

# RISK ALERT

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## CASE LAW UPDATE

### *Claimant Injured Driving Home from Pre-Employment Physical Denied Benefits*

Executive Personnel Group (“EPG”), an employment agency, entered into a contract with Penco Products whereby, in exchange for a fee, EPG paid the hourly wages of temporary employees working at Penco and provided them with workers’ compensation coverage. Neither company required that temporary employees pass a pre-employment physical or drug screen.

Once EPG’s temporary employees worked a specified number of hours at Penco, they became eligible for permanent employment, although actually obtaining it was contingent on both the applicant’s satisfactory completion of Penco’s pre-employment physical and drug screen and the company’s staffing needs. Penco did not offer employment to all temporary employees who passed the physical and drug screen.

Dianna Floyd worked off and on at Penco for about two years before completing an application for permanent employment. Penco then scheduled her for a physical exam and drug screen, which she understood had to be completed on her own time. She also knew that she would not be paid while being tested, nor reimbursed for travel expenses.

While driving home from the physical, Floyd suffered injuries to her wrist, ankle and knee in an auto accident. When she filed a workers’ compensation claim, it was denied by both EPG and Penco. The deputy commissioner who heard the case found that at the time of the accident Floyd was an employee of EPG, but not Penco, and agreed that the accident arose out of and in the course of Floyd’s employment with EPG. On appeal, the Full Commission agreed that she was not an employee of Penco, but it also determined that the accident did not arise out of and in the course of Floyd’s employment with EPG.

Floyd appealed to the Court of Appeals, which on December 16, in *Floyd v. Executive Personnel Group*, affirmed the Full Commission’s denial of her claim. The Court agreed with Penco, which was defended by Bruce Hamilton of TCDG, that no employer-employee relationship arose

between claimant and Penco, citing as authority its 2002 decision in *Huntley v. Howard Lisk Co.*

In *Huntley*, a prospective employee was injured while taking a driving test that was part of the job application process. In holding that the Commission did not have jurisdiction over his claim, the Court of Appeals held that “because there was ‘no agreement, written or oral, between the parties, or, for that matter, a promise of employment conditioned upon the pre-employment [driving test],’ the requisite employer-employee relationship did not exist between the parties.” To hold otherwise “would be akin to allowing every person who is injured in the course of a job interview to seek benefits ... [and] [t]his is clearly not the purpose of the Act.” Therefore, because there was evidence in *Floyd* that “although it was plaintiff’s understanding that she was going to be hired as a permanent employee by Penco ... if she passed the physical and drug screen, the greater weight of the evidence shows that ... successful completion of Penco’s pre-employment physical and drug test did not guarantee employment” and as there had been instances where employees passed both tests, but were never hired by Penco, the Court affirmed the Commission’s determination that Floyd failed to establish that an employer-employee relationship arose between herself and Penco.

The Court also considered and rejected Floyd’s argument that the injuries she suffered arose out of her employment with EPG because EPG would directly benefit if she obtained a permanent position, as “Penco’s hiring of EPG workers furthered EPG’s business relationship with Penco and served as incentive for temporary workers to seek employment with EPG.” The Court noted that in order for an injury to be compensable, it must occur “during the period of employment at a place where an employee’s duties are calculated to take him.” Further, by virtue of the Supreme Court’s 1977 ruling in *Gallimore v. Marilyn’s Shoes*, the employee’s injury must have been a “natural and probable consequence of the nature of the employment.” Because claimant’s pre-employment physical and drug testing were not related to her job duties with EPG, and as those duties did not require her to drive her personal vehicle, the Commission correctly concluded that Floyd’s injuries did not arise out of and in the course of her employment with EPG and, therefore, were not compensable.

**Risk Handling Hint:** The decision in *Floyd* should prove to be a useful tool for risk managers defending claims arising out of pre-employment physicals. In future cases, the Commission and our appellate courts will be seeking to determine whether there was an employment agreement at the time the employee was hurt. By virtue of the express provisions of N.C.G.S. § 97-2(2), an employment agreement, or “contract of hire,” can be “express or implied, oral or written ....” In *Floyd*, the fact that other temporary workers who passed a pre-employment physical were not offered permanent jobs was a significant factor in determining Penco’s liability. In a similar way, determinative of whether claimant’s injuries arose out of and in the course of her employment with EPG were the fact that EPG did not require physical exams or drug screening of its temporary employees, nor was driving part of their job duties.

*Claim Remanded for Further Findings  
on Applicability of Seagraves Test*

David Jones was working for Modern Chevrolet as an automobile mechanic when he injured his right knee in November 2004. Liability was admitted and medical and indemnity benefits paid, including arthroscopic surgery and TTD, until he returned to work without restrictions, and in his pre-injury position, on April 25, 2005.

At that point, Jones was still being treated for complaints of left knee pain and swelling, which the treating physician, Dr. David Martin, believed were causally related to his on-the-job injury. Later, an MRI was recommended to investigate the basis for Jones’ complaints of pain and swelling in that knee, but Dr. Martin did not assign work restrictions and the job Jones performed during this timeframe was not modified in any way.

On July 1, 2005, Modern Chevrolet fired Jones for poor workmanship on a brake repair. The next day, he received the results of his left knee MRI, which revealed a tear in the medial meniscus. Arthroscopic surgery performed two months later revealed a large tear in the meniscus and other damage to the knee.

The defendants accepted liability for Jones’ left knee problems and resumed payment of TTD as of the date of his left knee surgery, but Jones requested a hearing, seeking TTD from the date of his termination through the date of surgery. Despite the fact that he had been released to return to work without restrictions during the time at issue, the Commission applied the “*Seagraves* test” and held that Jones was entitled to compensation for the time in question because the defendants failed to prove that he was terminated for misconduct that was (1) unrelated to his compensable injury and (2) would have resulted in the termination of a non-disabled employee.

The *Seagraves* test, which was first articulated by the Court of Appeals twelve years ago in *Seagraves v. Austin Company of*

*Greensboro*, is normally applied to cases in which an employee who has been terminated for misconduct nevertheless seeks an award of weekly benefits and the defendants argue that his claim is barred by N.C.G.S. § 97-32, which provides that “if an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal ....” There being case law support for the proposition that a refusal to accept suitable work can be either actual or constructive, the *Seagraves* test was originally developed to address the situation in which an injured employee is provided light duty employment by his employer, but then constructively refuses that work, and as a result is terminated for “fault” or “misconduct,” thereby forfeiting his right to further worker’s compensation benefits.

More recently, the Supreme Court adopted the *Seagraves* analysis in *McRae v. Toastmaster, Inc.* In doing so, it stated that in order for the employee’s misconduct to bar payment of further benefits, “an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee’s compensable injury.” The Court also observed that “the test serves to protect injured employees from unscrupulous employers who might fire them in order to avoid paying [benefits, and] ... serves employers as a shield against injured employees who engage in unacceptable conduct while employed in rehabilitative settings.”

In *Jones*, Modern Chevrolet and its third party administrator argued on appeal to the Court of Appeals that because claimant was working at full duty and without restrictions when he was fired, and as he was not employed in a rehabilitative setting at the time, it was error for the Commission to apply a *Seagraves* analysis to his claim for benefits. However, in a 2-to-1 decision filed on December 2, *Jones v. Modern Chevrolet*, the Court sanctioned the use of the *Seagraves* analysis in certain cases involving full duty returns to work. It noted that earlier this year, in *Hogan v. Terminal Trucking Co.*, it upheld the Commission’s application of *Seagraves* to a case in which the employee had been released to return to work without restrictions.

The Court’s majority in *Jones* also observed that because claimant’s right knee was still being treated, and as his left knee injury had not resolved when he returned to full duty work, “[p]laintiff’s situation bears some similarities to that of a claimant who returns to work under light duty restrictions and is later terminated.” According to the Court’s majority, the “treatment of plaintiff’s left knee injury extended defendant’s obligation to pay workers’ compensation benefits beyond the date that plaintiff returned to work, arguably placing plaintiff in the vulnerable position discussed [by the Supreme Court in *McRae*],” where an unscrupulous employer might choose to terminate an employee simply so as to avoid having to pay additional workers’ compensation benefits.

While the Court’s majority in *Jones* found that the Commission’s application of the *Seagraves* test might have been appropriate even though claimant had been released to return to work without restrictions and, therefore, no longer had the benefit of a presumption of continuing disability, it also determined that the Commission’s findings of fact, which constituted nothing more than “mere summarization or recitation of the evidence,” were insufficient to explain why it had applied the *Seagraves* test to the facts of the case, thereby warranting a remand back to the Commission for further findings.

In his dissent, Judge Wynn argued that the Commission’s findings supported its application of *Seagraves* and that, therefore, its award of benefits, based as it was on its conclusion that the defendants had failed to show that claimant was terminated for misconduct for which a non-disabled employee would have been terminated, should have been affirmed without remand. In his review of the case law, Judge Wynn found “a number of workers’ compensation cases in which our courts have applied the *Seagraves* analysis without making a specific finding that plaintiff-employee was on light or rehabilitative duty prior to his termination,” such as *Flores v. Stacy Penny Masonry Co.*, and *Workman v. Rutherford Elec. Membership Corp.* At the same time, like the majority, Judge Wynn was of the opinion that the fact that claimant was still being treated for his left knee injury when he returned to work without restrictions was sufficient to invoke application of the *Seagraves* analysis, even though he was working without restrictions or wage loss at the time he was terminated.

**Risk Handling Hint:** In assessing the significance of the Court’s analysis in *Jones*, risk managers should be aware of the fact that, with regard to the closed period of TTD at issue, the defense argument from the outset was that since claimant had neither been written out of work nor assigned any work restrictions during the period in question, he was not entitled to additional compensation until Dr. Martin took him back out of work after obtaining the results of his MRI. In the absence of testimony from Dr. Martin that claimant was totally disabled during that period of time, and given the fact that claimant did not have the benefit of a presumption of continuing disability once he returned to work, claimant appears to have successfully bootstrapped an award of TTD to a *Seagraves* argument which defendants did not make, and prevailed because other mechanics had not been fired for the same conduct that resulted in his termination.

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