

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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THE ATTORNEYS AT
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WITH QUESTIONS
CONCERNING THE
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NEWSLETTER

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CASE LAW UPDATE

Commission's Rejection of Improperly Completed Form 22 Upheld by Court of Appeals

Devendra Patel, who worked in the order processing department of Stanley Works Customer Support, suffered an admittedly compensable back injury while lifting a heavy box in June 1997. On the Form 19 it filed shortly thereafter, Stanley Works indicated that he earned \$9.21 per hour, worked 12 hours a day and 7 days a week, and had an average weekly wage of \$773.64.

Patel was initially treated conservatively and able to continue working. However, his condition gradually worsened to the point that his doctors recommended surgery. Two weeks after a microdiscectomy was performed on December 15, 1998, Stanley Works filed a Form 60, on which it again indicated that Patel's average weekly wage was \$773.64. It then began paying him TTD at the maximum compensation rate for 1997, \$512.00 per week.

With the exception of a six week period of time in mid-1999 when Patel unsuccessfully tried to return to work, he was paid TTD at that rate until January 29, 2003. At that point, Stanley Works and its carrier notified him that they had miscalculated his average weekly wage and overpaid him. They then unilaterally reduced his weekly check to \$206.40 after recalculating his AWW based on a Form 22 wage chart

Stanley Works had submitted to the Commission a month earlier.

However, that form only indicated the total amounts Patel had earned each month and did not contain any information about the days he actually worked. Further, the amounts listed were different for 5 of the 12 months it covered, and no explanation was given for that discrepancy.

Patel requested a hearing after his weekly check was so substantially reduced. Despite the fact that his tax returns and daily attendance records had been introduced into evidence to supplement the Form 22, the deputy commissioner who heard the case ordered the defendants to reinstate TTD at the maximum compensation rate and directed them to pay Patel the unpaid difference in benefits which had accrued after his weekly check was unilaterally reduced.

In justifying his decision, the deputy commissioner focused on defendants' delay in filing their Form 22, which he found to be unreasonable, and on the "prejudice [which] would result ... from a sizeable reduction in the benefits that [Mr. Patel] has been receiving."

Defendants then appealed to the Full Commission, which noted that their Forms 19 and 60 both indicated that claimant's average weekly wage was \$773.64. And, it found that the defendants had failed to submit a properly completed wage chart, since the instructions on a Form 22 require

that an X be placed in the proper squares “to indicate days paid in full,” which the defendants failed to do. Therefore, it found that “defendants have not presented competent evidence that the average weekly wage paid plaintiff for over five years was incorrect.”

On July 18, in *Patel v. The Stanley Works Customer Service*, the Court of Appeals affirmed the Commission’s award of benefits. In doing so, it noted that the standard of appellate review is whether the record contains *any* evidence to support the Commission’s findings of fact, and it held that the Commission was entitled “to give greater weight to the Forms 19 and 60 than the improperly-completed and belatedly-filed Form 22.”

While the Court acknowledged that statements on an employer’s Form 19 or 60 do not conclusively determine the nature and extent of the employee’s disability, it held that “such representations by the employer to the Commission remain competent - although not conclusive - evidence of an employee’s average weekly wage.” Thus, as the Commission’s decision on average weekly wage was supported by some competent evidence, and “since the Commission’s calculation is supported by defendants’ own representations to the Commission in the Forms 19 and 60, as well as their years of payments to Mr. Patel,” it affirmed the Commission’s award of benefits at a weekly rate which was over \$300 greater than that shown on defendants’ Form 22.

Risk Handling Hint: While there is no requirement that a Form 22 be completed in every case, the result in *Patel* illustrates the importance of not only obtaining accurate wage information at the outset of a claim, but documenting it in accordance with the instructions set out on the back of the Form 22. Risk managers are cautioned that if there is any delay in getting

a Form 22 prepared, the attendance records necessary to accurately establish which days the employee worked may no longer be available. And, although the Form 60 explicitly states that the injured worker’s average weekly wage is provided for informational purposes only and does not constitute an agreement of the parties, the decision in *Patel* makes it clear that defendants may find themselves bound by the wage information they use on their Forms 19 and 60, should a properly completed Form 22 not later be produced.

Moreover, there have been several recent cases in which deputy commissioners have imputed the maximum compensation rate in the absence of a properly completed Form 22, even when all of the evidence tended to show that the employee’s average weekly wage was actually much lower. In order to avoid a substantial overpayment that may never be recouped, it is clear that the better practice is to obtain a complete and accurate Form 22 at the outset of every claim.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

Maximum Compensation and Mileage Rates Set

The Commission has announced that the maximum compensation rate for 2007 will be \$754.00 and that its current mileage reimbursement rate is \$.445 per mile.

Chairman Issues Message on Terrorism Insurance

On July 24, in response to numerous inquiries from employers who have received premium notices referencing “terrorism insurance coverage,” Chairman Lattimore issued a memorandum explaining the applicability of The

Terrorism Risk Insurance Act (“TRIA”) to workers’ compensation insurance policies in North Carolina. In his memorandum, he notes that since the Workers’ Compensation Act requires coverage for all injuries by accident, there is no exclusion for losses resulting from an act of war or terrorism in this state. Enacted initially by Congress as a short-term measure to help the insurance market recover from the terrorist attacks of September 11, 2001 by providing reinsurance coverage to reimburse insurers following a declared act of terrorism, TRIA was extended for another two years last December. Therefore, employers can expect to continue seeing in their workers’ compensation premium notices references to the cost of terrorism insurance, at least through the end of 2007.

Dates Set for Commission’s Annual Educational Conference

The Commission’s 11th annual educational conference will be held October 18-20, 2006. As in the past, CEU credits will be offered. For the sixth consecutive year, the Case Law Update will be presented by TCDG. Additional information can be obtained from the Commission’s website, www.comp.state.nc.us/ncic.

LEGISLATIVE UPDATE

The Legislature recently passed House Bill 818, an amendment to N.C.G.S. § 97-19.1 dealing with workers’ compensation coverage for truck drivers. It provides that trucking companies will have no workers’ compensation liability for independent contractors who, at the time of injury, are injured while operating their own trucks under their own individual ICC licenses. HB 818, passed by the Legislature on June 15, 2006, is expected to be signed into law by Governor Easley shortly.