

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Court Debates Claimant's Burden of Proof under Russell v. Lowes

While working as a records clerk for AT&T in New Jersey since 1996, Amy Terasaka spent between four to eight hours a day typing. In October 2001, as part of a transfer to AT&T's office in Gastonia, North Carolina, she participated in an intensive, three-day customer service course, during which she typed eight hours a day. Toward the end of the course, Terasaka developed pain and numbness in both hands. She filed a Form 18 alleging her symptoms resulted from all the typing she did while training, but AT&T denied her claim.

Terasaka first came under the care of Dr. David Baker, who diagnosed bilateral carpal tunnel syndrome and ultimately performed surgical releases on both hands. However, claimant continued to complain of severe pain even after the surgery, and she worked only four days in the year 2003. Dr. Baker was unable to explain Terasaka's level of pain or dysfunction on any medical or scientific basis and was also unable to make recommendations regarding her ability to return to work.

Dr. Raymond Sweet, a neurosurgeon who saw Terasaka on two occasions in December 2002, later testified that, in his opinion, it was unlikely she could return to any job involving repetitive hand and wrist motion. He also testified that claimant's employment with AT&T had placed her at an increased risk of developing carpal tunnel syndrome and was a significant contributing factor in the development of her condition.

At the evidentiary hearing held by the Commission, Terasaka testified that she had unsuccessfully made approximately 500 attempts to find another job and the pain in her hands prevented her from being able to drive, dress herself, or do household chores. Based on that testimony, the Commission found claimant unable to work in any capacity and entered an ongoing award of TTD.

However, defendants appealed to the Court of Appeals, which on December 6, 2005, in *Terasaka v. AT&T*, reversed the Commission's award of benefits in a 2-1 decision, concluding that claimant had failed to meet her burden of proof on the issue of disability.

Judge Calabria, writing for the majority, stated that claimant had the burden of proving she was disabled, and under *Russell v. Lowes Product Distribution*, a case successfully defended by TCDG in 1993, could have met that burden in one of four ways: (1) producing medical evidence that, as the result of a work-related injury, she was physically or mentally incapable of work in any employment; (2) proving she was capable of some work, but after a reasonable effort on her part, had been unsuccessful obtaining alternative employment; (3) establishing that she was physically capable of some work, but it would have been futile because of preexisting conditions, such as her age, education or work experience, to seek a new job; or (4) proving that she had obtained other employment, but at wages less than she earned prior to being injured.

The Court's majority held that, because the Commission had found claimant unable to work in any capacity, and since that finding was supported by competent evidence in the form of Terasaka's own testimony that the condition of her hands prevented her from working, it was conclusive on appeal. Therefore the Court concluded that "the only *Russell* prong applicable on these facts is the first prong." And, it went on to hold that, in order to prove disability under the first prong of the *Russell* test, claimant had to produce *medical* evidence of an incapacity to perform any type of gainful employment. However, since the medical evidence on this issue only established that Terasaka was incapable of *repetitive* work, the Court's majority held that the Commission had erred in reaching the conclusion that she had carried her burden of proving total disability under the first prong of the *Russell* test.

In her dissent, Judge Geer cited another Court of Appeals decision, *White v. Weyerbaeuser*, for the

proposition that the absence of medical evidence does not preclude a finding of disability under the other three prongs of *Russell*. Judge Geer argued that claimant could have met her burden of proving total disability by producing, as she did, evidence that she was capable of some work, but after reasonable effort on her part, had been unsuccessful obtaining alternative employment. And, Judge Geer disagreed with the majority's assertion that the Commission had based its award only on the first prong of the *Russell* test, since it found that claimant had looked extensively for other work and received no job offers. That finding, according to Judge Geer, was sufficient to meet the second prong of the *Russell* test. Therefore, the Commission's award of benefits should have been affirmed.

Risk Handling Hint: As Judge Geer's dissent provides claimant with an automatic right of appeal to the Supreme Court and she will almost certainly avail herself of that right, it remains to be seen whether the holding in *Terasaka* will be limited to its facts or if the Supreme Court will eventually provide further guidance as to the quantum and quality of evidence claimants must produce to satisfy the *Russell* test for establishing disability. In the interim, the Court of Appeals' majority opinion in *Terasaka* provides risk managers with an additional basis for arguing that an injured worker's testimony regarding failed job search efforts may not be sufficient to prove total disability where the medical evidence shows her capable of performing some types of work.

Terasaka is also a good illustration of how a case which starts out as an injury by accident claim can evolve into an alleged occupational disease if the job in question involves repetitive activity. Risk managers should be prepared to defend such claims on both fronts with the appropriate medical and lay testimony.

Supreme Court Rejects Strict Interpretation of Thirty Day Written Notice Requirement

The July 2005 edition of *Risk Alert* highlighted the case of *Watts v. Borg Warner Automotive, Inc.*, in which the Commission awarded benefits despite claimant David Watts' failure to report his injury for 20 months, after it concluded that his fear of being fired constituted reasonable excuse for the delayed reporting of his injury. A divided panel of the Court of Appeals remanded the case back to the Commission for further findings of fact on the issue of whether Watts' failure to give timely notice was due to fear of retaliation by Borg Warner, and if so, whether Borg Warner had been prejudiced by the delay. At the same time, the Court ordered the Commission to make further findings on the issue of causation.

In a strongly worded dissent which gave the defendants an automatic right of appeal to the Supreme Court, Judge Tyson argued that remand was unnecessary because "plaintiff's actions are easily distinguishable from all precedents upholding reasonable excuses," such as where (1) the employer is already cognizant of the injury or (2) the employee "does not reasonably know of

the nature, seriousness or probable compensable character of his injury and delays notification until he reasonably knows." Judge Tyson also felt that remand on the issue of prejudice to the employer was unnecessary because, in his opinion, Borg Warner had been prejudiced as a matter of law. Watts' failure to timely report his injury had deprived Borg Warner of the opportunity to provide immediate medical treatment so as to minimize the seriousness of Watts' injury and to conduct the earliest possible investigation of the surrounding facts, the two purposes of the statute which requires written notice within 30 days of injury, N.C.G.S. § 97-22.

Finally, Judge Tyson felt remand for additional findings on the issue of causation wasn't warranted either because "[t]he entirety of plaintiff's expert medical testimony is 'possibility' and 'speculation' and does not meet plaintiff's burden to show the necessary degree of 'medical certainty' to prove causation." Claimant's experts had only been asked whether the accident "could or might" have caused his injury. To Judge Tyson, remand would only have "give[n] plaintiff a second bite at the apple" and would have perpetuated and encouraged "both fraudulent and stale claims against employers by employees who fail to report injuries for nearly two years and who fail to establish their injuries were caused by their alleged accident."

In reply, Judge Elmore, writing in a separate opinion concurring with the majority decision to affirm the Commission's award of benefits, argued that while no court had previously found any circumstance other than the employer's knowledge of the injury or the employee's lack thereof as a "reasonable excuse" for a delayed report of injury, the Commission should not be so limited in determining what constitutes reasonable excuse. To Judge Elmore, whether the employee has established a reasonable excuse for delaying the report of his injury depends on the reasonableness of his conduct under the circumstances, and that can only be determined on a case by case basis.

Apparently unwilling to adopt Judge Tyson's strict interpretation of N.C.G.S. § 97-22, the Supreme Court affirmed the Court of Appeals' majority opinion in *Watts* in a *per curiam* decision filed on December 16. On remand, it will be interesting to see if the Commission allows claimant the "second bite at the apple" on the issue of causation decried in Judge Tyson's dissent, or if it will hold that the testimony of claimant's experts that his accident "could or might" have caused his injury is insufficient as a matter of law to prove causation.

Risk Handling Hint: While N.C.G.S. § 97-22 clearly requires written notice within 30 days of an alleged injury, the *Watts* decision illustrates the lengths to which the Commission and our appellate courts will go to excuse an untimely report of injury. Nevertheless, risk managers are encouraged to continue closely scrutinizing claims which are not promptly reported, asking detailed questions in the recorded statement, if one is taken, as to why claimant did not immediately report his injury. If the employee later changes his story after

retaining counsel, what he said in his recorded statement could go a long way toward impeaching his credibility. At the same time, it is important to remember that the burden is on the *defense* to show that it was prejudiced by the late reporting. That can be established by producing evidence of the employer's policies and practices when injuries are timely reported.

Award of Death Benefits to Father of Deceased Employee Upheld

In September 2000, Richard Kelly, age 19, died as a result of injuries sustained in a motor vehicle accident arising out of and in the course of his employment with Price Brothers, Inc. He died intestate, leaving his mother and father, who had been divorced for many years, as his sole surviving lineal heirs.

Liability was admitted and the defendants were prepared to pay the commuted value of the death benefits owed under N.C.G.S. § 97-38 to Kelly's mother, Ruth Rhodes, and his father, Carson Kelly. However, Rhodes contended that Kelly had willfully abandoned the care and maintenance of his son and, therefore, the provisions of N.C.G.S. § 97-40 barred him from sharing in those benefits. The Commission eventually held otherwise, finding that Kelly had regularly visited with his son, sent him cards and gifts, and made child support payments in a timely manner.

Rhodes appealed, but on December 20, in *Rhodes v. Price Brothers, Inc.*, the Court of Appeals affirmed the Commission's award to both parents because the record contained evidence to support the Commission's finding that Kelly had made child support payments in a timely manner, maintained a health insurance policy on his son, and stayed in contact with him via cards, e-mails and telephone calls, and in turn, those findings supported its conclusion of law that Kelly had not willfully abandoned the care and maintenance of his son.

Risk Handling Hint: Had the deceased employee's mother not questioned her former husband's entitlement to any portion of the death benefits owed in *Rhodes*, the defendants could have made payment soon after the date of injury, in which case their total liability, commuted to present value, would have been approximately \$84,000. However, by virtue of the five year delay caused by the deceased's mother's appeals, over \$77,000 in benefits has now accrued and the present value of the remaining 124 weeks of benefits is another \$32,000, bringing defendants' ultimate liability in this case to approximately \$109,000. To avoid such a result, risk managers willing to pay death benefits to the next of kin in cases in which the only dispute is among potential takers are encouraged to consider filing a motion with the Commission seeking permission to pay the present day commuted value of the death benefits owed into a trust account from which payment can be disbursed at the conclusion of the potential takers' litigation over an issue in which the defense has no stake.