

RISK ALERT

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NEWSLETTER

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CASE LAW UPDATE

Court Discusses Requirements for Compensable Change of Condition

As owner and operator of Floors Perfect, David Ward installed flooring until August 1997, when he began hiring others to do the work for him. In 1998, pain in his knees caused him to stop working altogether and pursue a community college degree.

Ward eventually filed a workers' compensation claim. In the course of litigating its compensability, he offered the deposition testimony of his orthopaedic surgeon, Dr. Callaway, who had diagnosed a small medial meniscus tear, which he did not believe was employment-related, and a condition called bilateral patellofemoral pain, which he attributed to claimant's work.

In 2001, the Commission entered an Opinion and Award denying Ward's torn meniscus claim, but finding that his bilateral patellofemoral pain qualified as a compensable occupational disease. While the Commission found claimant entitled to medical treatment for the pain he was experiencing and compensation for PPD ratings to both legs, it otherwise denied his claim for indemnity benefits on the basis that he failed to prove either that he was incapable of working in any employment or that he was capable of some types of work, but had been unsuccessful finding a job despite a reasonable effort on his part. The Commission found that he voluntarily removed himself from the labor market to pursue his education and, therefore, was entitled to neither temporary partial nor temporary total disability benefits.

No sooner had Ward received the last of his PPD benefits than he filed a request for hearing, alleging a change of condition. He then deposed Dr. Callaway again and the doctor testified that (1) as early as his original testimony in 1999, he

knew Ward's knee pain would be chronic; (2) claimant had been unable to return to flooring work in 1999 and still could not do so in 2004; (3) his work restrictions were the same in 2004 as they had been in 1999; and (4) his incapacity for work in 2004 was of the same kind and character as it had been in 1999.

Based on that testimony, the Full Commission denied Ward's change of condition claim, concluding that "[i]n order to establish a change of condition, plaintiff must show conditions different from those present at the time of the prior award. It is not sufficient to show 'a continued capacity of the same kind and character and for the same injury.'" Because the evidence showed that Ward's wage earning capacity remained unchanged and that his physical incapacity to work was of the same kind and character as it had been at the time of the prior award, his TTD claim was denied. At the same time, however, the Commission awarded TPD for a period of time not to exceed 300 weeks from the date of injury.

After claimant again appealed to the Court of Appeals, defendants cross-appealed the TPD award. On June 5, 2007, in *Ward v. Floors Perfect*, a 2-to-1 majority of the Court upheld the Commission's resolution of the change of condition issue and Ward's entitlement to PPD benefits, but reversed the TPD award. Citing the Supreme Court's 1960 decision in *Pratt v. Upholstery Co.*, the Court explained that a change of condition "occurs where conditions are 'different from those existent when the award was made [A] continued incapacity of the same kind and character and for the same injury is not a change of condition' Rather, said the Court, "[a] change of condition for purposes of N.C.G.S. § 97-47 means a substantial change, after final award of compensation, of physical capacity to earn The change in earning capacity must be due to conditions different from those existing when the award was made."

After noting that “[t]he party seeking to modify a prior award based on change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based,” the Court went on to explain that a change of condition can consist of either “a change in the claimant’s physical condition that impacts his earning capacity, a change in the claimant’s earning capacity even though claimant’s physical condition remains unchanged, or a change in the degree of disability even though claimant’s physical condition remains unchanged.” Having established those guiding legal principles, the Court held that Dr. Callaway’s testimony to the effect that claimant’s earning capacity in 2004 was the same as it had been when his prior claim for total disability benefits was denied in 2001 was competent evidence supporting the Commission’s finding that there had been no change of condition within the meaning of N.C.G.S. § 97-47.

The Court then went on to address claimant’s contention that the Commission erred in failing to award him total disability benefits after his testimony that, despite reasonable efforts on his part to find other employment, he had been relegated to working at various jobs paying less than the average weekly wage he was earning when he contracted his occupational disease in 1999. After noting that there is no basis for altering a final award of compensation other than that provided by N.C.G.S. § 97-47, which requires proof of a change of condition, the Court concluded that since the Commission had correctly found no change of condition, there was no basis for modifying the prior award, which limited claimant’s recovery to compensation for the PPD ratings given by Dr. Callaway.

Utilizing that same analysis, the Court agreed with the defendant employer and its insurer that the Commission had erred in awarding TPD benefits in the absence of proof of a change of condition. But, Judge Wynn dissented, contending that claimant carried his burden of proving total disability by showing that he had made a reasonable, but unsuccessful, attempt to secure a new job. In his dissenting opinion, however, Judge Wynn failed to explain how claimant’s alleged inability to work in 2004 was any different than it had been at the time of the Commission’s earlier award in 2001.

Risk Handling Hint: When confronted with a request for additional compensation based upon an alleged change of condition, risk managers and their counsel are advised to confirm not only that there has been a change

in the employee’s wage earning capacity, but also that the change is causally related to the injury for which benefits are being claimed and that the change occurred within two years of the date of last payment of indemnity compensation. Even if a claim remains open for medical compensation, if it has been more than two years since indemnity benefits were last paid, the employee is barred from receiving an additional indemnity award, even if his wage earning capacity has in fact changed.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

Controlling Medical Expenses

One issue which is arising more and more frequently is whether employers and their insurers are liable for medical charges incurred by employees for treatment they have received from providers to whom they have been referred by the authorized treating doctor. If the physician to whom the employee is referred has failed to request authorization in advance, the risk manager might not learn of the referral until after treatment has been rendered. Industrial Commission Rule 407(4) provides that the employer or carrier “shall pay the statement of medical compensation providers to whom the employee has been referred by the authorized treating physician, *unless* said physician has been requested to obtain authorization for referrals or tests” In order to avoid having to pay for unreasonable and unnecessary referrals and tests, it is recommended that risk managers consider sending a letter to the authorized treating physician at the outset of the care or treatment being rendered, advising the doctor that he must obtain prior authorization for any referrals or tests.

Charlotte Man Arrested in Workers’ Compensation Scheme

The Commission’s website recently posted a news release from the North Carolina Department of Insurance regarding the arrest of a Charlotte man on charges of obtaining property by false pretense. Those charges were the result of an investigation by the Department of Insurance, which employs 19 sworn law enforcement officers dedicated to investigating claims of insurance fraud, including workers’ compensation fraud. While the Commission has its own fraud department, risk managers and their counsel are free to report cases of suspected workers’ compensation fraud to the Department of Insurance. To report suspected fraud, risk managers can contact the Department of Insurance Investigations Division at (919) 807-6840.

TCDG NEWS

TCDG Prevails at the Full Commission on Two Occupational Disease Claims

Two alleged occupational disease claims, *Richardson v. Mobawk* and *Hooks v. Pender County DDS*, have been successfully defended at the Full Commission by TCDG attorneys Jacob Wellman and Matthew Skidmore respectively. *Richardson* involved a claim for CMC joint arthritis which claimant alleged to have developed as a result of her work as a spinner. Jacob presented evidence to the orthopaedic surgeon in the form of a DVD of claimant performing her job. The doctor then testified that claimant’s work was not a causative factor in the development of her arthritic condition. *Hooks* involved the claim of a social worker who alleged that her office duties caused an ulnar nerve entrapment. However, her doctors were unable to draw a causal connection between her job duties and upper extremity complaints. As a result, the Full Commission affirmed the deputy commissioner’s denial of benefits.

Edward Schenk was recently successful in defending a stress claim before Deputy Commissioner John DeLuca. The claimant in *Evans v. Firsthealth of the Carolinas* was a nursing assistant assigned to work in the emergency department at Moore Regional Hospital. She filed a claim for occupational stress, anxiety and depression, which she attributed to her co-workers “berating, belittling and undermining” her. However, Deputy Commissioner DeLuca found that there was no injury by accident, as the relevant events were neither unexpected nor extraordinary, and that claimant’s contention that she had contracted an occupational disease likewise failed because the stressors complained of were general stressors common to any workplace.

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