

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



TEAGUE CAMPBELL
DENNIS & GORHAM
EXPERIENCE | TRUST | RESULTS

WORKERS' COMPENSATION
COMMERCIAL AND CIVIL LITIGATION
PRODUCTS LIABILITY
PREMISES LIABILITY
MEDICAL MALPRACTICE
NURSING HOME LITIGATION
REAL ESTATE LITIGATION
PROFESSIONAL LIABILITY
EMPLOYMENT & LABOR LAW
CONSTRUCTION LAW
ENVIRONMENTAL LAW
BUSINESS LITIGATION
AUTOMOBILE LIABILITY
GOVERNMENT & MUNICIPAL LAW
INSURANCE LAW & COVERAGE

PLEASE CONTACT
THE ATTORNEYS AT
TEAGUE, CAMPBELL
WITH QUESTIONS
CONCERNING THE
ARTICLES IN THIS
NEWSLETTER

(919) 873-0166
WWW.TCDG.COM

CASE LAW UPDATE

Employee's Threat of Violence Excused and Benefits Awarded

Rutherford Electric Membership Corporation (REMC) lineman Johnny Workman was injured when a utility pole fell across his abdominal area, causing a variety of internal injuries and digestive complications. His workers' compensation claim was voluntarily accepted as compensable by REMC and indemnity benefits were promptly paid pursuant to a Form 60.

After two operations, during which his gall bladder was removed and a hiatal hernia repaired, Workman returned to work at a lower average weekly wage, at which point he was paid temporary partial disability pursuant to a Form 62. However, Workman eventually became frustrated with REMC, complaining that medical treatment was being denied, that he was receiving medical bill collection letters, and that he was being required to perform job duties beyond his work restrictions, resulting in an aggravation of his medical condition.

Later, after hiring a lawyer, Workman testified that when he asked what could be done to improve the treatment he was receiving from REMC, the lawyer "joked" that Workman could "whip his [employer's] ass." Workman subsequently repeated this "joke" to his nurse caseworker while they were waiting for an appointment with his doctor. She, in turn, reported their conversation to REMC, which terminated Workman for "workplace violence." He responded by requesting a hearing, in which he claimed he had been improperly terminated and was entitled to receive additional medical and other benefits.

The Industrial Commission found that REMC's decision to terminate claimant violated the *Seagraves v. Austin Company* test. In 1996, the Court of Appeals had ruled in *Seagraves* that the lawful termination of an employee for a reason unrelated to his disability under circumstances which would justify the termination of any other employee constitutes a refusal to work on the employee's part, thereby ending the employer's liability for making additional indemnity payments. While REMC had offered evidence in *Workman* that in the past it had terminated one of its crew foremen for engaging in a fight on company time, the Commission distinguished that situation from the facts before it, finding REMC had failed to offer evidence that an employee who made *threats* similar to Workman's would have been terminated.

On June 7, in *Workman v. Rutherford Electric Membership Corporation*, the Court of Appeals affirmed the Commission's ruling on the termination issue, holding that although REMC had presented evidence of a bona fide reason for firing claimant, it failed to satisfy its burden of proving that the same misconduct would have resulted in termination of a non-disabled employee. Thus, the net result of the holding in *Workman* is that the Commission has been authorized to find an employer liable for ongoing weekly benefits to a terminated employee, even if it had a bona fide reason for terminating him due to misconduct unrelated to his on-the-job injury.

The holding in *Workman* places employers dealing with threats of workplace violence in a precarious position. In the *Workman* case itself, if REMC

had not terminated claimant for what it perceived to be a real threat of violence in the workplace, it would have exposed itself to the risk of civil liability for personal injury or other similar claims, had either claimant or another worker followed through on Workman's "joking" threats of violence. At the same time, the net effect of the decision in *Workman* is that unless the employer is able to present evidence of a past instance in which another employee was terminated for a substantially similar threat or conduct, it faces the real risk of being found responsible, as was REMC, for additional workers' compensation liability to the terminated employee.

In a separate portion of the *Workman* opinion, the Court of Appeals provided some solace to the defense community by ruling that the Commission erred in concluding claimant had satisfied the four-part test for proving disability established in *Russell v. Lowes Product Distribution*, a case successfully defended by TCDG in 1993. Noting that the Commission's findings of fact demonstrated Workman's capacity, albeit limited, to perform some types of work, the Court remanded the case to the Commission to make additional findings as to whether claimant had presented evidence sufficient to establish the second and third of the four *Russell* criteria for proving disability, i.e., "(2) evidence that he is capable of some work, but has after a reasonable effort been unsuccessful in his efforts to obtain employment; [or] (3) evidence that he is capable of some work but that it would be futile because of preexisting conditions ... to seek other employment."

Risk Handling Hint: The decision of the Court of Appeals to affirm that portion of the Industrial Commission's Opinion and Award in *Workman* which addressed claimant's termination for threatening violence highlights the very difficult position in which employers are placed as they try to combat workplace violence while at the same time attempting to minimize their workers' compensation liability. When deciding whether to seek authority for terminating benefits based upon an actual incident involving workplace violence, or an employee's threat of one, risk managers should be careful to question their insured and self-insured employers to develop evidence of prior instances in which employees have been either disciplined or terminated for misconduct. At the same time, risk managers should remain cognizant of other available defenses when injured workers

claim entitlement to additional benefits, including the strict definition of disability set forth in *Russell v. Lowes*.

Prior Employer Held Responsible for Injury During Subsequent Employment

In July 1994, Rebecca Taylor's primary employment was as a school bus driver, although she also cleaned houses and worked at a Wendy's restaurant owned by Carolina Restaurant Group (CRG). On July 22, 1994, she slipped on degreaser at the restaurant and injured her right knee to the extent that she had to have a total knee replacement.

Taylor continued to receive medical care following her knee replacement operation, including multiple arthroscopic surgeries to remove scar tissue, and her treating physician, Dr. Ward Oakley, reached the conclusion by June 1998 that there had been a "failure of [the] implant."

CRG's insurer then referred Taylor for an IME with another orthopaedist, Dr. David Mauerhan, who recommended against further surgery, suggested that she attempt to return to work despite her "painful toe and knee replacements which will give her difficulty," and rated her with a 50% permanent partial disability.

Taylor stopped working at the Wendy's restaurant, but was hired as a janitor by Richmond Community College. In January 2000, she fell on black ice in the college parking lot and injured her other knee, which became increasingly painful over time, to the point that arthroscopic revisions were required in April 2000 and October 2001. But, her left knee eventually healed well, leaving her with a 20% impairment rating and only light work restrictions. However, Taylor's *right* knee became ever more painful, necessitating additional arthroscopic surgery in 2002, during which a deteriorated portion of the knee implant was replaced.

Taylor requested a hearing, seeking additional benefits and claiming to be totally disabled. Her 1994 and 2000 injury claims were consolidated for hearing, but she then entered into a clincher settlement with Richmond Community College to resolve the left knee injury claim, leaving only her right knee claim against CRG for resolution by the hearing officer, Deputy Commissioner Holmes, who eventually concluded that it was claimant's January 2000 accident at the college which caused

her to be totally disabled. He found that the consequences of her left knee injury included a compensable aggravation of Taylor's preexisting right knee difficulties, but that she had relinquished her right to recover from Richmond Community College when she entered into a clincher agreement resolving her claim against the college in December 2001.

Taylor appealed to the Full Commission, which reversed Deputy Commissioner Holmes' decision, with Chairman Lattimore dissenting. The Full Commission's majority found that it was Taylor's 1994 *right* knee injury which had caused her to be totally disabled, and it ordered Carolina Restaurant Group and its insurer to pay ongoing weekly benefits to claimant.

On June 7, in *Taylor v. Carolina Restaurant Group, Inc.*, the Court of Appeals affirmed in a 2-to-1 decision, with Judge John Tyson issuing a lengthy dissent, arguing that there was no evidence to sustain the Full Commission's findings and undisputed evidence that Taylor's preexisting right knee condition had been aggravated by the January 2000 accident at Richmond Community College. To Judge Tyson, "[p]laintiff should not be permitted to settle with Richmond Community College, then recover from defendants in this case that which would be paid by Richmond Community College but for the settlement agreement."

Risk Handling Hint: While the two majority opinions in *Taylor* illustrate the lengths to which the Commission and our appellate courts have gone on occasion to ensure that weekly benefits are awarded no matter what the facts of the case or the voluntary actions taken by the claimant herself, such as the clincher settlement Rebecca Taylor reached with Richmond Community College, the Court of Appeals' discussion of the basic legal principles applicable to aggravation claims provides risk managers with a useful reminder. Had claimant not settled with the college, she would have had a relatively easy time establishing its liability for continued weekly benefits under the theory that the accident she had in January 2000 aggravated the right knee condition caused by her original injury in 1994, since it is a well-established principle of workers' compensation law that benefits are owed where a prior injury, whether work-related or not, is aggravated by a subsequent on-the-job injury.