



RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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LEGISLATIVE UPDATE

On June 9, the North Carolina General Assembly passed a revised version of H709, the landmark workers' compensation reform bill discussed in the March 2011 edition of *Risk Alert*. If, as is currently expected, Governor Perdue signs it into law, TCDG will publish a special edition of this newsletter devoted to a detailed analysis of the bill, with recommendations regarding strategic ways for risk managers to utilize its key provisions in pending and future claims.

CASE LAW UPDATE

Appeal Dismissed as Interlocutory

On June 19, 2007, Tammy Allison was injured while working for Wal-Mart, which accepted liability for the resulting left knee contusion and lumbar spine sprain pursuant to a Form 60 and paid temporary total disability benefits until Allison returned to light duty work in mid-July. Two months later, she was released to full duty work and assigned a zero percent permanent partial disability rating by the treating physician, Dr. Goebel.

In July 2008, Allison was found to have a medial meniscus tear in her left knee and a disc bulge at L5-S1, both of which required surgery and caused her to miss more time from work. At that point, she requested a hearing, claiming entitlement to additional medical and indemnity benefits, which Wal-Mart denied, contending that any treatment she received after being rated and released in September 2007 was not causally related to her original on-the-job injury.

At the time Allison's claim was heard, she had not yet reached maximum medical improvement, nor been released to return to work. The deputy commissioner found that her meniscus tear and disc bulge were unrelated to the original on-the-job injury and denied her claim for further benefits, but on appeal the Full Commission reversed and awarded weekly benefits for two closed periods of temporary total disability and ordered Wal-Mart to pay for the disputed surgical treatment. But, at the same time, it determined that "[t]he record contains insufficient evidence regarding the extent of [Allison's] disability" and reserved for "future determination or agreement of the parties" the issue of her continuing disability.

Wal-Mart gave notice of appeal from the Full Commission's award, but on May 17, in *Allison v. Wal-Mart Stores*, its appeal was dismissed by the Court of Appeals, which found that it was interlocutory. While neither party had raised that issue for the Court's consideration, it did so on its own, finding that "[i]t is our duty to dismiss an appeal *sua sponte* when no right of appeal exists." It also held that "[a]ppeal from an order of the Industrial Commission lies only from a final order, ... [while] appeal from an interlocutory order is improper."

Risk Handling Hint: Although an award of compensation such as that entered by the Full Commission in *Allison* might have an immediate and significantly negative impact on the interests of a defendant employer until it can be overturned on appeal, the general legal principles embodied in the Court's opinion in *Allison* are well-established. Therefore, if a Full Commission ruling either contemplates further proceedings

or does not fully dispose of the stage of litigation then at issue, our appellate courts will find it interlocutory and not immediately appealable.

*Interest Owed On Award from
Date of Initial Hearing*

In 2002, after working for Norandal USA as a maintenance electrician for over thirty years, Derwood Puckett filed an occupational disease claim, contending that he had developed asbestosis and asbestos-related pleural disease as a result of his employment. The following April, he requested a hearing on a Form 33.

Eight months later, in February 2004, Norandal finally filed a Form 61 denying Puckett's claim. When the case came on for hearing the following month, Deputy Commissioner George Glenn barred the defendants from disputing compensability because they "had not filed a Form 61 within 90 days of the initiation of Plaintiff's claim." He then considered and resolved the merits of the claim and determined that Puckett was entitled to compensation for permanent injury to both lungs. He also ordered Norandal to pay Puckett's attorney's fee under N.C.G.S. § 97-88.1 because its defenses to the claim were the result of "stubborn and unfounded litigiousness."

After Norandal gave notice of appeal, the Full Commission found that Deputy Commissioner Glenn erred when he refused to allow Norandal the opportunity to contest compensability, and it vacated his Opinion and Award and remanded the case for a full evidentiary hearing on all issues.

The claim was then heard by Chief Deputy Commissioner Stephen Gheen, who awarded Puckett \$20,000 for permanent impairment of each lung and assessed a 10 percent penalty under N.C.G.S. § 97-12 for "willful failure to comply with [OSHA] requirements for extended periods having known of the presence of asbestos that was a risk to the plaintiff." At the same time, Chief Deputy Commissioner Gheen denied Puckett's request for an attorney fee award under N.C.G.S. § 97-88.1. Both parties then gave notice of appeal, but the Full Commission subsequently affirmed

the chief deputy commissioner's Opinion and Award with minor modifications.

At that point, the defendants issued two checks to claimant, one for his permanent impairment award and ten percent penalty and the other for the interest that was due under N.C.G.S. § 97-86.2, calculated from the date of the hearing held by Chief Deputy Commissioner Gheen. Claimant responded by filing a motion seeking additional interest for the two year period of time between the hearings held by Deputy Commissioner Glenn and Chief Deputy Commissioner Gheen. His motion was denied by a third deputy commissioner, and then once again by the Full Commission, which held that it would be an abuse of discretion "to award interest from the date of a hearing that was not on the merits, and upon which the Deputy Commissioner's Opinion and Award was ultimately vacated"

Claimant appealed the denial of his motion to the Court of Appeals, which on May 3, in *Puckett v. Norandal USA, Inc.*, reversed and ordered the Commission to recalculate the interest owed, running it from the initial hearing held by Deputy Commissioner Glenn, not that of Chief Deputy Commissioner Gheen.

In reaching that result, the Court indicated that it was guided by the general rule that there is no room for judicial construction of a statute when the language in question is "clear and unambiguous." It held that "the relevant portion of N.C. Gen. Stat. Section 97-86.2 for purposes of this case, which focuses on 'the date of the initial hearing on the claim,' is clear and unambiguous and does not require additional construction." As in *Strickland v. Carolina Classic Catfish, Inc.*, "the first hearing before the deputy commissioner adjudicating the merits of the employee's claim is the 'initial hearing on the claim' within the meaning of section 97-86.2"

The Court rejected Norandal's argument that the hearing conducted by Deputy Commissioner Glenn was not on the merits because the deputy commissioner's decision barring it from contesting compensability was ultimately

vacated by the Full Commission. The Court observed that N.C.G.S. § 97-86.2 "speaks merely of the 'initial hearing,' regardless of whether the decision resulting from that hearing withstands further review" and "the fact that Deputy Commissioner Glenn erroneously deprived Defendants of the right to raise certain issues does not establish that the hearing which led to the entry of his order did not constitute an initial hearing concerning the merits of Plaintiff's claim."

The Court also found that the Commission's interpretation of the interest statute had effectively defeated its three purposes, (a) to compensate claimants for loss of use of their compensation benefits due to a delay in payment; (b) to prevent unjust enrichment to defendants in the use and valuation of money; and (c) to promote settlement. That being so, it held that since Puckett ultimately prevailed, the fact that Deputy Commissioner Glenn erroneously deprived the defendants of the right to contest compensability was not a logical basis for failing to compensate claimant for losing use of the compensation benefits which the Commission eventually determined he was entitled to receive.

Having concluded that the Commission erred in not awarding interest from the date of the initial hearing before Deputy Commissioner Glenn, the Court of Appeals held that the provisions of N.C.G.S. § 97-86.2 are mandatory and they require the Commission "to determine when the date upon which the interest calculation commences by complying with the applicable statutory language, which does not give the Commission any discretion in making the required determination."

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