

RISK/ALERT

A TEAGUE CAMPBELL DENNIS AND GORHAM PUBLICATION

DECEMBER 2004

CASE LAW UPDATE

Sanctions Upheld for Defending Claims "Without Reasonable Grounds" Despite Deputy Commissioner's Decisions for the Defense

In separate opinions entered two weeks apart earlier this month, the Court of Appeals has affirmed two Full Commission decisions assessing attorneys' fees against the defense under the theory that each claim was unreasonably defended, despite the fact that in both, the deputy commissioner who heard and decided it had ruled in the defendants' favor.

The first of these claims was brought by James Goforth, who had undergone eight cervical and lumber spine operations and was drawing Social Security disability benefits when his employment in K-Mart's garden department began. Five months after he stopped working in August 2000, Goforth filed for workers' compensation, alleging a low back injury in May of that year while loading bags of peat moss into a customer's car.

Deputy Commissioner Theresa Stephenson found that Goforth's allegation of a work-related injury lacked credibility, and she denied his claim. However, Commissioners Bolch, Scott and Lattimore reversed, finding that "the greater weight of the evidence" established claimant had in fact injured his back as alleged and was permanently and totally disabled, entitling him to ongoing TTD. Remarkably, they also found Goforth's claim to have been defended without reasonable ground, and as a result, they awarded his attorney a 25% fee, payable by K-Mart over and above claimant's TTD.

On December 21, in *Goforth v. K-Mart Corporation*, the Court of Appeals affirmed, holding that claimant's testimony was competent evidence

supporting the Commission's finding that he had been injured at work, and "while K-Mart's claim that Goforth lacked credibility might have some merit," as there was evidence of a long history of substance abuse and testimony that he did not file his claim until eight months after being injured, "the credibility of witnesses ... is the role of the Commission." Therefore, the Court concluded that the Commission had not abused its discretion in awarding an attorney's fee under N.C.G.S. § 97-88.1.

Two weeks earlier, a different panel of the Court had reached the same result in *Allen v. Southag Manufacturing*, a case in which the claimant, Michael Allen, was working as a painter and general laborer when a large angle iron fell on his left foot, fracturing his toes. A week after the incident, Allen returned to light duty work wearing orthopaedic shoes. However, he subsequently reported that his pain continued to increase, was diagnosed with RSD, and stopped working. Later, two coworkers testified that Allen had said he was leaving for another job. However, he testified that he stopped working because of the pain and claimed he had never said anything about another job.

The defendants did not dispute claimant's injury, but *did* contest his claimed disability. Deputy Commissioner Stephenson agreed, concluding that Allen lacked credibility and had not established he was permanently disabled. Therefore, she only awarded four weeks of TTD. However, the Full Commission, again consisting of Commissioners Bolch, Scott and Lattimore, reversed Deputy Commissioner Stephenson's credibility ruling and found claimant disabled by his RSD. At the same time, they once again concluded that the claim had been unreasonably defended. As a consequence, they ordered the defendants to pay not only Allen's TTD, but a 25% fee to his attorney.

In its December 7 opinion, the Court of Appeals applied the same analysis as in *Goforth*, concluding that claimant's testimony and that of his doctors supplied evidentiary support for the Commission's findings, which in turn engendered the conclusion that the Commission had not abused its discretion in awarding attorney's fees.

Risk Handling Hint: Risk managers may find it hard to understand how a defense upon which a deputy commissioner with no stake in the outcome of the case has based her Opinion and Award can reasonably be characterized as "stubborn, unfounded litigiousness" so as to support an award of attorney's fees under N.C.G.S. § 97-88.1, but that is the net result of the holdings in both *Goforth* and *Allen*. These two decisions point out the extraordinary power which the Full Commission wields in determining credibility cases and deciding whether claims have been unreasonably defended.

Risk managers should be cognizant of this hazard, carefully documenting all available defenses to minimize the danger of being assessed with attorney's fees under N.C.G.S. § 97-88.1, although it is difficult to see how they can do much more than develop precisely the same kind of evidence which Deputy Commissioner Stephenson found sufficient to support her denials in both *Goforth* and *Allen*. At least one panel of the Full Commission has shown that it is not averse to not only reversing its deputies' decisions in such cases, but at the same time entering an award of attorney's fees against the defense. Unfortunately, it appears from its opinions in both cases that the Court of Appeals' interpretation of the abuse of discretion standard will provide the defense with little or no relief when that happens.

*Superior Court Judge's Order Eliminating
Workers' Compensation Lien Vacated*

Johnnie Alan Wilkerson was killed when his cement truck was struck by an Amtrak train. After his employer's carrier, Liberty Mutual, began making workers' compensation payments, it asserted a lien against the proceeds of the negligence action the Wilkerson family brought against Norfolk Southern Railway. At mediation, the Wilkersons and Norfolk

Southern agreed to a \$400,000 settlement, subject to "satisfactory resolution" of Liberty's lien. The Wilkersons then filed a motion in Superior Court under N.C.G.S. § 97-10.2(j), asking that the lien be extinguished. The trial court entered an order to that effect and Liberty appealed.

On December 21, in *Wilkerson v. Norfolk Southern Railway Co.*, the Court of Appeals vacated the trial court's order, finding that the parties' agreement to resolve the tort claim did not qualify as a "settlement" for purposes of N.C.G.S. § 97-10.2(j). Rather, because it was expressly dependent upon a "satisfactory resolution" of the workers' compensation lien, no final settlement had been reached and the trial court did not have jurisdiction to eliminate the lien under N.C.G.S. § 97-10.2(j).

Risk Handling Hint: The holding in *Wilkerson* is an important victory for employers and their workers' compensation carriers. It confirms the fact that the only way the parties in a civil tort action can settle with any assurance about how the related workers' compensation lien will be treated is to obtain the consent of the employer and its carrier to the terms of their settlement. In the absence of that, the parties to the civil action will be unsure about the extent to which the trial court will reimburse the workers' compensation lienholder. By ruling out tentative settlements of third party claims which are contingent on elimination of the workers' compensation lien, the Court of Appeals has effectively given the parties to third party tort actions a strong incentive to involve employers and their carriers in the settlement negotiation process and has made it more likely that workers' compensation lienholders will receive at least partial reimbursements of the benefits they have paid, or will pay, under the Workers' Compensation Act. Risk managers are encouraged to aggressively use the leverage afforded by this decision whenever settlement of a third party claim is being considered. In the alternative, when negotiating the settlement of a workers' compensation claim in which a third party tort action has also been brought, risk managers should consider asking that the clincher's terms include a partial or total repayment of their lien against the third party recovery.