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CASE LAW UPDATE

*"Fair and Just" Provision of Average
Weekly Wage Statute Reinforced*

John Thompson worked as a mechanic on contract jobs for various employers, including STS Holdings, which provided contract aviation technicians to companies in the aerospace industry. While working for STS, Thompson suffered a compensable injury. In the preceding fifty-two week period of time, he had been employed by STS under five separate contracts, but only for a total of fourteen days. The bulk of his income during that time frame came from contracts with other employers.

STS voluntarily instituted temporary total disability payments to Thompson, initially at the rate of \$213.34 per week. Later, they were increased to \$329.58, but then a hearing was held, testimony taken, and an Opinion and Award entered by a deputy commissioner, who ruled that Thompson was only entitled to the statutory minimum of \$30.00 per week.

Thompson appealed to the Full Commission, but it affirmed the deputy commissioner's resolution of the average weekly wage issue and held that STS was entitled to a credit for the weekly benefits it had paid in excess of \$30.00. Thompson then appealed to the Court of Appeals, which on June 21, in *Thompson v. STS Holdings, Inc.*, affirmed the Commission's determination that he was only entitled to the statutory minimum of \$30.00 per week.

In explaining the basis for its ruling, the Court observed that N.C.G.S. § 97-2(5) provides five methods for calculating average weekly wage, the first of which was not applicable in Thompson's case because he did not work continuously for STS during the fifty-two week period of time before he was injured. It then looked to the fifth method, the one the Commission used to calculate

Thompson's average weekly wage, and it agreed with the Commission that it is only proper to use method five when unjust results would be occasioned by use of any of the other four methods.

The Commission had found that if it used either method two, three or four to calculate Thompson's average weekly wage, the compensation owed to him would have been in excess of what was warranted by the work he did for STS. Because there was competent evidence in support of its findings in that regard, and as those findings supported its conclusion that the alternative methods for calculating average weekly wage were either inapplicable or would not have led to "fair and just" results, the Court of Appeals affirmed the Commission's resolution of the compensation rate issue.

In the course of evaluating which of the available methods for calculating average weekly wage was the correct one to apply in *Thompson*, the Court reaffirmed prior case law holding that the fifth method neither requires nor prohibits any specific mathematical formula; rather, it calls for the Commission to utilize whatever wage calculation method will "most nearly approximate the amount which the injured employee would be earning were it not for the injury."

Although the Court acknowledged that the average weekly wage computed by the Commission in Thompson's case did not reflect the combined total of the wages he would have earned from all of his employments, it was clear that, in enacting the Workers' Compensation Act and, more particularly, in establishing the formula for computing average weekly wage found in N.C.G.S. § 97-2(5), the General Assembly had called upon the Commission to consider what is "fair and just" to both parties.

The Court also held that, in calculating Thompson's average weekly wage while working for STS, the Commission did not err

when it excluded from consideration Thompson's *per diem* travel pay and wage advances. While it recognized that N.C.G.S. § 97-2(5) states that "allowances of any character made to an employee in lieu of wages are a specified part of the wage contract ... [and] shall be deemed part of his earnings," the Court found that the evidence of record supported the Commission's finding that the *per diem* travel and wage advances STS made to Thompson were not paid in lieu of wages. As a result, they were properly excluded by the Commission when it calculated his average weekly wage.

Risk Handling Hint: The holding in *Thompson* is an excellent reminder to risk managers that the "fair and just" standard found in the statutory framework of N.C.G.S. § 97-2(5) applies to both employees and employers and is especially pertinent to calculations of average weekly wage when the injured worker was employed on a contract basis or did not work continuously for the defendant employer during the fifty-two week period of time before he was injured. *Thompson* has also reaffirmed the well-established principle that compensation paid in lieu of wages should not be included when calculating an injured employee's average weekly wage.

"Pickrell Presumption" Clarified

On November 29, 2001, Gregory McDaniel was working at the United Parcel Service hub in Greensboro when he observed his co-worker, David Gray, standing in front of a row of trucks. McDaniel went to his own truck and began to perform a safety check, when he noticed the brake lights of another truck, saw its backup lights come on, and noticed that it began backing up toward him. Not seeing anyone in the cab of the truck, he honked his horn because he was concerned that he was going to be hit.

The second truck struck McDaniel's. He jumped to the ground and saw Gray lying there on his back. His glasses, which appeared to have been run over by the truck, were three to four inches from his head. As McDaniel approached, Gray attempted to get up, said that his head was hurt, and complained about feeling cold. After he shut off the engine in Gray's truck, McDaniel called for help and returned to his coworker. An EMS worker arrived and tried to provide emergency aid.

McDaniel heard Gray take his last breath. A subsequent autopsy indicated that the most likely cause of death was an acute arrhythmia due to severe coronary atherosclerosis.

UPS filed a Form 19 on which it stated that Gray "suffered a heart attack while backing up tractor and it rolled into another parked UPS tractor." Gray's dependents subsequently filed a Form 18, seeking an award of death benefits and contending that Gray "fell out of the truck striking his head which contributed to a heart attack resulting in his death." UPS responded to the Form 18 by filing a Form 61 denial, contending that Gray's heart attack was not the result of a compensable injury by accident.

After conducting a full evidentiary hearing, the deputy commissioner entered an opinion and award finding that Gray's injury and death were compensable because the "*Pickrell* presumption" applied and it provides that "[w]here the evidence shows an employee died within the course and scope of his employment and there is no evidence regarding whether the cause of death was an injury by accident arising out of employment, the claimant is entitled to a presumption that the death was a result of an injury by accident arising out of employment." UPS appealed, but the Full Commission adopted the deputy commissioner's findings of fact and conclusions of law and affirmed his award of death benefits to Gray's dependents.

UPS then appealed to the Court of Appeals, which on June 21, in *Gray v. United Parcel Services, Inc.*, reversed the Full Commission's award of benefits. It found that the Commission had erroneously applied the holding in *Pickrell* to the facts of the case, particularly in its determination that the expert testimony presented by UPS failed to rebut the presumption of compensability.

The Court explained that the *Pickrell* presumption involves three steps. First, the Commission must determine whether the presumption applies. If the employee died in the course of his employment and the record does not disclose the cause of death, the presumption applies. The Court found that in *Gray* the Commission correctly determined that the presumption applied.

The second prong of the *Pickrell* analysis calls for the Commission to determine whether the defendants rebutted the presumption by proving that the employee's death either was not accidental or did not arise out of his employment. In *Gray*, UPS offered the testimony of Dr. Barry Welborne that Gray's employment had "no bearing on his death" and did not contribute to it. He also testified that the only explanation for Gray's irrational behavior in exiting the moving truck was that he had suffered an acute cardiac event in the cab of his truck. The Court found Dr. Welborne's testimony sufficient to rebut the presumption that Gray's death was related to his employment.

And, finally, as for the third prong of the *Pickrell* analysis, the Court held that if the defendants are able to satisfy the second prong so as to rebut the presumption of compensability, then the Commission must resolve the issue of compensability as if the presumption did not exist, with the burden of proof being on the claimant to establish that the employee's death was the result of an accident arising out of and in the course of his employment, which the Commission failed to do in *Gray*. Because the Commission had improperly applied the *Pickrell* presumption to the evidence before it, the Court remanded *Gray* back to the Commission to determine whether Gray's widow had met her burden of proof on the issue of medical causation.

TCDG NEWS

Earlier this month, TCDG published a special edition of Risk Alert that highlights the critical provisions of Protect and Put NC Back to Work, the landmark workers' compensation reform legislation that went into effect on June 24. We have obtained approval from Prometric for a two hour continuing education course for risk managers that will provide not only a detailed analysis of the revised Act, but suggestions for implementing the new procedures promulgated by the Legislature that will impact the daily handling of workers' compensation claims.

TCDG partner Bruce Hamilton was instrumental in assisting the industry representatives who developed and fine-tuned this bill, the most significant workers' compensation legislation in nearly two decades. Because the plaintiffs' bar was also heavily involved in the legislative process, the bill contains certain compromises that had to be made to create a politically achievable package. J. Michael Carpenter, Executive Vice President & General Counsel for the North Carolina Home Builders Association, who worked with the bill's sponsors during the political process leading to its passage observed that Bruce had the "respect of all at the table" and made an "invaluable contribution" to the bill's content and passage. Likewise, Andy Ellen, General Counsel of the North Carolina Retail Merchants Association remarked that the "respect Bruce commanded from the plaintiff's bar was often a key part" of the negotiation process. He hails the legislation as a "remarkable milestone – true workers' compensation reform."

We are also pleased to announce that on June 24, Governor Beverly Perdue appointed TCDG partner Tammy Nance to be one of the Full Commission's six Commissioners.

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