

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



TEAGUE CAMPBELL
DENNIS & GORHAM
EXPERIENCE | TRUST | RESULTS

WORKERS' COMPENSATION
COMMERCIAL AND CIVIL LITIGATION
PRODUCTS LIABILITY
PREMISES LIABILITY
MEDICAL MALPRACTICE
NURSING HOME LITIGATION
REAL ESTATE LITIGATION
PROFESSIONAL LIABILITY
EMPLOYMENT & LABOR LAW
CONSTRUCTION LAW
ENVIRONMENTAL LAW
BUSINESS LITIGATION
AUTOMOBILE LIABILITY
GOVERNMENT & MUNICIPAL LAW
INSURANCE LAW & COVERAGE

PLEASE CONTACT
THE ATTORNEYS AT
TEAGUE, CAMPBELL
WITH QUESTIONS
CONCERNING THE
ARTICLES IN THIS
NEWSLETTER

(919) 873-0166

WWW.TCDG.COM

JUDICIAL APPOINTMENT

Linda Stephens Appointed to the North Carolina Court of Appeals

On January 20, North Carolina Governor Michael Easley announced that he had appointed TCDG partner Linda Stephens to the North Carolina Court of Appeals. Her swearing in ceremony has been scheduled for February 2. Although Linda will be sorely missed by the firm and its clients, we congratulate her and applaud Governor Easley for recognizing Linda's outstanding legal career, while at the same time improving the quality of the State's judiciary, with her appointment to the bench. She is an excellent addition to the Court and will serve the citizenry and employers of this State with honor, integrity and distinction.

CASE LAW UPDATE

Employer Found Not Liable for Claimant's Unauthorized Medical Treatment

While working for Federal Express Ground as a manager in training on December 16, 2000, Anita Thompson injured her neck and low back removing luggage from her car. She was initially treated at Hillandale Medical Center, but

later referred to Triangle Orthopaedic Associates, where she came under the care of Dr. Raphael Orenstein.

Dr. Orenstein recommended conservative treatment, including therapy, medication and chiropractic care. He also suggested that Thompson return to work with modified duty restrictions. Even after an MRI was performed, he had been unable to determine the source of the pain she was reporting. So, when Thompson failed to respond to further treatment, Dr. Orenstein recommended that she attend a disciplinary pain program geared toward changing her attitude toward pain.

At about the same time, Thompson underwent a psychological evaluation by Dr. Scott Sanitate, who found no physical cause for her pain and determined that her symptoms were not consistent with the injury she had described. He believed her pain was psychological, concluded that she had reached maximum medical improvement, and stated that she was able to return to work with no permanent partial disability. The only additional treatment he recommended was a limited course of chiropractic care.

At that point, Thompson requested another opinion and asked to be referred to an osteopath. Because she had experienced no relief from chiropractic care, Dr. Orenstein felt that osteopathic

treatment was unnecessary, so he refused Thompson's request. But, she went to the Internet, found an osteopath, Dr. Thomas Motyka, and began receiving treatment from him on April 24, 2001.

Dr. Motyka eventually diagnosed fibromyalgia. Although Dr. Orenstein disagreed with that diagnosis, he later stated that Dr. Motyka's treatment from April 24 through June 26, 2001 was not necessarily inconsistent with the type of chiropractic treatment he had recommended for her, so it was both reasonable and necessary. However, as of June 26, 2001, Dr. Orenstein recommended no further chiropractic or osteopathic treatment.

Federal Express Ground and its workers' compensation carrier initially took no affirmative action to accept Thompson's claim as compensable, although they did pay her medical bills. On August 8, 2001, however, they accepted liability by filing a Form 60. But, at the same time, they refused to pay for the unauthorized treatment provided by Dr. Motyka.

On May 15, 2002, almost 13 months after she referred herself to Dr. Motyka, Thompson belatedly requested that the treatment he had been providing to her be approved by the Commission. She filed a motion to that effect, and at the same time filed a Form 33.

After an evidentiary hearing was conducted and an opinion and award entered by a deputy commissioner, Thompson's claim came before the Full Commission on appeal. Although it found claimant entitled to temporary total disability benefits and ordered the defendants to pay for Dr. Motyka's treatment for the limited time period between April 24 and June 26, 2001 under the theory it had been subsequently approved by Dr. Orenstein, the Full Commission also found that claimant's motion seeking approval of the remainder of Dr. Motyka's treatment was "not timely filed." As a consequence, it determined that the defendants were not liable for the unauthorized treatment Dr. Motyka had provided after June 26, 2001.

On January 17, in *Thompson v. Federal Express Ground*, the Court of Appeals affirmed the Full Commission's holding in that regard. In the course of doing so, it first acknowledged that, as a general rule, employers have the right to direct any medical treatment which is necessitated by a compensable work-related injury, and that necessarily includes the right to select the treating physician. However, the Court also cautioned that an employer's right to direct medical care only arises once it has accepted a claim as compensable.

In the present case, while Federal Express Ground had paid claimant's medical bills from the beginning, doing so was not an admission of liability. And, in fact, the defendants did not admit compensability until they filed their Form 60 on August 8, 2001. Therefore, they would not have been entitled to direct claimant's medical care until that date.

By the same token, however, the Court rejected claimant's argument that the Commission erred when it refused to find the defendants responsible for all of the unauthorized treatment she had received from Dr. Motyka. While the provisions of N.C.G.S. § 97-25 permit an injured employee to select a physician of her own choosing, that right is "subject to the approval of the Industrial Commission." But, in this case, the Commission had determined that claimant did not seek Commission approval of Dr. Motyka's treatment within a reasonable time and, therefore, claimant's motion was "not timely filed." Because the Court of Appeals found ample evidence of record to support that determination, it affirmed the Full Commission's opinion adverse to claimant.

Risk Handling Hint: The holding in *Thompson* provides several useful reminders to risk managers. First, it is well established that payment of medical bills alone does not constitute an admission of liability, nor is it the equivalent of a stipulation of compensability. On the other hand, risk managers should recognize that the only

time defendants are statutorily authorized to select the treating physician and actually direct an injured worker's medical care is after they have accepted compensability.

The clearest way to do so is by the filing of a Form 60 admitting compensability. Other circumstances in which the Commission has found that the defendants have accepted liability so as to trigger their right to direct the injured worker's medical care have included cases in which the employer has written a letter accepting the claim as compensable. Most often, this situation arises in those cases in which no indemnity benefits have been paid and a Form 60 may not be the most appropriate way to notify all interested parties, including the Commission, that the claim has been accepted.

Employer Held Responsible for Injury Which Occurred During Subsequent Employment

Last month, the Supreme Court issued a *per curiam* opinion affirming the 2-to-1 decision of the Court of Appeals in *Taylor v. Carolina Restaurant Group, Inc.* which Risk Alert addressed in its June 2005 edition.

In *Taylor*, the injured worker suffered a compensable injury to her right knee in July 1994 while working at a Wendy's restaurant owned by Carolina Restaurant Group (CRG). She was injured to such an extent that she had to have total knee replacement surgery and was eventually given a 50% PPD rating to her leg.

Taylor stopped working at the Wendy's restaurant, but was later hired as a janitor by Richmond Community College. In January 2000, she fell on black ice in the college parking lot and injured her *left* knee, which became increasingly painful over time, to the point that two arthroscopic procedures were required to treat it.

Taylor's left knee eventually healed well, although she was given a 20% permanent impairment rating and light duty work restrictions. However, her *right*

knee became more painful, necessitating additional arthroscopic surgery in 2002, during which a deteriorated portion of her knee implant was replaced.

Taylor requested a hearing, seeking additional benefits and claiming to be totally disabled. At that point, her 1994 and 2000 injury claims were consolidated for hearing. Then, Taylor reached a clincher settlement with the college resolving her left knee injury claim, but she continued to pursue her right knee claim against CRG.

Deputy Commissioner Phillip Holmes, who heard the case, concluded that when Taylor injured her left knee at the college in January 2000, she also aggravated the condition she had developed as a result of the injury she sustained at the Wendy's restaurant in July 1994. Therefore, he held that the later injury was the cause of her condition, and since claimant had relinquished her right to further compensation from the college when she clinched her claim against it, no further benefits were owing as a result of the January 2000 injury and her current disability was not causally related to the original injury she sustained in July 1994.

However, the Full Commission reversed Deputy Commissioner Holmes' opinion and award, with Chairman Lattimore dissenting. The Full Commission's majority opinion found that it was claimant's 1994 right knee injury which had caused her to become totally disabled, and it ordered CRG to pay ongoing weekly benefits.

As reported in *Risk Alert* last June, after CRG appealed the Court of Appeals affirmed the Full Commission in a 2-to-1 decision, over the vigorous dissent of Judge John Tyson. The majority felt that while there was a substantial amount of evidence which would have supported a contrary resolution of the case, such as that reached by Deputy Commissioner Philip Holmes, there was sufficient evidence to support the Full Commission's findings and, therefore, they were bound to affirm those findings and its resulting award of benefits.

Judge Tyson, on the other hand, argued that there was *no* evidence to sustain the Full Commission's findings. To the contrary, he found undisputed evidence that claimant's pre-existing right knee condition had been aggravated by her January 2000 slip and fall at the college. To Judge Tyson, "[p]laintiff should not be permitted to settle with Richmond Community College, then recover from defendants in this case that which would be paid by Richmond Community College but for the settlement agreement."

Risk Handling Hint: The Supreme Court's affirmance of the Court of Appeals majority's opinion in *Taylor* is a strong reminder to risk managers of the immense power that the Full Commission, as the ultimate finder of fact, has over the final resolution of claims such as this.

Interestingly, one presumably unintended consequence of the Supreme Court's rejection of Judge Tyson's dissent in *Taylor* is that our appellate courts may have created new defense possibilities in those cases in which the injured worker is alleging aggravation of a preexisting condition as the result of a subsequent injury, causing total disability. Judge Tyson's dissent focused on the fact that prior case law had clearly established that when an employment-related injury aggravates or accelerates a preexisting condition and proximately contributes to the employee's disability, that disability is the responsibility of the last employer. However, the net effect of the holding in *Taylor* is that, in the proper circumstances, defendants can now make the argument that claimant's subsequent injury was *not* in fact the cause of her disability, even if her preexisting condition was aggravated to some extent, if the later employer is able to establish that claimant's preexisting injury was of such a nature and to such an extent that her total disability actually resulted from the initial injury and not the subsequent aggravation.

TCDG NEWS

FORMER DEPUTY COMMISSIONER REJOINS TCDG

Former Deputy Commissioner Tamara R. (Tammy) Nance has rejoined TCDG, bringing with her nearly 25 years of workers' compensation experience. She previously worked with our firm from 1996 to 1999, after serving with the Industrial Commission as a deputy commissioner from 1987 to 1995. As in the past, Tammy, who is also a certified mediator, will specialize in the defense of workers' compensation claims.

TCDG ATTORNEYS AMONG NORTH CAROLINA SUPER LAWYERS

TCDG attorneys George Dennis, Dayle Flammia, Linda Stephens, Bruce Hamilton, Bob Kerner and Jan Pittman have been named "super lawyers" in the inaugural edition of North Carolina Super Lawyer magazine. The top 5% of all practicing attorneys in North Carolina, as determined by their peers, received this designation. Four of TCDG's "super lawyers" received this award in the area of workers' compensation. No other law firm had more than two attorneys so honored.

PLEASE CONTACT THE ATTORNEYS
AT TCDG WITH QUESTIONS YOU HAVE
ABOUT THE ARTICLES IN
RISK ALERT
(919) 873-0166 • WWW.TCDG.COM