

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Court of Appeals Panel Debates Burden to Establish Constructive Refusal of Suitable Employment

After Patricia Brooks, a seamstress with Capstar Corporation, was struck by a door, hurt her left arm, and was diagnosed with chronic medial tennis elbow, Capstar filed a Form 60, accepting her injury as compensable.

Two different doctors released Brooks to return to work, the second noting that her motivation for doing so was low. Later, after changing physicians again, she stopped working and weekly benefits were voluntarily reinstated. Following yet another change in doctors, the Commission ordered Capstar to continue paying TTD, but it also directed Brooks to "cooperate fully with medical and vocational services."

Capstar eventually filed a Form 24 stop payment application, contending that Brooks was impeding its efforts at returning her to suitable employment, and it was approved by a special deputy commissioner. However, after Brooks appealed, evidence was taken and an opinion and award entered which rescinded the special deputy's order suspending TTD. Capstar then filed its own appeal, but the Full Commission affirmed, saying that approval of the Form 24 had been "improvidently granted" as, in its opinion, Brooks had complied with the vocational services provided by Capstar.

On January 18, in *Brooks v. Capstar Corporation*, a 2 to 1 majority of the Court of Appeals agreed with the Full

Commission. Relying on the vocational case manager's testimony that Brooks attended each scheduled meeting and had "generally" done everything asked of her, Judges McGee and Timmons-Goodson concluded there was sufficient evidence to mandate an affirmance of the Commission's decision.

In support of their Form 24, the defendants focused on two job leads which they felt Brooks had sabotaged. While interviewing for a security job with Statesville Auto Auction, she informed the manager that she could not read the vehicle identification numbers on a sheet of paper and had difficulty writing. That caused the case manager to question her motivation to return to work. She testified that claimant often focused on what she could not do, rather than what she could. And, after an interview with the Cracker Barrel, its manager informed the case manager that even though his company makes a concerted effort to work with individuals who suffer from disabilities or who have work restrictions, he did not feel claimant wanted to work.

Despite the clear import of that testimony, the Court of Appeals' majority found there was competent evidence to support the Commission's determination that claimant had been cooperative and had not intentionally sabotaged defense efforts to find her another job.

However, Judge Tyson filed a lengthy dissent based on the Supreme Court's decision in *Johnson v. Southern Tire Sales & Service* (see *Risk Alert*, August 2004).

In his opinion, the Commission had failed to make “relevant findings of fact on defendants’...uncontradicted evidence,” as claimant had not “appropriately, actively, or diligently sought suitable employment” and made no “reasonable effort to return to work,” as required by the holding in *Johnson*.

Perhaps even more importantly, Judge Tyson went on to assert that doing what the vocational case manager told her to do was insufficient for claimant to overcome Capstar’s evidence of her refusal to work, the presumption that she was capable of performing work, and her obligation to show that she had diligently sought a return to work. He would not have allowed claimant to “sit idly by,” failing to make any effort to seek or secure employment, nor would he have placed the entire burden to procure a job on Capstar, while allowing claimant every opportunity to sabotage its efforts, as the Commission and Court’s majority had done. Rather, Capstar’s “uncontradicted evidence” proved that suitable employment *was* available and claimant had both constructively refused and actually sabotaged efforts to return her to work.

Risk Handling Hint: Judge Tyson’s dissent in *Brooks* ensures the defendants a review by the Supreme Court. In the meantime, risk managers will want to continue demanding of claimants genuine cooperation in the vocational rehabilitation process. At least in Judge Tyson’s view, the Supreme Court’s decision in *Johnson* requires more from claimants than mere compliance. Rather, they have the burden of showing that they “appropriately, actively and diligently sought suitable employment.” Thus, simply doing whatever the vocational case manager might request is insufficient, at least in Judge Tyson’s opinion. Whether that view will ultimately prevail in *Brooks* remains to be seen, and we will keep you updated as to developments in this potentially important case as they occur.

Form 26 Agreement for PPD Set Aside for Failure to Submit Medical and Rehabilitation Records

Bobby Clawson, a long distance truck driver, injured his back when he slipped on ice in a parking lot. A Form 21

agreement was executed and TTD paid until his trial return to work in May 1995. Later, after Clawson stopped working again, TTD was reinstated. However, benefits were subsequently terminated due to a computer error.

After Clawson filed a hearing request, he and his employer’s TPA entered into a Form 26 for a 10% PPD rating, and it was approved by the Commission despite the fact that only a one paragraph note to Clawson’s medical file, and no documentation showing why he was not entitled to additional TTD, had been submitted.

Eleven months after the Form 26 was approved, Clawson filed a motion to set it aside on the grounds that it was not “fair and just” to him because the defendants had not supplied, and the Commission did not have, the extensive medical, rehabilitation and vocational records which had been generated in the five years between his injury and the date on which the Form 26 was approved.

The Commission ruled in Clawson’s favor, finding it did not have all the records necessary to determine whether to approve the parties’ agreement. Therefore, it was “null and void.” That led the Commission to award TTD from the date of injury until claimant returned to work, subject to a credit for the income Clawson earned during his four unsuccessful returns to work and the benefits which the defendants had already paid. It also assessed a 10% late payment penalty on all of the additional compensation it awarded claimant.

On January 18, in *Clawson v. Phil Cline Trucking Company*, the Court of Appeals affirmed, holding that the parties’ failure to submit “a full and complete medical report” with their Form 26 agreement, as required by N.C.G.S. § 97-82, the Commission’s rules, and Court’s earlier decision in *Atkins v. Kelly Springfield Tire Co.* (see *Risk Alert*, July 2004), mandated the Commission’s action in setting it aside. The Court also specifically found that it is not claimant’s responsibility, but that of the defendants, to submit all attendant medical documentation with a form agreement for PPD.

Risk Handling Hint: As discussed in some detail in the September 2004 edition of *Risk Alert*, the Commission promulgated a set of new procedures for obtaining approval of Form 21 and 26 agreements for PPD in response to the *Atkins* decision. At the same time, however, those new procedures do not cure existing defects in previously filed form agreements, which until *Atkins* were being routinely approved without “a full and complete medical and report.” Risk managers should be cognizant of the fact that each of those prior approvals is subject to future attack at any time, as occurred in both *Atkins* and *Clawson*, creating the potential for significant additional exposure in cases previously thought to have been finally resolved. While it is possible that the Legislature may eventually modify N.C.G.S. § 97-82 in an attempt to deal with *Atkins* and *Clawson*, any such change would almost certainly be prospective only.

The Court’s opinion in *Clawson* makes it clear that the defense should be given full credit for all indemnity benefits paid pursuant to approved form agreements which are subsequently set aside under the *Atkins* rationale. However, it remains unclear whether the Commission retains the discretionary authority to reaffirm its prior approval of an agreement for PPD once all of the injured worker’s medical and rehabilitation records have been submitted. Because the statute states that such agreements are “voidable” by the employee if not accompanied by “a full and complete medical report,” an argument can be made that the decision to set aside the agreement is solely within the discretion of the employee. At the same time, however, there is substantial case law authority for the proposition that it is the Commission’s job to determine the appropriateness of all settlements submitted to it for approval, which would suggest that the Commission has the discretionary authority to approve, rather than void, such an agreement, should it choose to do so.

Risk managers faced with motions to set aside Form 21 or 26 agreements under the theory espoused in *Atkins* and *Clawson* are encouraged to contact the TCD&G workers’ compensation legal team for assistance in analyzing potential defenses and other appropriate responses to them.