

RISK/ALERT

A TEAGUE CAMPBELL DENNIS AND GORHAM PUBLICATION

JULY 2000

CASE LAW UPDATE

Court of Appeals Reverses Award of Permanent and Total Disability

On June 6, in a case defended by TCD&G, the Court of Appeals reversed an award of permanent and total disability benefits. ***Demerey v. Converse, Inc.***

In 1994, plaintiff injured his back, received medical care and then returned to regular work duties, but continued to complain of back pain. On January 2, 1995, he left his job, never to return. Plaintiff was eventually diagnosed with a herniated disc at L4-5, for which he underwent multiple operations. The treating physician felt he reached MMI in September 1996 with a 20% PPD rating. He restricted plaintiff to work involving frequent changes of position and limited bending, stooping and lifting.

After the defendants contested compensability, the hearing officer found the claim compensable, but only awarded TTD from January 1995 to August 1996 and PPD for the 20% rating. The Full Commission reversed, awarding ongoing TTD for so long as plaintiff remained totally disabled. On appeal, the Court of Appeals reversed again, saying the Commission erred in awarding TTD after plaintiff reached MMI.

Thereafter, the claim proceeded back through the Commission and the Full Commission eventually awarded permanent and total benefits. On June 6, on appeal by TCD&G, the Court of Appeals reversed that award, stating that since there was no Form 21 agreement and, therefore, no continuing presumption of disability, plaintiff had the burden of proving that he was *totally incapable of earning wages* to receive further compensation

under G.S. 97-29. Proof that he had a 20% impairment and permanent restrictions creating certain limitations on his post-injury activities did not necessarily support a finding of total disability, as that did not establish inability to work in *any* capacity.

The Full Commission's award of permanent and total benefits appeared to be a reaction to the Supreme Court's February 1999 decision in ***Neal v. Carolina Mgt.***, discussed in the March 1999 edition of *Risk/Alert*, in which it was held that an injured worker may be awarded permanent, but not temporary, benefits following a finding of maximum medical improvement. In ***Demerey***, the Full Commission did not want to limit plaintiff's recovery to PPD and, therefore, awarded permanent and *total* disability benefits. However, the Court of Appeals, relying on several previous holdings that such benefits are only payable if the employee is unable to earn the wages which he was receiving at the time of his injury *in the same or any other employment*, vacated the Commission's award under G.S. 97-29.

Risk Handling Hint: Risk managers should review future cases to determine whether the employee has reached MMI. If so, an argument can be made that no further TTD benefits are owed. While benefits cannot be terminated simply because MMI has been reached, defendants should seek a credit against any subsequent PPD award for all compensation paid after MMI, relying upon the holding in ***Demerey***.

Illegal Alien Status Does Not Preclude Award of Disability Benefits

On July 5, in ***Olivares-Juarez v. Showell Farms***, the Court of Appeals dealt with the claim

of an illegal immigrant who had used his brother's documentation to obtain employment without the defendant-employer's knowledge.

After he was hired, plaintiff suffered an injury to his left arm and payments without prejudice were begun under a Form 63. The parties subsequently attempted to execute a Form 21 agreement, with plaintiff signing his brother's name, but the Commission refused to approve it because "the name listed for the employee was admittedly fictitious." Plaintiff later underwent surgery and was eventually released to return to modified "one-handed" cleanup work. Thereafter, the employer initially offered him a job, but then withdrew its offer because of plaintiff's illegal immigration status. At that point, the defendant-carrier terminated disability payments. Plaintiff was subsequently assigned a 5% PPD rating and given lifting restrictions. Later, after obtaining other employment at an average weekly wage less than he was earning with the defendant-employer, plaintiff filed a request for hearing seeking ongoing TPD benefits.

The deputy commissioner concluded that plaintiff's unemployment status subsequent to the date he was authorized to return to modified work was caused by his illegal immigration status. Therefore, he limited plaintiff's recovery to PPD benefits for the 5% rating. The Full Commission reversed, finding that irrespective of plaintiff's illegal immigration status, the light duty position offered did not demonstrate a capacity to return to suitable employment at pre-injury wages. It awarded TPD benefits for a period not to exceed 300 weeks from the date of injury.

The Court of Appeals vacated that award, finding that since there was no Form 21 agreement, a presumption of disability did *not* arise. The Court held that before the defendants could be required to prove the availability of suitable employment, plaintiff had to first come forward with evidence showing that his earning capacity was diminished as a result of the injury in question.

Risk Handling Hint: This case has the potential to be of assistance to risk handlers in many future cases, since the Court of Appeals found that no presumption of ongoing disability arose when TTD benefits were paid pursuant to a Form 63 beyond the 90 day period allowed for denial of the claim. Therefore, although the defendants could no longer contest compensability at the end of that 90 day period, no presumption of continuing disability arose at that time and the burden of proof on the issue of disability remained with the injured worker. On August 14, TCD&G will be arguing for application of the same principle to Forms 60 during oral argument before the Court of Appeals in the *Sims v. Charmes/Arby's* case, discussed in more detail in the June edition of *Risk/Alert*.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ On July 22, Governor Hunt announced that the Industrial Commission's Administrator, Buck Lattimore, has been appointed to a six year term as Chairman. At the same time, Commissioners Bernadine Ballance, Laura Mavretic and Dianne Sellers have been reappointed for terms expiring in June 2006, April 2005 and April 2001 respectively.

✓ On June 1, The Michie Company announced that it has now published an updated edition of North Carolina Workers' Compensation Law Annotated. Copies can be ordered by telephone at 1-800-562-1197 or by a fax addressed to 1-800-643-1280.

✓ On July 25, TCD&G filed a petition on behalf of the North Carolina Association of Defense Attorneys supporting a joint request of the parties for rehearing of *Hansen v. Crystal Ford-Mercury*, the case in which Blue Cross and Blue Shield was found entitled to intervene, void an approved settlement agreement and claim entitlement to reimbursement for medical expenses paid on behalf of the injured worker. See the June 2000 *Risk/Alert* for a more detailed discussion of the holding and implications of *Hansen*.

PLEASE CONTACT THE ATTORNEYS AT TEAGUE CAMPBELL DENNIS & GORHAM
WITH ANY QUESTIONS YOU HAVE ABOUT THE ARTICLES IN RISK/ALERT

(919) 873-0166

www.tcdg.com