

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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## CASE LAW UPDATE

### *Assault on "Traveling Employee" Found Compensable*

Walter Ramsey, an electrician from Kinston, NC, worked for Southern Industrial Constructors at various locations throughout the southeast. In July 2000, he was sent to a job in Petersburg, Virginia. While there, his compensation included a per diem payment to cover food and lodging.

Originally, the work in Petersburg was only supposed to last until the end of the week, but when a maintenance man resigned, Ramsey agreed to return the following Monday. After going home for the weekend, he was late reporting on Monday because he first had to renew his driver's license. As a result, he was not eligible for the per diem payment that day.

At the end of his work shift, Ramsey returned to the motel where he stayed while in Petersburg. At approximately 11:30 p.m., he left his room to get ice for lunch the next day and was attacked by several assailants, who robbed and beat him, causing serious injuries.

Ramsey filed a claim for workers' compensation, which Southern Industrial denied on the basis that the assault did not arise out of his employment. But, both the deputy commissioner and Full Commission disagreed and found it compensable. And, on June 20, in *Ramsey v. Southern Industrial Constructors*, the Court of Appeals affirmed.

In its opinion, the Court first observed that the "in the course of" requirement

for compensability "refers to the time, place, and circumstances under which an accidental injury occurs," whereas the "arising out of" requirement "refers to the origin or cause of the accidental injury." It then turned to the "in the course of" component and found that since Ramsey was required to travel away from both his permanent residence and employer's place of business, he was a "traveling employee." In reaching that conclusion, it rejected Southern Industrial's argument that, at the time of the assault, he did not qualify as a "traveling employee" because he was not entitled to a per diem payment.

The Court went on to hold that, as a traveling employee, Ramsey was continuously "in the course of" his employment while out of town, except during "a distinct departure for a personal errand." And, with respect to the "arising out of" component, while it disagreed with claimant that *any* injury suffered while he was traveling at his employer's request would have arisen out of his employment, the Court also rejected Southern Industrial's contention that only those injuries which occur while an employee is engaged in his actual work duties are compensable. Rather, the question to be asked is whether the nature of the employment placed him at an increased risk of being injured. But, at the same time, the "increased risk" test for compensability is not the same as the "positional risk" doctrine previously rejected by our Supreme Court, under which a worker's injuries are deemed to have arisen out of his employment if the conditions or

obligations of the job placed him in the position in which he was injured.

The Court then noted that in Walter Ramsey's case, the hazard to which he was exposed, i.e., being robbed and assaulted, was not something to which he would have been equally exposed apart from his work, since while in Petersburg he was required to stay at an inexpensive motel in unfamiliar surroundings. It distinguished two prior Supreme Court decisions, *Bartlett v. Duke University*, in which a hospital employee choked on a piece of meat while eating, and *Roberts v. Burlington Industries*, in which a mill worker was struck and killed while attempting to help an injured pedestrian. In neither of those cases, said the Court, was the employee's injury either a hazard of the journey or particular to the act of traveling, unlike the situation in *Ramsey*.

At the same time, however, the Court rejected claimant's contention that he remained entitled to TTD even after being released back to work. While his doctor had imposed permanent restrictions, claimant failed to prove that he was incapable of all types of employment. Citing two cases successfully defended by TCDG, *Hilliard v. Apex Cabinet Company* and *Russell v. Lowes*, the Court acknowledged that although there was some evidence claimant might have difficulty finding a job, he failed to show that he was unable to do *any* work at all. Likewise, the evidence did not establish that it would have been futile for him to look for a job, considering his physical restrictions, age, education and work experience.

**Risk Handling Hint:** Claims involving traveling employees can be difficult to evaluate and defend. Most injuries suffered by employees while traveling overnight, out of town, will be deemed "in the course of" their employment, unless a distinct departure on a personal errand can be shown, such as in *Dodson v. Dubose Steel* (see *Risk Alert*, July 2003 and February 2004), in which the deceased employee was struck

and killed during a road rage incident. There, the Court noted that when he exited his vehicle to confront the driver of the other vehicle, the decedent removed himself from his employment. Therefore, his injury was personal in nature.

At the same time, risk managers should take note of that portion of the *Ramsey* decision in which the Court affirmed the Commission's refusal to award ongoing TTD, as it supports the general proposition that claimants cannot rely on residual restrictions alone when seeking continuing compensation once they have been released to return to work. But, while in the *Ramsey* case mere evidence of residual work restrictions was found insufficient to establish that claimant was incapable of all types of employment, in many other cases it would still be prudent for the defense to present affirmative evidence that the employee could have found some type of alternative employment, had he made a reasonable effort to look for and obtain a new job.

#### *Court Refuses to Extend Pickrell Presumption to Death of Quadriplegic*

On September 19, 1985, Leroy Douglas, a truck driver for J&S Truck Service, was asleep in the passenger seat of a truck driven by his coworker, when the driver lost control of the vehicle. In the ensuing accident, Douglas sustained spinal cord injuries which rendered him a quadriplegic.

Douglas received temporary total disability benefits from the time of the accident through October 1994 and was then paid permanent and total disability benefits until he died from hypertrophic heart disease in April 2001. Later, his widow filed a claim for death benefits, but J&S and its carrier denied it, contesting the causal connection between Douglas' quadriplegia and death.

On June 20, in *Booker-Douglas v. J&S Truck Service*, the Court of Appeals affirmed the Commission's denial of benefits, finding that the

defendants had offered evidence from a cardiovascular surgeon that there was no causal relationship between Douglas' quadriplegia and death. The Court also rejected claimant's argument that the testimony of defendants' expert should be stricken because he was paid a fee outside the Commission's fee schedule, holding that the fee schedule does not apply to doctors retained as expert witnesses.

Furthermore, and perhaps most importantly to risk managers, the Court rejected claimant's argument for extending the so-called "*Pickrell* presumption" to all situations in which the worker dies following a job-related injury. While the Supreme Court held in *Pickrell v. Motor Convoy* that a presumption of compensability arises "where the evidence shows that death occurred while the decedent was within the course and scope of employment, but the medical reason for death is not adduced," the *Booker-Douglas* Court noted that this presumption only applies "where an employee died within the course and scope of his employment," and not when he dies years later.

**Risk Handling Hint:** As noted in the August 2004 edition of *Risk Alert*, application of the six year time limitation for bringing a death benefit claim after an injury occurs was greatly reduced by the Court of Appeals in *Apple v. Commercial Courier Express*, in which it was held that the dependents of a deceased employee has two years from the "final determination of disability" to bring a death claim, and Commission approval of a Form 21 or 60 agreement paying TTD for "necessary weeks" does not qualify as a "final award" so as to cause the statute to begin running. Thus, risk managers can reasonably anticipate that more death claims will be filed well after the date of injury, as in *Booker-Douglas*. But, at the same time, they should aggressively investigate, and contest when appropriate, the medical causation question in such cases.