

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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NEWSLETTER

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RUMBLINGS AT THE INDUSTRIAL COMMISSION

New Commissioner Staci Meyer

On his last day in office, Governor Easley appointed a new Commissioner, Staci Meyer, to replace former Chairman Buck Lattimore. Commissioner Meyer had been serving as chief deputy, general counsel and acting head of the North Carolina Department of Cultural Resources.

New Chief Deputy Commissioner

Chair Pam Young has appointed Wanda Taylor Chief Deputy Commissioner, effective February 1. She replaces Steve Gheen, who will resume hearing cases as a Deputy Commissioner.

New Mileage Reimbursement Rate

On January 27, the Commission announced that in 2009 the mileage reimbursement rate for medical travel will be 55 cents per mile.

CASE LAW UPDATE

*Employer's Actual Notice of an Injury Obviates
Need for Written Notice*

Last February, *Risk Alert* reported on *Richardson v. Maxim Healthcare*, in which a 2-to-1 majority of the Court of Appeals held that the Commission failed to properly address whether the injured worker had reported her injury as required by N.C.G.S. § 97-22. The Court's majority ruled that the claimant's failure to give timely notice in writing was a bar to compensation unless "reasonable excuse" was provided for not having done so *and* she established that her employer was not prejudiced by the delay. The Court observed that "the mere existence of actual notice, without more, cannot satisfy the statutorily required finding with respect to 'prejudice.'"

On December 12, the Supreme Court reversed, holding that "[w]hen an employer has actual notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings

about prejudice." According to the author of the Supreme Court's opinion, Justice Robin Hudson, "[t]he plain language of section 97-22 requires an injured employee to give written notice of an accident 'unless it can be shown that the employer, his agent or representative, had knowledge of the accident.'"

By its holding in *Richardson*, the Supreme Court has read out of N.C.G.S. § 97-22 the entire second half of the statute, which provides that "no compensation shall be payable unless ... written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made ... for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." The Court's explanation for ignoring that provision was that it "[only] applies to those cases in which written notice is required because the employer has no actual notice of the accident." The statute itself contains no such limitation and the Court cited no authority for its assertion in that regard.

Also troubling was the Court's gratuitous observation that "the employer's 'actual notice' or 'knowledge' of the accident ... triggered the employer's duties set forth elsewhere in the Act to notify the Commission within five days, to notify the plaintiff within fourteen days of its decision to admit or deny the injury, and to quickly investigate."

Risk Handling Hint: The *Richardson* decision is in direct conflict with both the notice provisions of N.C.G.S. §§ 97-22 and 97-23 and their intent. The plain language of both statutes makes clear the Legislature's intent to promote prompt and complete reporting of claims. N.C.G.S. § 97-23 specifically calls for claimants to provide details of their accidents in the notices they are required to give to their employers. Yet, the holding in *Richardson* would suggest that the employee need only mention an accident to her employer to satisfy all of the notice requirements found in the Act.

The *Richardson* decision could well have a dramatic impact on the practical, day-to-day handling of workers' compensation claims in North Carolina. Employers and carriers may now find themselves subject to sanctions if they fail to investigate a "claim" following notice

of an "accident" by an employee and will be placed in a position of having to spend time and money investigating every report of an incident, however slight and regardless of whether the employee has any intention at the time of filing a workers' compensation claim.

Equitable Doctrine of Laches Applicable to Workers' Compensation Claims

In November 1992, Lola Daugherty was attacked by a patient and injured while working as a Health Care Technician at Cherry Hospital. She received medical treatment and was released to return to work the following day. A month later, she sought psychiatric care for depression from Dr. Louis Gagliano.

In February 1993, Daugherty filed a Form 18, alleging physical and psychological injuries caused by the November 1992 attack. The hospital admitted that her physical injuries were compensable, but denied the psychological injury claim. Later, when Daugherty's family doctor wrote a letter linking her psychological problems to the attack, the hospital requested a second opinion from Dr. Gagliano. When she refused to submit to one, the hospital advised her that, pursuant to N.C.G.S. § 97-27 (a), her "right to ... prosecute any proceedings under the Workers' Compensation Act is suspended."

Despite her psychological problems, Daugherty returned to work for the hospital in July 1993 and continued working there until November 1994, when she voluntarily resigned to complete her training as an LPN. The hospital heard nothing further from her until May 2006, when it received her hearing request seeking a retroactive award of indemnity and medical compensation for the 1992 injury.

The hospital denied Daugherty's claim for benefits, contending that it was time-barred under N.C.G.S. §§ 97-22, 97-24, and 97-25.1. The Full Commission agreed, finding that her lengthy delay in prosecuting the claim was unreasonable, "disadvantaged and prejudiced defendant" and was, therefore, barred by the doctrine of laches.

Daugherty appealed to the Court of Appeals, which on January 20, in an opinion written by TCDG alumnus Judge Linda Stephens, approved the Commission's application of the doctrine of laches. At the same time, the Court remanded the claim back to the Commission for further proceedings under Industrial Commission Rule 613.

The Court first observed that, being an equitable remedy, laches is applied "where lapse of time has resulted in some change in the ... relations of the parties which would make it unjust to permit the prosecution of the claim." It noted that while equitable remedies should not be utilized to supplant specific statutory provisions, the Supreme Court held more than fifty years ago in *Biddix v. Rex Mills, Inc.* that equitable estoppel is applicable to workers' compensation claims. In keeping with that precedent, the *Daugherty* Court ruled that "the equitable law of laches applies in workers compensation proceedings as in all other cases."

Having determined that laches is applicable to workers' compensation claims, the Court then considered whether it had been correctly applied by the Commission in this case. Noting that as a general matter courts should not resort to equitable relief when the party seeking it "has a full and complete remedy at law," the Court then looked at whether the Workers' Compensation Act provided the hospital with "a full and complete remedy against prejudicial delay caused by plaintiff's 13-year failure to pursue her claim" It found that Rule 613 "provides Defendant with a complete remedy against Plaintiff's detrimental delay in prosecuting her claim," as it states that "any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute"

Because the hospital had not filed a motion to dismiss for failure to prosecute under Rule 613 by the time claimant requested a hearing, the Court held that it was error for Commission to apply laches to bar her claim. Therefore, it reversed the Commission's dismissal with prejudice, but remanded the case for findings as to whether the claim should be dismissed pursuant to Rule 613. In doing so, the Court found competent evidence in the record to support the Commission's finding that claimant had "acted in a manner which deliberately or unreasonably delayed her case" and that the hospital was prejudiced by that delay. However, because the Commission did not make any findings on the issue of whether sanctions short of dismissal would suffice, the Court remanded the case to the Commission "for further proceedings under Rule 613"

Risk Handling Hint: In the past, the Commission has routinely granted Rule 613 motions to dismiss for failure to prosecute. However, in 2004, the Court of Appeals held in *Lee v. Roses* that the Commission must make findings of fact on three issues when dismissing a claim under Rule 613: (1) did claimant deliberately or unreasonably delay the matter; (2) was the defendant prejudiced by the delay; and (3) are there sanctions short of dismissal that would suffice?

While the net effect of the holding in *Daugherty* is that, in light of the remedy provided by Rule 613, the doctrine of laches cannot be utilized as a basis for dismissing a claim for failure to prosecute, the Court's decision may nevertheless provide risk managers with an additional basis for contesting other claims, such as belated requests for medical treatment. On the other hand, defendants can expect claimants and their attorneys to plead laches to their benefit when the facts of the case tend to show that the defendants have been guilty of unreasonable delay to the prejudice of the injured worker. It remains to be seen whether *Daugherty* will have any far-reaching effects, or if its applicability will be as limited as the doctrine of equitable estoppel has been since the Supreme Court's decision in *Biddix*.

TCDG NEWS

NEW TCDG PARTNER

TCDG is pleased to announce that Carla Martin Cobb became a partner in the firm, effective January 1. Carla is a 2001 graduate of Campbell Law School. Her practice areas include workers' compensation, general civil litigation, premises liability and professional liability.

TCDG SUPER LAWYERS

TCDG is pleased to announce that George Dennis, Dayle Flammia, Bruce Hamilton and Tammy Nance have all been selected by their peers for inclusion in the 2009 edition of *North Carolina Super Lawyers*, an annual publication which recognizes attorneys who have attained a high degree of peer recognition and professional achievement. In addition, Melissa Cleary was chosen as a "Rising Star" for her work in the area of workers' compensation law. As was the case in 2008, TCDG had more attorneys selected in the field of workers' compensation than any other defense firm in North Carolina.

UPCOMING TCDG CONTINUING LEGAL EDUCATION LECTURE

On February 13, Bruce Hamilton and Kathryn Deiter-Maradei will be featured speakers at the annual continuing legal education seminar sponsored by the Workers' Compensation Section of the North Carolina Bar Association at the Grandover Resort and Conference Center in Greensboro. Bruce and Kate will be presenting the Appellate Case Law Update.

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