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CASE LAW UPDATE

Single Car Accident Not a Direct and Natural Consequence of Work-Related Injury

Paul Cooper, who began his employment in the construction industry in 1966, had a history of right shoulder problems. They were exacerbated in September 1993 when he stepped on a piece of rebar while carrying a roll of mesh wiring at work, lost his balance and fell. Cooper sustained crush injuries to his upper body and eventually had to undergo five operations on his shoulder.

After his fall, Cooper's employer, Cooper Enterprises, voluntarily admitted compensability and paid medical and disability benefits. When maximum medical improvement was reached in December 1997, the treating physician, Dr. Donald D'Alessandro, found that Cooper had been left with a 50% permanent partial impairment of his right arm and a 100% impairment of his right shoulder. When he was next seen by Dr. D'Alessandro three months later, however, Cooper was doing quite well, his shoulder was not bothering him, and no further treatment was necessary.

On October 17, 1998, Cooper was involved in a single car accident, when gravel on the road on which he was driving caused his automobile to slide toward the right shoulder, where there was a steep drop-off. He responded by turning sharply to the left, causing the car to veer toward an embankment on

the other side of the road. He was unable to regain control, his vehicle went off the road, and it flipped over.

Cooper received serious injuries in the accident, including hip and leg fractures. He eventually filed a new workers' compensation claim, alleging that his inability to regain control of the vehicle was a direct and natural consequence of his earlier shoulder injury, as his right arm was not strong enough to control the steering wheel, and that in turn caused the accident to occur.

Cooper's claim was heard by Deputy Commissioner Brad Houser, who agreed with claimant and awarded benefits. However, the Full Commission reversed, holding that Cooper had failed to present sufficient evidence that his accident was a direct and natural consequence of the shoulder injury he suffered at work in 1993.

On February 15, in *Cooper v. Cooper Enterprises, Inc.*, the Court of Appeals affirmed the Full Commission's denial, finding that there was "little evidence" to support Cooper's contention that the residual effects of his shoulder injury had caused the auto accident. When asked about that relationship, Dr. Alessandro admitted he was "no expert in the area of driving with impaired extremities" and it would be "just conjecture" for him to link them together. While he "imagine[d]...the right arm could really only be used to steady the wheel

to re-grip it with the left,” he also acknowledged that he had not examined claimant for six months before the auto accident and did not see him for another ten months after it. Furthermore, Cooper was doing quite well when he was last examined before it occurred, his shoulder was not bothering him at the time, and no further treatment seemed to be necessary.

In its opinion affirming the Full Commission’s denial of Cooper’s claim, the Court of Appeals distinguished each of the cases cited by claimant, observing that in all of them, the injured worker was still in the process of recovering from his original, work-related injury when the new injury which prompted the claim in dispute had occurred. And, in each case, unlike the situation in *Cooper*, there was evidence that the second injury was a natural and direct result of the first. The Court also noted that even if an injury is the direct and natural result of a prior, compensable condition, if the second injury resulted from an independent intervening cause attributable to claimant’s own intentional conduct, then it is not compensable.

Risk Handling Hint: While risk managers should be cognizant of the fact that subsequent injury cases can be difficult to defend, both the holding in *Cooper* and the Court of Appeal’s rationale for its decision make it clear that there are limitations on the extent to which injuries will be related back to prior work-related conditions. And, as the Court noted in its opinion, not only will expert testimony be required to establish the necessary causal link, but the expert’s opinion will be disregarded if it is shown to have been based on “a guess or mere speculation.”

***Ongoing Disability Award
Affirmed Due to Futility of Seeking
Alternative Employment***

David Weatherford, a long-time employee of American National Can Company, worked twelve hour shifts, four days a week. As “back-end maintainer” of a machine which printed labels on

soda and beer cans, his job consisted of standing, walking, climbing steps, and kneeling on cement and metal surfaces.

Beginning in 1998, Weatherford began having left knee problems. He was eventually found by his treating physician, Dr. King, to be suffering from internal derangement of the knee with mild synovitis and chondromalacia of the patella femoral joint.

Four months after undergoing surgery in July 1998, Weatherford went back to work, only to develop problems in his right knee the following June. After undergoing additional arthroscopic surgery a month later, he returned to work again at the end of September 1999. However, Dr. King soon took him out of work once more, beginning on March 20, 2000 and continuing through July 1, 2000. At that point, because he was still experiencing pain, he decided to retire, rather than return to work.

Weatherford had received short-term group disability benefits while he was on medical leave under Dr. King’s care. Later, he filed an occupational disease claim for each of his knees, but both were denied. However, after an evidentiary hearing was held and Dr. King’s deposition taken, American Can accepted compensability and agreed to pay TTD for Weatherford’s time out of work before he retired, subject to a credit for the benefits he had been paid under its group disability plan. The parties then agreed that the sole issue for the Commission to decide was whether claimant was entitled to ongoing TTD after July 1, 2000.

The deputy commissioner ruled for Weatherford, as did the Full Commission, finding that although he had not actively sought employment after retiring, he was physically incapable of returning to his former job at American Can. And, even if he was capable of some types of sedentary work, the restrictions imposed by Dr. King made the process of engaging in job search efforts futile, considering his age, physical impairment and lack of work experience, training and transferable skills.

On February 1, in *Weatherford v. American National Can Company*, the Court of Appeals agreed, noting that when he retired, Weatherford was 61 years old, had worked in maintenance his whole life, and was without office skills or training. Further, he testified that he would have kept working but for the combined effects of the severe pain he was experiencing and his concern that continuing to perform the activities required of him at work would have eventually prevented him from being able to walk.

The Court of Appeals found additional support for the Commission’s award in the fact that Weatherford’s early retirement had left him with reduced pension and health benefit rights which were not commensurate with his thirty years of employment at American Can. And, it concluded that not only were the Commission’s findings supported by competent evidence, but they established that claimant “went beyond proving his disability and inability to earn a wage by...showing that...it would be futile for him to engage in a job search in light of his age, lack of work experience, lack of training and education, lack of transferable skills and physical impairment.”

Risk Handling Hint: The holding in *Weatherford* is consistent with a disturbing trend at the Industrial Commission in which injured workers are being deemed permanently and totally disabled and defendants are being denied the right to vocationally rehabilitate them. Awards of that sort entitle the injured worker to lifetime indemnity benefits, as there is no cap on an employee’s right to TTD under N.C.G.S. § 97–29. As such, risk managers are encouraged to begin developing as much vocational evidence as they can as soon as possible, seeking to establish the availability of suitable employment within the injured worker’s restrictions, so as to short-circuit the Commission’s propensity for entering total and permanent disability awards.