

RISK/ALERT

A TEAGUE CAMPBELL DENNIS AND GORHAM PUBLICATION

MARCH 2002

CASE LAW UPDATE

Court of Appeals Invites Supreme Court Action to Resolve Conflicting Rulings Regarding Impact of MMI on Right to Continuing TTD

On March 5, in ***Knight v. Wal-Mart***, the Court of Appeals acknowledged the inconsistency in its recent decisions regarding the impact of reaching MMI on an employee=s entitlement to continuing TTD benefits. As discussed in last July=s *Risk/Alert*, separate panels of the Court entered contradictory opinions on July 17 in ***Anderson v. Gulistan Carpet and Russos v. Rushco Food Stores***. In *Anderson*, one three judge panel essentially held that an employee may not continue drawing TTD after reaching MMI, whereas a different panel reached the opposite result in *Russos*.

In ***Knight***, claimant had a long history of back problems. While working for Wal-Mart and removing computers from a shelf, he fell from a ladder and felt something Apop@ in his back. The treating orthopaedic surgeon linked claimant=s subsequent problems to an aggravation of his underlying, pre-existing condition. After MMI was reached, a dispute arose over claimant=s ability to return to work. Relying on *Anderson* and the 1996 decision upon which it was based, ***Franklin v. Broyhill Furniture***, Wal-Mart argued that claimant=s presumption of disability and right to TTD ended at MMI, shifting the burden of proving what **permanent** disability benefits, if any, were owed to claimant. Under *Franklin* and *Anderson*, Wal-Mart asserted, it was error for the Commission to award **temporary** total disability benefits after MMI was reached.

In its opinion rejecting that argument, the ***Knight*** Court observed that Athe primary

significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N. C. Gen. Stat. 97-31*, and . . . does not have any direct bearing upon an employee=s right to continue to receive temporary disability benefits once . . . [he has] established a loss of wage-earning capacity pursuant to N. C. Gen. Stat. 97-29 or 97-30.@

However, in an apparent attempt to force a final resolution of the obvious conflict between that holding and last year=s ***Anderson*** decision, which the Supreme Court declined to do when it denied defendants= Petition for Discretionary Review in *Russos*, one of the three Court of Appeals judges involved in the ***Knight*** case filed a dissent, giving Wal-Mart an automatic right to bring its appeal to the Supreme Court. Further developments in this interesting and potentially significant case, including the Supreme Court=s eventual resolution of the MMI issue, will be monitored and highlighted in a future edition of *Risk/Alert*.

Risk Handling Hint: Until the Supreme Court finally considers and resolves ***Knight***, risk handlers can legitimately continue to cite ***Franklin*** and ***Anderson*** as support for a contention that TTD is not owed after an injured worker has reached MMI. At the very least, the defense can claim entitlement to a credit against its PPD liability, if any, for all indemnity benefits paid after the end of the Ahealing period.@ At the same time, however, the majority opinion in ***Knight*** supports the opposing argument of the plaintiff=s bar that even after a claimant reaches MMI, it is proper to award TTD.

Use of Non-Prescribed Controlled Substance Creates Rebuttable Presumption of Impairment

On November 17, 1997, William Mullins was driving a tractor-trailer for Williamson Produce, when it veered to the right, left the road surface and slid down an embankment, causing injuries from which Mullins died. Witnesses reported that the truck was traveling 65 to 70 miles per hour at the time and that its operator had been driving erratically for 45 minutes prior to the accident. The coroner's report, a lab test from the hospital where Mullins was taken, and a separate confirmation test all indicated that his urine contained metabolites of cocaine and marijuana at the time of death.

After a guardian ad litem was appointed for Mullins' minor daughter, a claim for death benefits was brought, which defendants contested under N.C.G.S. 97-12, contending that the accident and deceased employee's death were proximately caused by his being under the influence of a non-prescribed controlled substance. They offered evidence through the testimony of Dr. Arthur E. Davis, Jr., who was qualified as an expert pathologist and toxicologist, that Mullins was impaired at the time of the accident and that his impairment caused the accident. In response, claimant offered the testimony of the Chief Toxicologist in the state's Office of Chief Medical Examiner, who testified that it was impossible to determine from the drug screens done on Mullins' blood and urine whether he was impaired when the accident occurred.

Based on the eyewitness accounts of the accident and Dr. Davis' testimony, the deputy commissioner denied the claim, but the Full Commission reversed and awarded benefits, giving no weight to Dr. Davis' opinion and holding that defendants had failed to present sufficient competent evidence to establish that the accident

Risk Handling Hint: If later affirmed by the Supreme Court, the holding in *Willey* could be of significant benefit to the defense in future cases. Employers and their risk managers are encouraged to require employees to undergo drug testing following accidental injuries. If the results of those tests are positive for a non-prescribed controlled substance and there is evidence of a link between

was the proximate result of Mullins having been under the influence of either cocaine or marijuana.

However, on March 5, the Court of Appeals vacated the Commission's award, pointedly referring to Aour State's policy of >no tolerance= for driving while intoxicated or impaired . . . , especially . . . commercial vehicles,@ and holding that while the employer bears the burden of proving the affirmative defenses of impairment and intoxication, it is not required to disprove all other causes, nor show that intoxication was the sole proximate cause. Further, if the employer proves Ause of a non-prescribed controlled substance, it is presumed . . . the employee was impaired,@ and once the employer offers evidence of proximate cause, Athe burden shifts to the employee to rebut the presumption of impairment or that . . . [it] was not a contributing proximate cause of the accident,@ *Willey v. Williamson Produce*. The Court also ruled that claimant had to rebut the presumption of impairment by proving either the deceased was not impaired or that his impairment was not a contributing proximate cause of the accident, which claimant did not do.

In a lengthy dissent, Judge Greene objected that the Court's majority had impermissibly disregarded the appropriate standard of appellate review, substituting its judgment for that of the Commission regarding credibility and the weight to be given to the evidence of record. He felt there was competent evidence to support the Commission's findings, thereby mandating an affirmance of its award of benefits. He also argued that the Court's majority had not only ignored the burden of proof statutorily imposed on the party asserting impairment as a defense under N.C.G.S. 97-12, but they were relying on decisions from other states with different statutory provisions than North Carolina.

its use and the accident, the holding in *Willey* would support a denial of benefits under N.C.G.S. 97-12. Further, the language used in the majority opinion suggests that the same rebuttable presumption of impairment may apply to cases involving alcohol-related injuries. Depending on the ultimate outcome of claimant's expected appeal to the Supreme Court in *Willey*, risk managers should consider more

frequently asserting N.C.G.S. 97-12 as a defense than they have in the recent past, including in those cases where alcohol has been implicated as a cause of claimant=s injury. *Employer Need Not Locate Replacement Job*

for Illegal Alien to Establish His Residual Wage Earning Capacity

When Ruperto Gayton applied for work with Gage Carolina Metals, he presented false Social Security and resident alien cards. After he later injured his back, defendants accepted his workers compensation claim as compensable and began paying weekly TTD. Gayton was eventually rated and released with restrictions by the treating physician. Defendants retained a vocational rehabilitation specialist, but a prospective employer discovered claimant=s illegal status and refused to hire him. Defendants then took the position that because it would be improper for the vocational rehabilitation consultant to solicit what would have been an illegal employment under federal law, Gayton=s status as an illegal alien was a constructive refusal to perform vocational rehabilitation,@ entitling them to terminate benefits.

On March 19, in *Gayton v. Gage Carolina Metals*, the Court of Appeals rejected that argument and affirmed the Commission=s award of ongoing TTD. In the process, however, it used broad language which may prove helpful to the defense in that large number of cases where disputes arise over whether injured workers should be treated as disabled after being released to work with restrictions. While agreeing that engaging in placement efforts to obtain a new job which would violate federal regulations should be avoided, the Court suggested that defendants perform labor market surveys so as to determine those jobs which fit the worker=s physical limitations and held that a federal law does not prevent [searching for] . . . other suitable jobs . . . plaintiff might be able to obtain but for . . . [his] illegal alien status. . . . [I]t is not required that the employer produce a specific job that has already been offered to the employee in order to terminate workers= compensation

benefits.@ In so holding, the Court appears to have once again expressly rejected the view expressed in the May 2001 dissent of Court of Appeals Judge Robin Hudson (see *Risk/Alert*, May 2001) that defendants must present evidence of a specific job the worker is able to obtain once MMI is reached in order to justify stopping the payment of benefits.

In an interesting concurring opinion, Judge Walker went even one step further than the *Gayton* majority, observing that the employer=s obligation to locate employment for an injured illegal alien is no different from that of employers of workers who are not illegal aliens. That is, the employer can satisfy its burden of proving claimant=s residual wage earning capacity by establishing that jobs are available which he would be capable of performing, considering his age, education, physical limitations, vocational skills and experience. Further, in the context of an illegal alien, once that burden has been met, claimant must show a reasonable effort to find employment,@ and his failure to receive the status of a legal alien would be a crucial fact for the Commission in its determination of whether plaintiff has made a reasonable effort to find employment.@

Risk Handling Hint: The holding in *Gayton* is a reminder to risk managers of the importance and potential use of labor market surveys in countering certain claims of total disability. Aggressive job placement efforts may produce better evidence of an injured worker=s wage earning capacity in other cases, however, and it requires a careful judgment call to determine which of these defense tools is appropriate in each individual case.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

On March 19, in a case being defended by TCD&G, *Carroll v. Living Centers Southeast*, the Full Commission rejected claimant=s argument that one of the consequences of last year=s enactment of House Bill 1045 was to shorten from 39 days to 24 the time period defendants have to pay the proceeds of an approved settlement before the 10% penalty provisions of N.C.G.S. 97-18(g) are triggered. For a

more detailed discussion of this issue, see the October 2001 edition of *Risk/Alert*.

We will continue to monitor and advise you of developments in connection with each of the above areas of interest and concern.

