been required to prove how much he spent on meals and lodging each week, and only that portion of Conlon's *per diem* payments which exceeded claimant's actual expenses should have been included in his average weekly wage. Without distinguishing its prior ruling in ***Greenman***, the Court rejected that argument, citing instead Conlon's *per diem* guidelines, which the Court held "clearly establish the payment of a set amount, neither determined by reference to actual receipts, nor expected to cover all expenses of travel."

The fact that Conlon had reserved the right in its *per diem* policy to reimburse

only its employee's *actual* lodging, meal and transportation expenses if it so chose, as opposed to the \$320 *per diem* supplement it paid to claimant, appeared to be a critical factor in the Court's analysis and resolution of the average weekly wage issue in *Greene*.

**Risk Handling Hint:** When confronted with the question of how to correctly calculate average weekly wage in cases involving *per diem* payments, risk managers are advised to closely examine the circumstances under which the employee was hired, to determine whether any "allowances" were made "in lieu of wages." Under the Court's analysis in *Greene*, if the employee was paid a lump sum amount on a *per diem* basis even without having incurred any actual expenses for lodging and meals, or if he has been given complete discretion how, or whether, to spend his *per diem* payment and does not have to submit receipts before being reimbursed, the Commission has been directed by the holding in *Greene* to include the full amount of the *per diem* payment in its calculation of average weekly wage. On the other hand, however, if the employee was required to submit receipts, presumably only that portion of his *per diem* payment which exceeded actual expenditures should be included in calculating his average weekly wage.

## RUMBLINGS AT THE INDUSTRIAL COMMISSION

On August 15, 2007, Chief Deputy Commissioner Steve Gheen announced that the Commission is now posting on its website the status of cases pending for decision by its Deputy Commissioners. Each Deputy Commissioner's cases are being divided into two categories: those in which the record has been closed and the case is pending a written decision (code 114) and those in which a hearing has been held, but the parties are still taking post-hearing depositions (code 127). For cases in code 127 status, the Commission's website shows whether one or more extensions of time have been requested, and if so, the revised projected date for closing the record. For cases in code 114 status, i.e., those which are ready to be decided, the Commission's website now shows how many days the case has been pending for decision.

Presumably, interested parties can look at the list of cases pending for

decision before any particular Deputy Commissioner and determine how many others that Deputy has to write before a decision can reasonably be expected.

This portion of the Commission's website will be updated bimonthly, during the first and third weeks of each month. To utilize this new feature, go to [www.comp.state.nc.us/ncichome.htm](http://www.comp.state.nc.us/ncichome.htm) and click on "Deputy Section Case Status."

It is anticipated that this type of information will be found useful by many parties, including risk managers, awaiting decisions from the Commission.

## CONTINUING EDUCATION CREDITS AVAILABLE THROUGH TCDG

Risk managers seeking to satisfy State of North Carolina CEU requirements while at the same time keeping current with the latest developments in workers' compensation practice, procedure and law are encouraged to avail themselves of the Department of Insurance (DOI) approved continuing education programs TCDG offers free of charge to its clients. Among the covered topics included in this year's DOI-approved six-hour course are:

- Handling a Workers' Compensation Claim from Beginning to End
- Workers' Compensation Case Law Update
- The Role of Mediation in Superior Court and Workers' Compensation
- The Use of Spinal Cord Stimulators in Pain Management
- Liens and Subrogation

A condensed version of the six-hour course, approved by DOI for three hours of CEU credits and consisting of the first two topics, "Handling a Workers' Compensation Claim from Beginning to End" and "Workers' Compensation Case Law Update," is also available to TCDG's clients.

Risk managers interested in more information about either program should contact TCDG's workers' compensation practice area coordinator, Bruce Hamilton.

# TCDG NEWS

## Recent Successes at the NCIC

This summer, TCDG attorneys Jacob Wellman and Carla Cobb have both successfully established the necessary criteria for application of the "*Seagraves test*," under which an employee's termination is found to have been a "constructive refusal of suitable employment" so as to bar him from receiving further benefits. In *Herrin v. VEPCO*, a claim in which the injured employee was terminated after his post-accident drug test came back "substituted," Jacob successfully argued that the "substituted" drug test constituted conduct for which any employee would have been terminated. That, combined with the fact that claimant had already returned to light duty work, was found sufficient to bar him from receiving further TTD benefits. Carla's case, *Fowler v. Bill Black Chevrolet*, did not involve employee misconduct, but rather, a claimant who, post-injury, voluntarily quit his job as a car salesman to take a job at another, less successful, dealership, where he earned less than what he was earning when injured. Carla was successful in defeating his claim for temporary partial disability benefits by offering testimony from the treating physician that claimant could have returned to work for the employer of injury despite the pain he was allegedly experiencing.

*Thompson v. Kroger*, a claim involving allegations of both an accidental injury to the shoulder and a neck injury caused by a specific traumatic incident, was successfully defended by TCDG attorney Tara Muller, who established that, in claimant's recorded statement and discovery responses, she had asserted that her pain was definite and certain and that it had begun at a specific time and with such force that she grabbed her arm, started to cry, and was unable to move. Unfortunately for claimant, however, Tara was able to establish through the evidence she offered after claimant rested her case, including a store video which showed that on the alleged date of injury, she evidenced no outward manifestation of pain. In his opinion and award, Deputy Commissioner Gillen specifically found that claimant's testimony that she was not the employee depicted in the video lacked credibility.

TCDG attorney Tammy Nance recently received a favorable ruling from the Full Commission in *Gibbs v. Tideland Electric*, in which the injured employee returned to full duty work earning wages greater than at the time of his injury. Despite that fact, the deputy commissioner awarded claimant additional TTD benefits, calculated on a daily basis, for every day he missed work to go to the doctor for ongoing treatment of the condition which had been caused by his compensable injury. Since the claimant in *Gibbs* will likely require lifetime medical treatment for his injury, the net effect of the deputy commissioner's decision was that claimant's indemnity claim would have remained open for his lifetime. Fortunately, however, Tammy's appeal was successful and the Full Commission reversed, holding that claimant is entitled to neither temporary total nor temporary partial disability benefits, even when he misses an entire day of work to go back to the doctor.