



RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Unexpected Condition During a Routine Action

While working as a certified nurse's assistant at The Oaks of Carolina, a nursing home, Marie Salomon changed a resident without assistance. Salomon indicated that such tasks were typically done with help, but that "understaffing . . . sometimes made this impossible." On an occasion when Salomon changed a resident by herself, the resident "suddenly pushed back against" Salomon, allegedly resulting in injury to Salomon's shoulder. The claim was denied on the basis that Salomon did not suffer an injury by accident inasmuch as changing a resident without assistance was Salomon's normal job. Deputy Commissioner Baddour agreed and denied Salomon's claim after an evidentiary hearing. The Full Commission reversed and found that Salomon had, in fact, suffered a compensable injury by accident. Defendants appealed to the Court of Appeals.

On November 15, 2011, in *Salomon v. The Oaks of Carolina*, the Court upheld the Full Commission's decision that Salomon had suffered an injury by accident. The Court looked to an earlier holding in *Gray v. RDU Airport Auth.* and explained that a compensable injury by accident "involve[s] more than the employee's performance of his or her usual and customary duties in the usual way" and is characterized by "its unusualness and unexpectedness" The Court agreed with Defendants' argument that, as a result of regular understaffing, changing residents alone was routine for Plaintiff, but found 'unexpectedness' in the resident's act of pushing back against Salomon "suddenly and without warning" as she held him up with one arm. Salomon's testimony was that this action was unexpected. In comparing Salomon's injury to *Konrady v. U.S. Airways, Inc.*, where a flight attendant suffered a compensable knee injury while getting out of a courtesy van due to "unforeseen circumstances," that the step down from the van was much shorter than the Plaintiff anticipated, causing her to 'misstep' and hit the ground harder than expected, the Court noted that, as in *Konrady*, Salomon's injury was the result of "an unexpected condition which occurred during a routine activity" and was, therefore, a compensable injury by accident.

The Court also addressed whether Salomon was entitled to ongoing indemnity benefits based on Defendants' argument that she had constructively refused suitable employment by being fired for reasons unrelated to her injury. The Court considered the second and third prongs of the *Russell v. Lowe's Prod. Distribution* test, specifically, (2) the production of evidence that Plaintiff has, after a reasonable effort, been unsuccessful in her effort to obtain employment; and (3) the production of evidence that it would be futile to seek other employment because of preexisting conditions such as age, inexperience or lack of education and concluded that the Commission's findings as to Salomon's very limited efforts to find work were "conclusory" and that detailed findings of fact were required to show that the limited effort was reasonable. As to the third method, the Court remanded the case for further findings as the Commission had not addressed Salomon's evidence of futility.

Risk Handling Hint: Risk Managers should make efforts to clearly pinpoint the specifics of an activity reported as having caused an injury. Additionally, Risk Managers should clarify not only the written job description, but also the actual work activities performed by individuals in the claimant's given position to help in analyzing whether an event constitutes an injury by accident because of an unexpected event during an otherwise usual activity.

Unrelated Medical Condition

Anita Thompson suffered a compensable injury to her back and neck. As part of an interdisciplinary pain program recommended by her treating physician, Thompson had a psychological evaluation which concluded that her pain was "psychological and not physiological in nature." Thompson's request for a second opinion was denied, so she began treating with a doctor on her own who diagnosed her with fibromyalgia and myofascial pain syndrome. Thompson then filed a Request for Hearing when Defendants refused to pay for her treatment with that physician. After an evidentiary hearing and appeal, in September 2004, the Full Commission entered an Opinion and Award directing Defendants to pay for medical expenses related to Thompson's back injury and care from

April 24, 2001 through June 26, 2001 only, and awarding ongoing indemnity benefits.

In October 2007, Thompson filed another Hearing Request as to the causal relationship between the work injury and her myofascial pain syndrome and fibromyalgia. The Full Commission subsequently denied her claim for medical treatment and ongoing indemnity. Plaintiff appealed to the Court of Appeals arguing that she was entitled to a presumption of disability and that the Full Commission erred in finding that her myofascial pain syndrome and fibromyalgia were not related to the compensable injury.

On November 15, 2011, in *Thompson v. FedEx Ground/RPS, Inc.*, the Court of Appeals concluded that Thompson was not entitled to a presumption of disability. While the Court recognized that one circumstance giving rise to a presumption of disability is when there has been a prior disability award from the Industrial Commission, it rejected Thompson's argument that the Full Commission's September 2004 decision was such an award as that decision focused on her medical treatment related to her back injury and specifically excluded treatment for fibromyalgia and myofascial pain syndrome beyond a limited period of time. In addition to pointing out that Defendants had admitted compensability only with regard to Thompson's back injury, the Court noted that the 2004 Opinion and Award had not found a compensable causal relationship between the alleged myofascial pain syndrome and/or fibromyalgia and Thompson's compensable injury.

In rejecting Thompson's argument that the Commission erred in failing to find her myofascial pain and fibromyalgia conditions compensable, the Court noted that the testimony of Thompson's previous treating physician and the physician who performed her psychological evaluation served as competent evidence to support the Commission's findings of fact that her symptoms were psychologically induced and not causally related to her compensable injury.

Last Injurious Exposure

Davis Rex Mauldin worked for A.C. Corporation in 1971, from 1976 to 1977, and from March 3, 1980 to June 1997. Mauldin's job involved working

with insulation. In 1997, he was diagnosed with laryngeal cancer. By that time, he could only speak through a voice box and Mauldin was laid off due to his inability to communicate. He did not return to work. Argonaut Insurance was the workers' compensation insurance carrier at the time Mauldin went out of work. In 2007, Mauldin was diagnosed with lung cancer and asbestosis.

Mauldin then filed for workers' compensation benefits alleging that his asbestosis and lung and laryngeal cancers were related to his exposure to asbestos in insulation. His claim was by denied by each of the insurance carriers that provided coverage for A.C. Corporation during Mauldin's employment. After an evidentiary hearing, the Deputy Commissioner concluded that Mauldin's laryngeal, lung and lymph node cancers, asbestosis and pleural plaques were compensable occupational diseases; that Mauldin had been disabled since July 1997 as a result of laryngeal cancer and that Argonaut Insurance was the responsible carrier. The Deputy Commissioner also awarded Mauldin permanent total disability benefits and compensation for damage to several internal organs. The Full Commission affirmed that decision with modifications to Mauldin's compensation rate and the amounts awarded for damage to the lungs and lymph nodes. The Full Commission also held that Mauldin was entitled to medical treatment. Defendants appealed to the Court of Appeals.

On November 15, 2011, in *Mauldin v. A.C. Corporation*, the Court of Appeals remanded the case to the Full Commission for additional findings. Specifically, the Court looked to N.C.G.S. § 97-57 which provides that in occupational disease cases, the liable carrier is the one that provided coverage when "the employee was last injuriously exposed to the hazards of such disease," and that in asbestosis cases, "when an employee has been exposed to the hazards of asbestosis . . . for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . ." The Court concluded that the record lacked evidence to support the Commission's finding that Mauldin was last injuriously exposed to asbestosis in 1997 when Argonaut was the responsible carrier. Although Mauldin testified that

he was last exposed to asbestos for more than 30 days at a plant in 1986 or 1987 and that he did not visit the plant in 1997, the Court rejected Mauldin's reliance on job logs showing that he worked on a project at the plant in 1997 due to evidence and testimony that the logs were not a reliable indicator as to whether Mauldin was actually on-site for the project. Based on the insufficient evidence to hold Argonaut responsible under N.C.G.S. § 97-57, the Court reversed and remanded to the Full Commission to determine the timing of Mauldin's last injurious exposure to asbestosis as well as the carrier at that time.

The Court also concluded that the Commission erred in determining that Argonaut was the responsible carrier for Mauldin's laryngeal cancer. Argonaut did not contest the Commission's finding that Mauldin's last exposure to the hazards of laryngeal cancer occurred while it was carrier, but argued that the Commission failed to find that this exposure proximately augmented the disease to any extent, however slight, as required by *Rutledge v. Tultex Corp./Kings Yarn*, and that based on expert testimony, there was an insufficient connection between Mauldin's cancer and his exposure while Argonaut provided coverage. The Court agreed and remanded the issue to the Commission to make further factual findings. The Court also noted that the expert opinions were conflicting and that it was the Commission's role to resolve conflicts involving expert testimony.

In rejecting Defendants' argument that the Commission erred in awarding compensation for Mauldin's lymph node cancer and pleural plaquing because Mauldin had not filed a claim for either disease, the Court also noted that the Commission may award compensation for *all* conditions within the chain of causation flowing from a compensable condition.

Judge Beasley dissented in part from the majority's opinion, concluding that there was competent evidence to support the Commission's decision that Argonaut was liable for Mauldin's asbestosis. Judge Beasley recognized that Mauldin's testimony regarding his last injurious exposure was inconsistent, but noted that the Commission could have based its determination on the job logs nevertheless.

TCDG NEWS

TCDG's George Pender and Courtney Britt recently obtained a favorable decision from Deputy Commissioner Theresa Stephenson in a case where Plaintiff failed to return to her pre-injury position with Defendant-Employer. Defendants litigated the employment refusal by filing a Form 24 and, later, defended the claim at two hearings before Deputy Commissioner Stephenson. The Form 24 application to terminate benefits was initially allowed. Afterwards, Plaintiff presented to a former treating physician who had released her nine months earlier and was "tearful and persistent that she could not return to her sedentary computer job." The former physician took Plaintiff out of work due to

her mental status and chronic pain. In post-hearing depositions, an IME physician testified that Plaintiff did not exhibit any pain or discomfort which would indicate she was unable to work. Plaintiff also admitted on cross examination at the second hearing that she regularly drove three hours each way to assist her daughter in caring for her three grandchildren. In addition, she admitted recently traveling twelve hours by car to board a five-day cruise to Mexico where she participated in normal cruise activities, including an off-ship excursion. Deputy Commissioner Stephenson ruled that Plaintiff unjustifiably refused the position offered by Defendant-Employer and allowed Defendants to suspend benefits beginning in 2009. The case is currently on Plaintiff's appeal to the Full Commission.

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