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CASE LAW UPDATE

Constructive Refusal/Voluntary Termination

Uldarica M. Keeton worked as a manager for Circle K, which required travel to Charlotte area Circle K locations to supervise the various stores in that market. While traveling to one of those stores, Keeton was injured in a motor vehicle accident. The claim was accepted as compensable and Keeton received medical treatment for various injuries and was released to return to regular activities. Keeton was subsequently transferred to the Winston-Salem area. Keeton made a single trip to her new job location before seeking additional medical treatment for an exacerbation of her work-related condition. Keeton contended that the commute to Winston-Salem from Charlotte aggravated her back symptoms and headaches. Keeton went on medical leave from her employment with Circle K and was paid temporary total disability benefits. Keeton did not return to work thereafter at any time for Circle K, seek a position in a different capacity with Circle K or contact Circle K regarding her absence. Keeton's employment was subsequently terminated and defendants filed a Form 24 to request suspension of indemnity benefits as a result of Keeton's refusal of suitable employment. Defendants' Form 24 was denied in the administrative setting; defendants appealed and both the Deputy Commissioner and Full Commission ruled in defendants' favor. Specifically, the Full Commission concluded that the Winston-Salem area position was within Keeton's permanent restrictions, that Keeton did not make a reasonable effort to return to her position, that Keeton's refusal of the Winston-Salem position was not justified and that Keeton was not entitled to any disability payments during the time of her unjustified refusal to return to work. Keeton appealed the Full Commission's Opinion and Award to the Court of Appeals.

On December 6, 2011, in *Keeton v. Circle K*, the Court of Appeals affirmed the Full Commission's Opinion and Award. The Court first addressed Keeton's argument that the issue of refusal of suitable employment was improperly resolved by the Full Commission when defendants had not raised the issue in the Pre Trial Agreement. The Court

concluded that the issue was properly addressed when the parties stipulated to the issue as to whether defendants Form 24 should have been approved and both the Special Deputy Commissioner and the Deputy Commissioner made detailed findings as to the contentions of each party with regard to Keeton's ability to perform the Winston-Salem job.

In rejecting Keeton's argument that the Full Commission erred in not following the Court's prior holding in *Seagraves*, the Court noted that the threshold issue for a determination of refusal of suitable employment was whether the employment was voluntarily or involuntarily terminated. The *Seagraves* analysis only applies to situations of involuntary termination. According to the Court, the undisputed evidence was that Keeton never returned to work for Circle K, she never contacted Circle K about returning to work in any other capacity, that her employment with Circle K was not terminated until 18 weeks after expiration of her protected leave period and that Keeton contacted staffing agencies and recruiters to 'keep her options open' during that time. The voluntariness of Keeton's termination obviated any consideration of 'constructive refusal' under *Seagraves* by the Full Commission.

The Court also found that the Full Commission did not err in finding that the Winston-Salem position constituted suitable employment and was within Keeton's work restrictions. According to the Court, Keeton's refusal of suitable employment was not justified when her basis for not returning to work was premised on her personal belief that she could not perform the prescribed duties. The Commission concluded that the position in Winston-Salem was suitable as long as Keeton was permitted to take short breaks while driving as required by her work restrictions and that Circle K had accommodated those restrictions thus rendering Keeton's refusal of this position unjustified. The Court further noted that all of Keeton's treating physicians had opined that the Winston-Salem position was physically suitable to Keeton's permanent restrictions.

Risk Handling Hint: The *Keeton* case clarifies that it is within the Commission's discretion to determine what evidence is most relevant

VOLUME 14

NUMBER 1

to the consideration of whether a job is within an employee's restrictions. In *Keeton*, the Full Commission gave more weight to the opinions of the various physicians who examined the employee and considered her job duties, than the employee's testimony. To the extent possible, Risk Managers should make every effort to provide suitable light duty work to bring injured employees back to work. Risk Managers should also seek approval of the proffered job by the authorized treating physician. If an employee is unwilling to cooperate with return to work efforts, defendants may be able to prevail upon the Commission to terminate benefits especially if the medical evidence establishes that the employee is physically capable of the work.

Pre-Approval of Attendant Care

Dewey D. Mehaffey sustained a compensable knee injury while working as a manager for Burger King. Mehaffey underwent surgery but did not improve. Concerned about regional pain syndrome, Mehaffey's authorized treating surgeon referred him to a pain specialist, Dr. Eugene Mironer, who performed an unsuccessful lumbar sympathetic block. Mehaffey then presented to his family physician, Dr. John Stringfield, who referred him to a chronic pain specialist and psychiatrist for treatment of depression. Although Burger King and Liberty Mutual approved a trial spinal cord stimulator which was implanted by Dr. Mironer, they did not approve prescriptions by Mehaffey's family physician, Dr. Stringfield, for a hospital bed, a motorized wheelchair and a mobility scooter.

Mehaffey's wife, untrained as a nurse, quit her job and provided full time attendant care for her husband. Judy Clouse, RN, a nurse consultant with the North Carolina Industrial Commission, made recommendations that defendants compensate Mehaffey for psychological sessions, an RSD specialist evaluation, rehabilitation sessions, wheelchair specialist appointment, eight hours of attendant care per day for five days a week, and the purchase or rental of a hospital bed. Defendants

approved the rehabilitation and wheelchair evaluations, but did not otherwise authorize any of Ms. Clouse's other recommendations. Dr. Stringfield, Mehaffey's family physician, recommended approval of sixteen hours of attendant care services per day retroactive to the date of RSD diagnosis.

Defendants offered to provide Mehaffey with transportation to an RSD specialist as well as hotel accommodations, but Mehaffey declined the treatment. The RSD specialist subsequently testified that use of a wheelchair would be counterproductive to Mehaffey's treatment, and also stated that there was no medical basis for providing him with a hospital bed. The Full Commission gave full weight to Dr. Stringfield's recommendations and found that Mehaffey was entitled to a hospital bed, mobility scooter, vehicle modifications and home modifications to allow mobility and accessibility within his home. The Full Commission also awarded retroactive compensation for Mehaffey's wife's attendant care services for up to sixteen hours per day and for future attendant care services up to eight hours per day. Defendants appealed the Full Commission decision to the Court of Appeals.

On December 6 2011, in *Mehaffey v. Burger King*, the Court of Appeals reversed, in part, the Full Commission's decision awarding attendant care services. The Court noted that when attendant care is provided prior to approval by the Commission and is not rendered in response to a sudden emergency, the employee is not entitled to recover for those services. *Hatchet v. Hitchcock Corp.* According to the Court, this specifically applies to practical nursing services by members of the employee's immediate family. In addition, N.C.G.S. § 97-25 and 97-26 requires that "fees for practical nursing service by a member of claimant's family or anyone else will not be honored unless written authority has been obtained in advance." *Hatchet*, 140 N.C. at 593. As a result, defendants were not required to reimburse Mehaffey for the services provided by his wife. The Court rejected

Mehaffey's argument that *Godwin* overruled *Hatchet*, a case where retroactive payments were upheld for a family member who provided attendant care prior to the Commission's approval. The Court distinguished *Godwin* because a separate statute was involved and the Commission had approved some, but not all, of the payments which constituted "substantial, if not technical, compliance of the Commission's Rules." *Godwin* 270 N.C. at 694. Here, because no payments had been previously approved the Commission and N.C.G.S. § 97-25 and 97-26 applied, *Hatchett* was the controlling authority and Mehaffey was not entitled to payments for his wife's attendant care services provided prior to the Commission's approval.

In affirming the Commission's award of ongoing attendant care, a hospital bed, mobility scooter, wheelchairs and home and vehicle modifications, the Court noted that the Commission is the "sole judge of credibility of the witnesses and the weight to be given to testimony," *Anderson v. Lincoln Constr. Co.* Despite the fact that some physicians did not recommend the treatment that was eventually prescribed, the Commission gave greatest weight to Dr. Stringfield's recommendation and the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even when there is evidence that supports a finding to the contrary. *Jones v. Myrtle Desk Co.*

Risk Handling Hint: N.C.G.S. § 97-2(19) was revised last year to include a provision about attendant care services. Now, the "term 'medical compensation' means medical, surgical hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission..." Employees seeking payment for attendant care services of family members must now have a prescription for those services from an authorized treating physician.

TCDG NEWS

TCDG is pleased to announce that several of our attorneys will be included in the upcoming North Carolina Edition of *Super Lawyers*. In order to develop its list, *Super Lawyers* identifies outstanding lawyers, from more than 70 practice areas, who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Dayle A. Flammia, Bruce A. Hamilton and George W. Dennis will be listed in the upcoming 2012 issue. In addition, Carla M. Cobb, William A. Bulfer, Julia S. Hooten, Courtney C. Britt, Kate A. Deiter-Maradei, Edward S. Schenk and Matthew W. Skidmore will be included in the list of "Rising Stars." For more

information about the attorneys of TCDG, please go to www.tcdg.com/attorney_profiles/.

TCDG's Brad Inman recently received a favorable decision from Deputy Commissioner Phillip A. Holmes in a case where plaintiff alleged that her post-injury position as a materials handler with the employer was make-work and caused her to earn less money since the position was modified from her pre-injury job. Defendants put on evidence that the wages of all employees fluctuated with the economy and that plaintiff's position was not modified or created for her after the injury. The Deputy Commissioner held that the job was suitable, that plaintiff was not entitled to past-due indemnity, and she was not earning less wages as a result of her injury or condition.

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