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## CASE LAW UPDATE

### *Retirement Fund Contributions Are Not Earnings for Purposes of Calculating Average Weekly Wage*

Last November, *Risk Alert* reported on the decision of the Court of Appeals in *Shaw v. U.S. Airways, Inc.*, in which a 2-to-1 majority of the Court held that U.S. Airways should have included the 401(k) and pension plan contributions it made for its injured employee, Curry Shaw, when calculating his average weekly wage. After noting that the relevant statute, N.C.G.S. § 97-2(5), provides that “[w]henver 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,” the Court’s majority held that “at least some fringe benefits may be encompassed within the average weekly wage calculation,” so long as they conferred an “unconditional tangible benefit” on the employee “capable of conversion into a cash equivalent.”

In his dissenting opinion, Judge Robert Hunter noted that the statute makes no mention of fringe benefits. He observed that it is not the place of our appellate courts to impose a concept it believes the legislature should have included in the Workers’ Compensation Act, but did not. He also cautioned the majority that its decision could have the undesirable effect of encouraging employers to abandon their pension plans.

Judge Hunter’s dissent provided the defendants with an automatic right of appeal to the Supreme Court, which they exercised. Agreeing with Judge Hunter, the Supreme Court reversed the Court of Appeals, holding in an opinion issued on August 27 that “based on the plain language of section 97-2(5), ... employer contributions to an employee’s retirement accounts are not included in the calculation of ... average weekly wage.”

In explaining the rationale for its decision, the Supreme Court turned to the Legislature’s intent in enacting N.C.G.S. § 97-2(5). It then looked to the statute’s express language and went on to consider both its legislative history and the circumstances of its enactment. Noting that fringe benefits were rare at the time the Workers’ Compensation Act was adopted in 1929 and that the “original language used

by the legislature in setting out the first method of calculating average weekly wages ... has remained substantially unchanged” since enactment despite the proliferation of fringe benefits in recent years, the Court concluded that “the General Assembly did not intend to include fringe benefits in the concept of earnings.” While the majority opinion at the Court of Appeals focused on whether the Act *excludes* fringe benefits, the Supreme Court concluded that the controlling question was “whether the Act specifically *includes* them.”

The Supreme Court noted that its statutory interpretation of N.C.G.S. § 97-2(5) is consistent with that used by the United States Supreme Court in *Morrison-Knudsen Construction Company v. Director, Office of Workers’ Compensation Programs, U.S. Department of Labor*, which held that the Department of Labor’s contributions to employee pension plans should not be treated as wages when calculating benefits due under the Longshoremen’s and Harbor Workers’ Compensation Act. The Court found it significant that although there have been numerous revisions to the Longshoremen’s and Harbor Workers’ Compensation Act over the years since its enactment in 1927, Congress failed to include fringe benefits in any of them.

As further support for its decision in *Shaw*, the Supreme Court quoted Professor Larson’s treatise, *Workers’ Compensation Law*, which calls for fringe benefits to be treated separately from earnings such as tips, bonuses, commissions, and room and board and cautioned against including fringe benefits in calculating average weekly wage. It also found support for its holding in the fact that under the Internal Revenue Code, an employer’s contribution to its employee’s retirement plan is subject to neither federal income tax nor Medicare and Social Security taxes. While recognizing that the Workers’ Compensation Act should be liberally construed when appropriate, the Court cautioned against “judicial legislation” and an assumption that “the legislature would leave an important matter regarding the administration of the Act open to inference or speculation ...,” and it concluded its analysis by stating that “[w]ithout further guidance from our legislature, we will not issue an opinion requiring the Industrial Commission to consider whether ‘earnings’ includes fringe benefits.”

Justices Robin Hudson and Patricia Timmons-Goodson dissented. They took exception to the assertion made by the Court's five-person majority that the contributions made by U.S. Airways to its employee retirement plans are not taxable because they *are* taxed when withdrawn. The dissenting justices felt that the Court's holding was "not consistent with the well-established requirement of liberal construction, but represents the opposite" and argued that "[t]he General Assembly clearly knew how to use the word "wages" if that is what it intended," but instead used the broader term "earnings" in defining the phrase "average weekly wages."

**Risk Handling Hint:** By its opinion in *Shaw*, the Supreme Court has placed the ball squarely in the General Assembly's court, and it remains to be seen whether the plaintiff's bar will make this issue part of its legislative agenda in coming years. In addition to the basic logistical problems that would be created if a value had to be assigned to fringe benefits so as to include them in an injured worker's average weekly wage, the Supreme Court's majority opinion in *Shaw* aptly noted that "inclusion of fringe benefits as part of 'earnings' in calculating workers' compensation benefits might deter employers from offering those benefits in the first place." With employers already having to cut back on fringe benefits in a weak economy, risk managers and employers alike can only hope that our Legislature will hesitate to amend the Act in a way that might further adversely impact the benefits many working employees currently enjoy.

#### "Constructive Disability" Claim Rejected

Deborah Polk, who was a wastewater operator for Nationwide Recyclers, sustained a compensable left elbow injury, but continued to work under light duty restrictions while undergoing treatment, including two operations to repair her left ulnar nerve. Following the first operation, Polk's treating physician, Dr. Warren Burrows, assigned a 15 percent rating to the injured arm. Later, after she reached maximum medical improvement following a second operation that successfully reduced her complaints of pain, Dr. Burrows changed Polk's rating to 12 percent and released her with permanent work restrictions.

Because Nationwide Recyclers was unable to accommodate those restrictions, Polk's employment was terminated and TTD payments reinstated. She continued to receive them until she began working as a dispatcher for another employer, Carolina By-Products, earning *more* than at the time of her injury. Polk was still working in that capacity when Nationwide Recyclers requested a hearing, seeking an order allowing them to pay the PPD benefits to which Polk was entitled by virtue of Dr. Burrows' 12 percent impairment rating.

After a hearing was held, Deputy Commissioner Deluca found that although Polk was earning an annual salary in excess of \$27,000, she was nevertheless entitled to both PPD benefits

under N.C.G.S. § 97-31 *and* compensation for "constructive total disability" under N.C.G.S. § 97-29. He also found that Polk could not be required to make an election between her available remedies.

After the defendants appealed Deputy Commissioner Deluca's Opinion and Award, the Full Commission reversed, holding that Polk was only entitled to compensation for her permanent impairment. It also rejected her argument that she could not be compelled to accept compensation for her rating because her condition might worsen in the future. It found that Polk had "provided no rational basis – in law or fact – upon which to find that [she] should be able to defer the only remedy available to her at this juncture [i.e., payment of the rating]...."

Polk gave notice of appeal. On August 19, in *Polk v. Nationwide Recyclers, Inc.*, the Court of Appeals affirmed. In doing so, it rejected Polk's argument that she was entitled to ongoing TTD benefits for "constructive disability" pursuant to the Supreme Court's holding in *Peoples v. Cone Mills* because her job with Carolina By-Products was so modified as to qualify as "make work" and, therefore, was not indicative of her wage earning capacity in the competitive labor market. In *Peoples*, the Supreme Court had ruled that "proffered employment would not accurately reflect earning capacity ... if [it] is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market." In *Polk*, the Commission and Court of Appeals distinguished *Peoples* because the job at issue wasn't a modified position offered by Polk's pre-injury employer. Rather, it was obtained in the competitive job market from an employer that was aware of her permanent work restrictions and hired her anyhow.

The Court of Appeals also rejected Polk's argument that the Commission had erred by requiring her to make an election of remedies for the disability she was claiming. It held that under N.C.G.S. § 97-83, defendants have the right to request a hearing to determine their employee's entitlement to benefits under the Act. Further, "per the Full Commission's ruling, plaintiff does not have two remedies between which to pick: the Full Commission [correctly] held that she is entitled to benefits only under N.C. Gen. Stat. Section 97-31 . . . ."

In so holding, the Court rejected claimant's argument that while its decision in *Knights v. Wal-Mart Stores* gave injured workers the choice of whether and when to make an election with regard to benefits for permanent injury, employers do not have the right to petition the Commission for entry of an order awarding PPD benefits. In *Knights*, the Court held that maximum medical improvement marks the point at which the healing period ends and represents "the first point in time at which the employee may elect, if the employee so chooses, to receive scheduled benefits for ... impairment under N.C. Gen. Stat. § 97-31." The *Polk* Court

rejected claimant's argument that the phrase it used in *Knights*, "if the employee so chooses," should be construed to mean that *only* the claimant can petition the Commission for a determination as to whether indemnity compensation is owed after maximum medical improvement. Rather, *both* parties have that right under N.C.G.S. § 97-83. As such, the Court affirmed the Commission's decision to order payment of compensation for claimant's PPD rating.

**Risk Handling Hint:** It is normally in the defendants' best interests to pay all of the compensation they owe for permanent impairment at the earliest possible opportunity, so as to start the clock running on the two year statute of limitations for a change in condition. For years, risk managers and their counsel have struggled with how to accomplish that when faced with a claimant who has returned to work, but refused compensation for his or her permanent impairment. The Court's decision in *Polk* provides welcome guidance to both the Commission and the parties who come before it as to whether such claimants can be compelled to accept PPD benefits when there is no question that they have reached MMI and regained their capacity to earn the same or greater wages than they were making when injured. As the Full Commission noted in *Polk*, claimant "provided no rational basis – in law or fact – upon which to find that ... [she] should be able to defer the only remedy available to her at this juncture, which is to receive payment for the . . . rating to her left arm per N.C. Gen. Stat. Section 97-31(13)."

By the time the defendants filed their hearing request in *Polk*, Deborah Polk had been reemployed for over two years and was earning more than her pre-injury average weekly wage. The question that may yet remain unanswered after her claim was resolved by the Court of Appeals is whether there might be a shorter period of time after an injured worker has reached MMI and returned to work during which it would be acceptable for him or her to defer acceptance of compensation for PPD. But, even if there is, a good argument can be made that any such delay should not extend beyond the nine-month trial return to work period contemplated by N.C.G.S. § 97-32.1.

In either event, now that the Court of Appeals has spoken in *Polk*, if the defense is forced to go to a hearing to obtain an order awarding PPD when there is no reasonable basis for the injured worker to claim further total or partial wage loss benefits, a defense request for attorney's fees might be appropriate under N.C.G.S. § 97-88.1.

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