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CASE LAW UPDATE

Court Debates Thirty Day Written Notice Requirement

From October 28, 1999 until he was terminated for failing to comply with Borg Warner Automotive's absence policy on April 30, 2001, David Watts was periodically out of work drawing short-term disability benefits while he recovered from back surgery. During that period of time, he told neither his supervisor nor anyone in human resources that his condition was work-related. To the contrary, he stated on four separate health benefit indemnity forms that it was *not* the result of his employment. He also failed to report an on-the-job injury to his chiropractor. And, when he was referred to an orthopaedic surgeon by the chiropractor, Watts told the orthopaedist that his injury was not work-related.

Nine weeks after he was fired, however, Watts filed three separate workers' compensation claims, alleging injuries to his low back on October 28, 1999 and May 26, 2000 and to his cervical spine, right hand and fingers on May 16, 2000. After all three claims were denied by Borg Warner, they were heard Deputy Commissioner Morgan Chapman, whose subsequent Opinion and Award was favorable to Borg Warner and adverse to Watts.

Watts appealed to the Full Commission, which reversed Deputy Commissioner Chapman and awarded TTD benefits, medical expenses and attorneys' fees. Borg Warner then appealed to the Court of Appeals, contending that Watts' alleged injuries were not compensable and that he had failed to prove medical causation. It also argued that, in any event, his claims

were barred by N.C.G.S. § 97-22 because he had failed to give timely written notice at the time his injuries allegedly occurred. In response, Watts claimed that he feared being discharged if he reported them.

On June 21, in *Watts v. Borg Warner Automotive, Inc.*, the three Court of Appeals judges who heard Borg Warner's appeal agreed that the Commission's findings were inadequate because, while the Commission's opinion included a *conclusion of law* that fear of being fired is a reasonable excuse for delaying notice of an injury, there was no specific *finding of fact* that Watts feared losing his job if he reported being injured at work. However, the judges could not unanimously agree on an appropriate remedy for the deficiency in the Commission's findings. By a 2-to-1 vote, the majority remanded the case back to the Commission to make specific findings as to whether claimant's failure to give timely notice was due to a fear of retaliation and, if so, whether Borg Warner had been prejudiced by the delay.

In a concurring opinion, Judge Elmore described the disagreement between the Court's majority and minority as being over whether the concept of "reasonable excuse" should be read broadly or, in the alternative, strictly construed so as to limit its application to two previously identified circumstances: (1) where the employer is already cognizant of the injury or (2) where the employee "does not reasonably know of the nature, seriousness or probable compensable character of his injury and delays notification until he reasonably knows."

In a lengthy dissent, Judge Tyson argued that remand to the Commission

was unnecessary, as “plaintiff’s actions are easily distinguishable from all precedents upholding reasonable excuses,” i.e., those in which “reasonable excuse” was found either because the employer knew of the injury or the employee was unaware of its “nature, seriousness or probable compensable character.” And, in response to claimant’s contention that he failed to report being injured because he feared losing his job, Judge Tyson observed that “the purpose of the notice requirement ... is not for benefit of the employee, but rather to provide actual notice to the employer.”

Judge Tyson was also opposed to a remand because it would “give plaintiff a second bite at the apple.” He pointedly observed that “the majority perpetuates and encourages both fraudulent and stale claims against employers by employees who fail to report injuries for nearly two years and who fail to establish their injuries were caused by their alleged accident.” Further, he felt that Borg Warner had been prejudiced as a matter of law by Watts’ delay in giving written notice of the three injuries he was belatedly claiming because, as to each of them, it had been deprived of the dual purposes of the statute: providing immediate medical diagnosis and treatment to minimize the seriousness of the injury and facilitating the earliest possible investigation of the surrounding facts.

As Judge Tyson’s dissent provides the defense with an automatic right of appeal, it is anticipated that the vigorously contested issues discussed in the majority and minority opinions in *Watts* will ultimately be resolved by the Supreme Court. In the meantime, however, even the majority opinion in *Watts* provides at least minimal support for defendants to more aggressively defend claims on the basis that the 30 day written notice provisions of N.C.G.S. § 97-22 have been violated, and it may also encourage the Commission to reexamine its traditional leniency toward the failure of employees to give timely notice of their claims.

Risk Handling Hint: Risk managers are encouraged to carefully scrutinize claims which are not promptly reported. If they find that there has been a substantial delay in the employer’s report of injury, both the employer and employee should be interviewed to determine when and how the employer first became aware that a job-related injury was being claimed and when, if at all, the employee filed his written notice of injury, so as to determine

whether he complied with the 30 day notice provisions of N.C.G.S. § 97-22.

Credit Denied for Payments Made from Partially Funded Disability Plan

Ronald Cox, a waste water pump mechanic for the City of Winston-Salem, injured his shoulder when he fell into an open manhole, exacerbating problems related to a pre-existing tumor in his right sternoclavicular joint. Upon the advice of his doctors, Cox remained out of work and began drawing long-term disability retirement benefits from the Local Governmental Employees’ Retirement System (LGERS).

After he filed a claim seeking workers’ compensation benefits as well, a dispute arose between Cox and the City over whether he had contributed anything to pay for the disability retirement benefits he received while he was out of work and whether the City was entitled to either a partial or total credit for them under N.C.G.S. § 97-42.

The City offered the testimony of its financial system and employee accounting manager that, because Cox was eligible to request a refund of his contributions to LGERS plus four percent interest, he contributed nothing to pay for the disability benefits he had received. In response, Cox offered deposition testimony from the Deputy Director of the State Retirement System, whose opinion was that Cox’s disability benefits were not entirely funded by the City. Based on that testimony, the Commission found as a fact that the disability retirement payments made to Cox were only partially funded by the City. And, from that finding, it concluded that the City was *not* entitled to a credit for Cox’s LGERS disability retirement payments.

The City appealed to the Court of Appeals, which on June 21, in *Cox v. City of Winston-Salem*, affirmed the Commission’s award of benefits, stating in the process that, under the provisions of N.C.G.S. § 97-42, “the decision of whether to grant a credit is within the sound discretion of the Commission.”

In multiple prior cases, our appellate courts, including the Supreme Court in *Foster v. Western Electric Co.*, had held that where an employee has been paid wage replacement benefits from a plan fully funded by the employer, it “should not be penalized by being denied full

credit for the amount paid as against the amount which is subsequently determined to be due the employee under workers’ compensation.” At the same time, it has been consistently held in other cases that payments made from disability plans which are entirely *employee* funded are subject to no credit at all. Less clear has been the rule to be applied in those cases in which the disability plan has been partially funded by the employer and partially funded by the employee. In *Cox*, the Court of Appeals has now ruled that the credit mandated by both N.C.G.S. § 97-42 and the Supreme Court’s holding in *Foster* need not be applied to disability plans which are not fully funded by the employer.

Risk Handling Hint: The situation which arose in *Cox* occurs most often in those cases in which the employee’s workers’ compensation claim has been denied, but he has nevertheless received either short- or long-term disability benefits. In such cases, risk managers are advised to carefully question knowledgeable representatives of the employer to determine the extent to which their disability plan is employer-funded. If the plan has been entirely underwritten by the employer, then by virtue of the decisions in *Foster* and its progeny, any subsequent award of workers’ compensation benefits will be offset by the disability benefits the employee received. By the same token, however, if the disability plan was funded by a combination of employer and employee contributions, then by virtue of the holding in *Cox*, the decision whether to give the employer a credit is a discretionary one for the Industrial Commission to make.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

Chairman Lattimore recently announced the appointment of three new Deputy Commissioners, Jim Gillen, Robert Harris and Robert Rideout. Deputy Commissioner Gillen has been employed at the Commission since 1994, first as an Agency Legal Specialist and later as a Special Deputy Commissioner. Deputy Commissioner Harris has been a Special Deputy Commissioner for the past two years, after nine years of private practice in Wake County. Deputy Commissioner Rideout, a Captain in the U.S. Army Reserves, has been an Assistant District Attorney in Edgecombe County since 1999, and before that he served as an Assistant Public Defender.