

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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RUMBLINGS AT THE INDUSTRIAL COMMISSION

In an attempt to “bring greater predictability, efficiency and timeliness to the hearing process,” the Industrial Commission recently revised its docketing and hearing procedure rules. Under the new docketing rules, cases will be heard during the second month after mediation, reducing the time between mediation and hearing by about 30 days. The Deputy Commissioners have also been placed on new six-month rotations, during the first five months of which they will retain jurisdiction over any cases that are continued and then reset for hearing. In addition, a uniform Pre-Trial Order has been adopted, which the parties will be required to file no later than the third Thursday of the month immediately preceding the date on which the case is scheduled to be heard.

CASE LAW UPDATE

Commission's Calculation of Bus Driver's Average Weekly Wage Reversed

Debra Conyers had been a bus driver for the New Hanover County Schools for 12 years when she sustained a compensable injury in October 2001. She only worked during the school year and was neither employed nor paid during the summer. While she earned a weekly average of \$436.00 during the months she worked, her total earnings during the 52-week period immediately prior to her injury only came to \$17,608.94.

Deputy Commissioner Holmes held a hearing to resolve multiple issues, including average weekly wage. He eventually held that the first method for determining average weekly wage found in N.C.G.S. § 97-2(5), i.e., dividing the employee's earnings during the 52-week period prior to injury by 52, should be used, producing an average weekly wage of \$338.63. However, after claimant appealed, the Full Commission reversed, holding that the third method [“where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks ... during which the employee earned wages ...”] should be utilized, and that generated an average weekly wage of \$434.07.

The school system then appealed to the Court of Appeals, which on January 15, in an opinion authored

by retired TCDG partner Linda Stephens, *Conyers v. New Hanover County Schools*, reversed the Full Commission and remanded the case for entry of an award based on an average weekly wage calculated by dividing claimant's wages during the 52 weeks prior her injury by 52. Judge Stephens observed that N.C.G.S. § 97-2(5) “sets forth five methods, in order of preference, by which an injured employee's average weekly wages are to be computed.” She found that the three methods potentially applicable to this case were the first, relied upon by Deputy Commissioner Holmes, the third, relied upon by the Full Commission, and the fifth: “where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method ... may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

In applying those legal principles to the facts of the *Conyers* case, Judge Stephens noted that “[t]he dominant intent of this statute is to obtain results that are fair and just to both employer and employee.” She then found that claimant's average weekly wage could not be calculated using the first method because her employment extended for less than 52 weeks prior to her injury and using method three, as the Full Commission did, produced an unfair result from the school district's perspective, as it resulted in annual compensation almost \$5,000 more than what claimant actually earned in the 52 weeks prior to her injury. To Judge Stephens, “this result is not fair and just as Defendant would be unduly burdened while Plaintiff would receive a windfall.”

Judge Stephens then went on to discuss the fifth, “exceptional reasons,” method of calculating average weekly wage, which “may only be utilized subsequent to a finding that the previous methods were either inapplicable, or were applicable but would fail to produce results fair and just to both parties.” Having reached precisely that conclusion, she noted that the Supreme Court's decision in *Joyner v. A. J. Carey Oil Co.* was authority for finding that it would be unfair to the employer to not take into consideration the slack periods of claimant's employment. She was like a “seasonal” worker because she only worked during the school year and not the summer. As such, the proper method for calculating her average weekly wage would be to divide her total wages during the 52 weeks prior to her injury by 52, resulting in an average weekly wage of \$338.63, a figure which “most nearly approximated the amount the injured employee would be earning were it not for the injury.”

Risk Handling Hint: Although the first method of calculating average weekly wage found in N.C.G.S. § 97-2(5) could not be utilized in *Conyers* because claimant did not work a full 52 weeks prior to her injury, the Court of Appeals ultimately calculated her average weekly wage in substantially the same way under the fifth method. It rejected the notion that this “might be an impermissible way to circumvent the statute when calculation under the first method was otherwise inappropriate” because “the dominant intent of N.C.G.S. § 97-2(5) is that ‘results fair and just to both employer and employee be obtained.’” The Court also noted that “the language of the fifth calculation method neither requires nor prohibits any specific mathematical formula from being applied; instead, the statute provides that average weekly wage calculations should “most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

In applying the holding in *Conyers* to their cases, risk managers are advised to promptly obtain completed wage charts, make average weekly wage calculations in the order of preference set forth by the statute, and keep in mind that even if a particular method might otherwise apply, it should not be utilized if it produces results that are not fair to both parties.

Finding of Disability Lacks Evidentiary Support

In a 1988 automobile accident, Zoraida Williams suffered bilateral femur fractures that required rod placement. Twelve years later, she sustained a back injury in another auto accident, but this time her injuries arose out of and in the course of her employment. When seen at Rex Hospital for treatment of her back injury, the doctor who took her history noted that she reported no symptoms related to her prior bilateral femur fractures.

Williams’ claim was accepted as compensable on a Form 63. Surveillance subsequently showed her sweeping without a limp and entering and exiting a car at several places of business without assistance. At the same time, when seen in the Behavioral Medicine Pain Management Program at the North Carolina Spine Center, she walked very slowly with a pronounced limp and held onto the walls when entering the interview room.

After completing a pain management program under the direction of Dr. Catherine Lawrence, Williams was given work restrictions and a five percent permanent disability rating to her back. Later, however, after she reviewed the results of the surveillance, Dr. Lawrence testified that Williams had no work restrictions and a zero percent rating to her back.

In August 2003, Williams came under the care of Dr. Steven Olson at Duke Medical Center, who found that her right femoral rod had broken. He was unsure why or how that happened, but felt it unlikely that it was connected to the auto accident she had in 2000.

In response to questioning from claimant’s attorney as to whether that accident substantially aggravated her preexisting back condition, Dr. Olson responded in the negative. He testified

that “there is no reason I can identify as to why this accident should have precipitated this pain” and added that it was possible, but not probable, that claimant’s pain was caused by the broken rod in her leg. When pushed to clarify his opinion in that regard, he said that “it is within the realm of possibility, but I am not more than 50 percent sure that it is.”

Based on that evidence, Deputy Commissioner Deluca found that claimant was not disabled, that she was not entitled to TTD after March 2002, and that the defendants were entitled to a credit for all compensation paid after that date. However, over Commissioner Lattimore’s dissent, the Full Commission reversed, finding that claimant suffered from chronic leg pain resulting from her on-the-job injury and was entitled to ongoing TTD.

The defendants then appealed to the Court of Appeals, which on January 15, in *Williams v. Law Companies Group, Inc.*, reversed the Full Commission’s award and held that claimant had failed to meet her burden of proving medical causation. Judge Wanda Bryant, speaking for the Court’s majority, found that “the Commission’s conclusions of law are in error as causation must be established by the evidence ‘such as to take the case out of the realm of conjecture and remote possibility.’” In this case, as Commissioner Lattimore noted in his Full Commission dissent, “all of these physicians’ opinions do not rise above the level of a guess or mere speculation [and are] ... insufficient to prove that plaintiff’s current symptoms are related to her compensable injuries.”

Judge Martha Geer dissented, however. While she agreed with the Court’s majority that the medical evidence offered by claimant in her attempt to prove medical causation, that is, her doctor’s testimony that the auto accident “could have” caused the rod in her leg to break, was insufficient as a matter of law, nevertheless, Judge Geer would have remanded the case back to the Commission to make additional findings of fact as to whether claimant’s ongoing inability to be gainfully employed was due to a chronic pain syndrome caused or contributed to by her injury at work.

Risk Handling Hint: The holding in *Williams* provides risk managers with further ammunition for contesting claims involving testimony from expert medical witnesses to the effect that the employee’s workplace injury “could or might” have caused her disability. At the same time, however, risk managers should be cognizant of the fact that the result in this case might have been different if claimant had assigned as error the Full Commission’s failure to apply the so-called *Perez* and *Parsons* presumptions (see *Risk Alert*, October 2006) to this case. If raised, those presumptions would have shifted the burden to the defense to prove that claimant’s ongoing complaints and disability were not causally related to her workplace injury. Judge Geer’s dissent serves as a useful reminder that, even when a favorable ruling is received from the Full Commission, if claimant gives notice of appeal it is important for the defendants to consider whether to cross-assign as error any ruling which deprives them, as appellees, of an alternative basis for obtaining an affirmance from our appellate courts.

TCDG NEWS

New TCDG Partners

TCDG is pleased to announce that, effective January 1, 2008, Tammy Nance and Carrie Meigs became partners in the firm. Tammy, who rejoined TCDG in 2005, is a former deputy commissioner who specializes in the defense of workers’ compensation claims. Carrie, a 1998 graduate of the University of North Carolina School of Law, specializes in the areas of medical malpractice defense, professional and general liability defense, and insurance coverage.

TCDG “Super Lawyers”

TCDG was recently advised that George Dennis, Dayle Flammia, Bruce Hamilton and Tammy Nance have all been selected by their peers for inclusion in the 2008 edition of North Carolina Super Lawyers, an annual publication which recognizes attorneys who have attained a high degree of peer recognition and professional achievement. TCDG had more attorneys selected in the field of workers’ compensation than any other firm in North Carolina.

Latest TCDG Litigation Successes

TCDG partner Melissa Cleary has successfully defended *Bennett v. Johnson Controls*, in which the employee, who had longstanding knee problems requiring extensive medical treatment, including surgery, alleged a compensable injury to her back and both knees. While claimant pursued her claim under joint theories of injury by accident and occupational disease, Melissa established to the satisfaction of Deputy Commissioner Phillip Holmes that the medical evidence offered in support of the claim was insufficient to establish medical causation and, therefore, the claim had been properly denied by Johnson Controls.

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