

RISK/ALERT

A TEAGUE CAMPBELL DENNIS AND GORHAM PUBLICATION

DECEMBER 2000

North Carolina's appellate courts issued no opinions in the area of workers' compensation on their regular opinion days in December. As a consequence, publication of this issue has been delayed to permit analysis of several decisions handed down on December 29, including those described below.

CASE LAW UPDATE

Circumstantial Evidence Sufficient to Establish Average Weekly Wage

In *Larramore v. Richardson Sports Limited Partners, d/b/a Carolina Panthers*, claimant signed a contract to play football which provided for a \$1,000 bonus and salary of \$85,000 upon his being added to the Panthers' active roster. Until then, he was only entitled to a per diem amount for expenses. The contract expressly permitted the Panthers to unilaterally terminate him if his football skills were unsatisfactory.

Prior to making the active roster, contract players like claimant were required to participate in the pre-season football camp in which he injured his back. After being treated for that injury, he was released back to practice by the team physician and returned to training camp. However, when the Panthers listed their team roster the next day, claimant was not on it. Thereafter, he sought additional medical treatment and pursued his workers' compensation claim.

The Full Commission awarded 300 weeks of temporary partial compensation, using an average weekly wage based on claimant's full contract salary and bonus. Defendants objected since he was never actually placed on the active roster and neither his contract salary nor bonus had gone into effect. However, the Court of Appeals affirmed the award,

holding that although there was no direct evidence establishing that, but for claimant's back injury, he would have made the active roster, there was **circumstantial** evidence which could have led the Commission to infer that claimant's injury caused his release.

There was a dissent by Judge Greene, both as to the AWW issue and the Commission's award of TPD. Therefore, this case will most likely be appealed to and ultimately resolved by the Supreme Court.

Risk Handling Hint: This holding has the potential of becoming a very troubling precedent, as it is expected that future claimants will argue that their average weekly wage should include anticipated promotions and raises. Risk managers should aggressively defend all such claims and assert that the exception to the general rule that an employee's actual earnings should be used to calculate AWW ought to be narrowly applied.

Defendants' Right to Direct Medical Treatment in Accepted Claims Reaffirmed

In *Kanipe v. Lane Upholstery*, claimant had been employed as a sewer for 28 years. She developed carpal tunnel syndrome and was referred to an orthopaedic surgeon, Dr. de Perczel, by her family physician. He concluded her condition was work related and recommended surgery. Defendants then sent claimant to their physician for an IME. He confirmed both the diagnosis and recommendation for surgery, and then referred her to Dr. Nicks to perform a CTS release.

Two days before surgery, however, it was canceled because claimant wanted it performed by Dr. de Perczel. Defendants refused her request, but she went forward with the operation anyhow and

had it done by Dr. de Perczel. Later, he indicated that claimant was incapable of returning to work. Dr. Nicks testified that if he had performed the operation, claimant would have been removed from work for no more than 7 days.

The deputy commissioner found that defendants did not have the authority to control claimant's medical treatment because they had not accepted liability under a Form 21 or 60. However, the Full Commission reversed, concluding that since defendants had accepted liability both verbally and in writing, they had the right to control medical care. The Commission went on to deny not only payment of claimant's medical expenses, but also, her claim for disability compensation.

In affirming that decision, the Court of Appeals noted that "as soon as the employee claims . . . entitle[ment] to compensation, the employer has the right to require the employee to submit to an examination with one of its authorized physicians." However, it also stated that that right is **not** the equivalent of authority to direct medical treatment. The "triggering point" for that is defendants' acceptance of liability. But, to accept liability, it was not necessary to file a Form 21 or 60, since at the time of surgery, claimant had lost no time from work. The only benefits then at issue were medical. Defendants had accepted the claim verbally and in writing and, therefore, had the right to direct medical care.

At the same time, the Court said claimant would have had a right to procure her own physician if (1) her employer had failed to direct medical treatment in a prompt and adequate manner, (2) an emergency had occurred, or (3) claimant had obtained approval from the Commission to switch physicians. The Court found that none of those situations were present and that the Commission properly denied claimant's request for payment of Dr. de Perczel's bill.

However, the case was remanded with respect to the denial of disability compensation, the

Court holding that if it was because claimant refused to undergo treatment with Dr. Nicks, that was not a valid reason. On the other hand, if the Commission ruled as it did because Dr. Nicks would not have taken claimant out of work for more than the 7 day waiting period, that would have been proper. Therefore, the case was remanded to determine the basis for the Commission's denial of weekly compensation.

Risk Handling Hint: It is imperative for risk managers to recognize that while this case reaffirms a defendant's right to obtain an IME during the investigation stage of a claim and then to direct medical care if it is accepted, even then, the right to control treatment is not unlimited. To maximize the chances of medical control, risk managers should accept cases early and then provide prompt and appropriate medical treatment, so as to avoid having claimants seeking medical care on their own.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ The parties' joint petition for discretionary review in *Hansen* (whose holding was described in detail in the June 2000 edition of *Risk/Alert*) was denied by the Supreme Court on December 20. A Motion for Reconsideration is in the process of being filed. In the meantime, the Commission is wrestling with various measures to deal with the substantial increase in litigation anticipated if the Court of Appeals' decision is not overturned by the Supreme Court or legislature.

✓ The Commission has announced that long-term employees Ronnie Rowell and Brad Houser, who most recently served as Special Deputy Commissioner and Agency Legal Specialist respectively, have been appointed to fill positions vacated by Deputy Commissioners Bill Bost and Margaret Morgan Holmes.

We will continue to monitor and advise you of developments in connection with each of the above areas of interest and concern.