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CASE LAW UPDATE

*Court of Appeals Orders Award of
Attorney Fees for Unreasonable Defense*

Roger Blalock, a carpenter by trade, suffered from a variety of medical problems caused by 30 years of cigarette smoking, including chronic obstructive pulmonary disease and emphysema. In October 2005, he experienced chest pains and difficulty breathing after inhaling silica dust for two days while tearing down a cinderblock wall with a masonry saw and sledgehammer.

After Blalock reported the symptoms he was experiencing to his supervisor, he sought treatment from Dr. Kenneth Shank, who ordered a chest x-ray, which showed hyperinflated lungs and Blalock's underlying COPD. Dr. Shank diagnosed an exacerbation of the pre-existing condition and possible pneumonitis. He later testified that while Blalock's underlying lung problems were caused by years of smoking, his two-day exposure to dust on the job exacerbated them.

Blalock filed an occupational lung disease claim, which his employer and its insurer denied. However, the deputy commissioner who heard and ultimately ruled on the claim found it compensable and awarded temporary total disability benefits. The defendants then appealed to the Full Commission, which led Blalock to cross-appeal, seeking entry of an attorney fee award for an unreasonable defense under N.C.G.S. § 97-88.1.

The Full Commission affirmed the deputy commissioner's award of TTD, but did not address Blalock's request that his attorney's fee be taxed against the defendants, so Blalock filed a motion asking the Commission to do so in an amended opinion and award. However, before it could rule on that motion, the defendants appealed to the Court of Appeals. The Court eventually dismissed the appeal as interlocutory, at which point Blalock renewed his motion for attorney's fees. But, the Full Commission found that it was not unreasonable for the

defendants to have contested compensability and denied the motion.

Initially, both parties appealed the case back to the Court of Appeals, but the defendants later withdrew their appeal. However, Blalock pressed forward with his, contending that it was an abuse of discretion for the Commission to deny his request that the defendants be taxed with his attorney's fee. On January 18, in *Blalock v. Southeastern Material, d/b/a Custom Wood Structures, Inc.*, the Court agreed. It reversed the Commission, found that the defense of Blalock's claim was in fact unreasonable, and remanded the case back to the Commission with instructions to determine the appropriate fee to be awarded under N.C.G.S. § 97-88.1.

After noting that the granting or denial of a motion filed under N.C.G.S. § 97-88.1 "will not be disturbed absent an abuse of discretion," the Court conducted its own evaluation of the reasonableness of defendants' denial of Blalock's claim and reversed the Commission's resolution of that issue without finding an abuse of discretion. In doing so, it found that each of the expert witnesses who testified in the case were of the opinion that "while plaintiff's COPD was pre-existing and likely due to his cigarette smoking, his inhalation of silica dust and concrete at work more likely than not caused an acute exacerbation of the COPD" The Court then cited several prior cases holding that a work-related aggravation or acceleration of an employee's preexisting, but previously non-disabling, condition is compensable and "defendants' ignorance, or affirmative disregard, of these longstanding opinions ... renders their defense unreasonable and unfoundedly litigious under N.C. Gen. Stat. Section 97-88.1."

The Court also criticized the defendants for "attempt[ing] to manipulate Dr. Shank's testimony to support their position" and for challenging the competency of the testimony of another of the three experts who testified, stating that "[c]hallenging one medical expert's testimony as incompetent ... does not justify defense of a claim when two other experts have previously testified in support of causation and no contrary medical testimony exists."

The Court also chastised the defendants for arguing that a “common sense evaluation” of the facts of the case showed that Blalock’s problems were caused by his longstanding smoking history: “defendants cannot substitute their ‘common sense’ for the opinions of experts.” Because the medical testimony left “no room for any legitimate doubt,” the Court held that “[a]t the point when [defendants] learned that their theory lacked any medical basis, they were obligated to cease denying and defending the claim based on a lack of causation.” The Court then made its own finding that continued defense of the claim “based on self-proclaimed ‘common sense’ in the face of unanimous contrary medical testimony was unreasonable,” which led it to reverse the Full Commission and remand the case to determine the amount of attorney’s fees to be awarded against the defendants.

Risk Handling Hint: In cases involving complex medical causation issues, it is not unreasonable to proceed to hearing and depose the claimant’s treating physicians, but as the holding in *Blalock* clearly illustrates, when the testifying experts are unanimous in their opinion that the condition in question is work-related, risk managers are cautioned to carefully evaluate the risk of being taxed with an attorney’s fee under N.C.G.S. § 97-88.1, if they do not accept the claim as compensable before an opinion and award is entered.

Appeal Dismissed As Interlocutory

Cheri Evans was the office manager of a Texas car dealership owned by Hendrick Automotive Group. While on a business trip to Charlotte, she injured herself returning from a company-sponsored dinner at which alcoholic beverages were served when she put her leg over the side of an escalator to ride it down, but instead fell 25 to 30 feet to the floor below.

The company’s denial of Evans’ claim for workers’ compensation benefits led her to request a hearing, after which the deputy commissioner found her injuries compensable. On appeal, the Full Commission affirmed with minor modifications that included its determination that the “defendants are responsible for additional [wage loss] benefits as will be determined by subsequent order.”

Evans filed a motion asking the Full Commission to amend its decision because some of its wage loss calculations contained clerical errors. The defendants agreed, but before her motion was ruled on, they gave notice of appeal to the Court of Appeals. Evans moved to dismiss the appeal as interlocutory because her motion to amend required the Commission to rule on the amount of compensation to which she was entitled. Hendrick’s response was that the Commission’s Opinion and Award was a final

determination and not interlocutory because it “did not expressly reserve any issues for further determination” and did not contemplate further proceedings before the Commission.

On March 1, in *Evans v. Hendrick Automotive Group*, the Court of Appeals agreed with claimant, dismissed Hendrick’s appeal, and cited *Gregory v. Penland* for the proposition that “there is generally no right to appeal an interlocutory order,” which it defined as one that “does not dispose of the case but required further action by the trial court in order to finally determine the entire controversy.” The Court acknowledged that even interlocutory orders may be immediately appealed if they affect a substantial right which, “if not corrected before appeal from a final judgment,” would work injury upon the appealing party. As applied to workers’ compensation claims, the Court held that “[a]n opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory.”

In applying those general principles to the facts before it in *Evans*, the Court held that in attempting to determine whether Hendrick’s appeal was interlocutory, the proper focus of attention was on the Full Commission’s opinion and award, not claimant’s subsequent motion to amend. At the same time, although the Commission’s opinion and award set forth the amount of temporary total and permanent partial disability benefits due, it also provided that “[d]efendants are responsible for additional benefits as will be determined by subsequent order.” This language, said the Court, “expressly reserved pending issues regarding the amount of plaintiff’s compensation award,” and her motion to amend “only serves to emphasize the interlocutory nature of the appeal” Because the opinion and award “on its face contemplated further proceedings,” the Court dismissed Hendrick’s appeal as interlocutory.

Risk Handling Hint: Risk managers not wanting to lose their appeal rights often find it difficult to forego an immediate appeal of an adverse decision, particularly when it is unclear whether the Commission’s ruling qualifies as a “final award.” The decision in *Evans* provides them with at least some guidance in attempting to determine whether a particular decision is not appealable because it is interlocutory or if it is immediately appealable because it qualifies as a final award. The defendants in *Evans* did not argue that the Commission’s opinion and award affected a substantial right. If they had, and if that right was one which would have been “lost absent immediate review,” it would have been properly appealable, even though it was interlocutory in nature.

TCDG NEWS

Additional TCDG “Rising Stars”

In its January edition, *Risk Alert* highlighted some of the members of TCDG who have been designated by their peers as “Super Lawyers” or “Rising Stars” and included in the 2011 edition of *North Carolina Super Lawyers*. **Jacob Wellman**, a 2002 graduate of the UNC School of Law, and **Courtney Britt**, a 2004 graduate of Wake Forest Law School, join **Julie Hooten**, **Bill Bulfer** and **Ed Schenk** as “Rising Stars,” while TCDG’s “Super Lawyers” include **George Dennis**, **Dayle Flammia**, **Bruce Hamilton** and **Tammy Nance**.

Recent Victories at the Industrial Commission

Melissa Cleary has obtained a favorable decision from the Full Commission in an occupational disease case in which both of the disabled claimant’s legs were amputated above the knee as the result of a severe invasive MRSA infection. The employee, who worked as an electrician, claimed that his infection was caused by the electrical work he did at Duke Medical Center in the spring of 2007. He contended that he suffered cuts and abrasions while handling wire and metal conduit and was exposed to the risk of infection when he touched a variety of surfaces in the emergency room. Although the Full Commission found that the renovation work he performed while working there placed him at an increased risk of acquiring MRSA, Melissa established that he did not develop the symptoms of his infection until the following fall and that the greater weight of evidence failed to establish a causal link between his employment and the infection that caused multiple organ failure and sepsis and ultimately led to amputation of his legs.

Melissa also received a favorable decision from Deputy Commissioner Theresa Stephenson in a case in which the employee contended that his per diem allowance, the value of an employer-provided cell phone, and use of a company-owned vehicle should be included when calculating his average weekly wage. At hearing, Melissa established that claimant did not have to keep expense receipts in order to receive his per diem, which was paid whenever he was required to stay out of town overnight, and that he could only use the vehicle when on company business. Claimant also admitted that he did not declare the per diem, cell phone or vehicle payments as income on his state or federal tax returns. For those reasons, Deputy Commissioner Stephenson found that they should not be included in when calculating his average weekly wage.

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