

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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THE ATTORNEYS AT
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WITH QUESTIONS
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CASE LAW UPDATE

Award of Pool Maintenance Expenses Reversed

After home health care nurse Karyn Winders sustained a compensable injury to her back, she underwent both a two-level fusion and implantation of a dorsal spinal column stimulator. Continued complaints of severe back pain led her treating physician, Dr. John Gorecki, to recommend a physical therapy program, including three months of pool therapy. Winders enrolled in an aquatic exercise class at the YMCA, which she attended three days a week. After her three month prescription ended, she began paying for the pool therapy classes herself. Later, when she asked Dr. Gorecki about continuing the aquatic therapy, his response was that it "would always be useful for her."

Winders' father built an enclosed, in-ground heated pool at his home and she used it three to five days a week to perform the exercise regimen she learned at the YMCA. Later, after she and her husband purchased the home from her parents, Winders made an effort to use the pool daily. She kept its temperature warmer than normal, which she said gave her more significant benefit than the relief she received from the pool at the YMCA. She also reported that she was relatively pain-free while in the pool, but her pain gradually increased within a few hours after she came out of it.

Winders continued under the care of her family physician, Dr. Sunderman. At her request, he wrote a prescription for "home pool therapy, including cleaning, maintenance, and supplies." She then requested a hearing, seeking reimbursement of the cost of heating the pool, and supported her claim with testimony from Dr. Sunderman that she experienced brief, but significant, relief from her pool therapy regimen.

The Full Commission found that Winders failed to prove she was entitled to reimbursement for her pool maintenance expenses because Dr. Gorecki had not indicated that she needed therapy in a heated pool. Nevertheless, it ordered the defendants to provide pool therapy to Winders "a minimum of five days per week" and directed them to pay her \$6.85 for each day she had a "valid reason" for doing it at home, since the therapy she did there qualified as medical treatment "reasonably required to either provide relief, effect a cure, and/or lessen Plaintiff's disability" under N.C.G.S. § 97-2(19).

On December 18, in *Winders v. Edgecombe County Home Health Care*, the Court of Appeals agreed with the Commission that "relief from pain is a legitimate aspect of the 'relief' anticipated by future medical treatment under N.C.G.S. § 97-25." At the same time, the Court reversed the Commission's reimbursement of claimant's pool maintenance expenses, agreeing with defendants, who were represented by Bob Kerner of TCDG, that there was no basis for awarding "a minimum of five days per week" of pool therapy because there was no evidence claimant's doctors had prescribed that a specific number of sessions per week were "reasonably necessary" to alleviate her pain. The Court found that the Commission's award of daily payments to cover pool maintenance was inconsistent with its conclusion that claimant had failed to prove entitlement to compensation for maintaining her pool. It also found that the Commission had provided no guidance as to what constituted a "valid reason" for claimant to use her home pool instead of the one at the YMCA.

Risk Handling Hint: Risk managers are often asked to authorize expenditures for various types of service and equipment under the guise that they constitute "medical compensation," as that term is defined in N.C.G.S. § 97-2(19). While it is clear that relief from pain is a legitimate goal of medical compensation and, therefore, can be compensable under N.C.G.S. § 97-25, N.C.G.S. § 97-2(19) also imposes a requirement of reasonableness. Whether a particular request meets those two criteria will be determined and resolved on a case-by-case basis. A review of recent decisions shows that the Full Commission refused to order the defendants to install a ground floor Jacuzzi in *Clark v. The Sanger Clinic*, I.C. No. 333197 (2002), finance the cost of an addition to plaintiff's home to accommodate a 500-gallon hot tub in *Smith v. Carpenter Co.*, I.C. No. 963549 (2006), or pay for the lawn care expenses recommended in a life care plan in *Scarboro v. Emory Worldwide Freight*, I.C. No. 877002 (2007), as all three are ordinary expenses of life meant to be paid from the statutory substitute for wages (TTD) provided by the Workers' Compensation Act. On the other hand, the Full Commission did order the defendants in *Torres v. Kelly Springfield Tire Co.*, I.C. No. 212973 (2000), to pay for claimant to hire "an individual to come to her home twice a week to perform necessary cooking and housekeeping tasks as long as such assistance is medically necessary."

Benefits Suspended Due to Employee's Pre-MMI Refusal of Light Duty Work

Eleanor Russo, a Food Lion customer service manager, injured her right arm when she grabbed a conveyor belt in an attempt to avoid falling after slipping on some grapes. She was initially diagnosed with right carpal tunnel syndrome, right trapezial strain and right shoulder tendonitis, but was released to return to full duty work within two months of her injury and successfully resumed her regular job duties without any absences or additional treatment for several months. Later, however, she presented to Dr. Neil Conti with new right arm complaints, which he diagnosed as complex regional pain syndrome (CRPS). After Russo refused the physical and occupational therapy Dr. Conti recommended, he released her to light duty work because of the therapeutic benefits of using a CRPS-affected extremity.

Russo was subsequently seen by another specialist, Dr. T. Kern Carlton, who felt that at a minimum, she was capable of left-handed work. At that point, Food Lion offered her a position in its Temporary Alternative Duty (TAD) program, which tailors job duties to accommodate workers who have been injured on the job until they are able to return to their regular work. Participants in the TAD program are only paid minimum wage, but they are eligible to collect temporary partial disability benefits for the wage differential.

Food Lion's letter offering Russo work in the TAD program informed her that refusing to accept the company's offer of a light duty job would be interpreted as "a lack of desire on [her] ... part to continue employment with our company." When she failed to report to work, Food Lion filed a Form 24, seeking to terminate TTD due to her refusal of "suitable employment" under N.C.G. S. § 97-32.

Food Lion's Form 24 was referred for a full evidentiary hearing before Chief Deputy Commissioner Gheen, who subsequently denied it. However, Food Lion successfully appealed to the Full Commission, which reversed and held that by refusing to accept the company's offer of a light duty job and failing to look for any other work, Russo had constructively refused suitable employment, thereby forfeiting her right to benefits during the period of refusal.

In explaining the rationale for its holding, the Full Commission stated that "the standard for suspension of disability compensation for unjustified refusal of pre-maximum medical improvement employment is distinctly different from the standards used to determine suitability of post-maximum medical improvement employment." It also observed that the two leading "suitable employment" cases, *Peoples v. Cone Mills* and *Saums v. Raleigh Community Hospital*, both involved employees who had reached MMI and held that the standards enunciated in those two cases do not apply to pre-MMI light duty work. As a result, the Full Commission granted Food Lion's Form 24 and authorized it to suspend, but not terminate, claimant's weekly benefits.

Both parties appealed the Full Commission's ruling. On December 4, in *Russo v. Food Lion*, the Court of Appeals rejected claimant's argument that

Food Lion's TAD program was "make work" under *Peoples* and *Saums*, noting that in both cases, the employee had already reached MMI, which was not so in *Russo*.

The Court then analyzed Eleanor Russo's termination utilizing the two-pronged test set forth in *Seagraves v. Austin Co.* and *McRae v. Toastmaster, Inc.*, under which an employer may avoid ongoing liability for weekly benefits if (1) it establishes that its employee was terminated for the kind of misconduct unrelated to her injury for which a non-disabled employee would also be terminated and (2) the employee fails to prove that her inability to find suitable employment was due to work-related disability. In *Russo*, the Court found that the Full Commission had properly applied the *Seagraves* test when it determined that claimant's rejection of Food Lion's offer of work through its TAD program qualified as a refusal of suitable employment, as "the critical area of inquiry into the circumstances of an injured employee's termination is ... whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform." Of particular relevance was the fact that all of Russo's physicians had advised her that appropriate employment would be therapeutic for her arm injury.

Having determined that the Full Commission had correctly concluded that claimant constructively refused work suitable to her capacity, the *Russo* Court next addressed Food Lion's contention that the Commission should have *terminated* claimant's benefits, as opposed to merely *suspending* them. In rejecting Food Lion's argument in that regard, the Court noted that "nowhere in defendant's Form 24 do they contend benefits should be terminated based upon an absence of disability associated with plaintiff's ... accident." In fact, at the evidentiary hearing before Chief Deputy Commissioner Gheen, counsel for both parties had agreed that the only issue in dispute was whether claimant had unjustifiably refused suitable work. Because N.C.G.S. § 97-32 authorizes a *suspension* of benefits "during the continuance of such refusal [of suitable employment]," the Court held that the Full Commission had correctly addressed and resolved the sole issue before it.

Risk Handling Hint: Unfortunately, the Court of Appeals panel which issued the opinion in *Russo* indicated that it should be reported as an "unpublished" opinion under Rule 30(e), which authorizes the Court to enter decisions that do not constitute controlling legal authority in future cases. At the same time, however, a recent amendment to the rule provides that "if a party believes ... that an unpublished opinion has precedential value to a material issue in the case and ... there is no published opinion that would serve as well, the party may cite the unpublished opinion if [it] ... serves a copy thereof on all other parties ... and on the court to whom the citation is offered." There being no other appellate decision which directly addresses the question of whether the standard for suspending benefits for an unjustifiable refusal of pre-MMI light duty work is different from the one used to determine the suitability of post-MMI employment, risk managers should find the holding in *Russo* useful whenever they have to deal with an employee who has refused a pre-MMI offer of light duty work and claims that it was not "suitable" under *Peoples* and *Saums*.

TCDG NEWS

Latest TCDG Litigation Successes

On December 18, in *Winders v. Edgembe County Home Health Care*, TCDG partner Bob Kerner successfully obtained a reversal from the Court of Appeals of that portion of a Full Commission decision which reimbursed claimant the cost of maintaining her personal pool because the therapy for which she used it qualified as "medical compensation" under N.C.G.S. § 97-2(19). For further details of the holding in *Winders*, see the article on page 1.

TCDG partner Bruce Hamilton recently obtained a favorable decision from the Full Commission in *Floyd v. Executive Personnel Group and Penco Products*, I.C. File No. 448304, in which the claimant was seriously injured in a motor vehicle accident while returning home from a pre-employment physical. TCDG represented Executive Personnel Group (EPG), a staffing agency which supplied temporary workers to Penco Products. Claimant started with Penco as a temporary worker, but was later asked to apply for a permanent position, which required that she undergo a pre-employment physical. Deputy Commissioner Donovan found EPG to be claimant's employer and held that the accident arose out of her employment because EPG benefited when temporary employees like claimant are hired as permanent employees by the company's customers. On appeal, however, the Full Commission held that although claimant may have been an employee of EPG, her injury did not arise out of or in the course of that employment. To the contrary, the Full Commission found that EPG played no role in scheduling the appointment for claimant's pre-employment physical with Penco's doctor and she was neither paid by EPG nor scheduled to work at the time of her physical. Claimant's settlement demand prior to the Full Commission's ruling was \$200,000 plus payment of her outstanding medical bills, which were in excess of \$70,000.

TCDG CLE Lectures

Bruce Hamilton was also a featured speaker and panelist at the North Carolina Trial Academy's Advanced Workers' Compensation continuing legal education program on December 7. He and distinguished TCDG alumnus and current Court of Appeals Judge Linda Stephens were members of a panel that discussed the most significant workers' compensation decisions of 2007.

North Carolina Comp Law At A Glance

The 2008 version of TCDG's North Carolina Comp Law At A Glance is now available for distribution. Please contact the attorneys at Teague Campbell to request a complimentary copy for current use or future reference.