

RISK/ALERT

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CASE LAW UPDATE

Supreme Court Refuses to Overturn Dismissal of Bad Faith Lawsuit Against Carrier and Rehabilitation Company

In *Johnson v. First Union Corp.*, claimant contended that after she signed a Form 21 agreement, the adjuster handling her claim improperly altered it and the rehabilitation nurse misrepresented facts to the treating physician. Rather than pursue a fraud claim before the Industrial Commission, claimant filed a civil action in Superior Court alleging intentional infliction of emotional distress, bad faith refusal to pay insurance benefits, unfair insurance claim settlement practices, unfair trade practices and civil conspiracy.

The trial court dismissed all of those claims, holding that claimant's sole remedy was under the Workers' Compensation Act. The Court of Appeals initially reversed, finding that the Act did not provide the exclusive remedy and holding that claimant could sue the carrier, employer and rehabilitation company directly. However, after defendants filed a petition for rehearing, the Court of Appeals reversed itself, held that the trial court was correct in dismissing claimant's civil action and stated that the Industrial Commission has exclusive jurisdiction over all claims alleging fraud.

Claimant's petition for discretionary review was granted by the Supreme Court. Thereafter, in excess of ten briefs were filed by a variety of interested parties, including the North Carolina Association of Defense Attorneys. On March 3, the Supreme Court entered an Order stating that it had improvidently allowed discretionary review. The legal effect of that Order is to leave in effect the

Court of Appeals' holding that injured workers are precluded from seeking damages in civil actions alleging claims-handling fraud, and are limited to seeking redress through the Industrial Commission.

Risk Handling Hint: The *Johnson* decision is of enormous importance to employers, carriers, rehabilitation professionals and others involved in the administration of workers' compensation claims. A contrary decision allowing plaintiffs to file civil actions against employers and their insurers for claims of fraud and/or unfair trade practices would have opened a floodgate of lawsuits in the civil court system. At the same time, risk managers should be aware that limited remedies remain available to aggrieved parties under the Workers' Compensation Act if fraud is proven.

Court of Appeals Holds Presumption Of Disability Does Not Arise from Proof of an Injury by Accident

On March 7, in a case defended by TCD&G, the Court of Appeals held that proof of an injury by accident does not entitle employees to a presumption of disability. In *Fuller v. Motel 6*, claimant suffered an injury to her neck when she slipped and fell while cleaning a bathroom in her employer's hotel. She also alleged development of an occupational disease, contending that squeezing a cleaning spray bottle throughout the day caused her to develop carpal tunnel syndrome and a ganglion cyst.

However, the Court of Appeals affirmed the Industrial Commission's finding that claimant had failed to prove increased risk. It also affirmed the Commission's finding that notwithstanding the admittedly compensable slip and fall, claimant was capable of performing her regular work duties. Therefore, she was not

entitled to weekly compensation. It held that an employee is entitled to weekly benefits only after proving both an injury by accident *and* disability resulting from her injury. Employees are *not* entitled to a presumption of disability simply by proving an injury by accident. Consequently, although claimant suffered an accident, she was not entitled to weekly benefits because she failed to prove disability resulting from her fall.

Risk Handling Hint: There has been a concerted effort by the plaintiffs' bar to expand the scope and application of the "presumption of disability" which arises in cases where the Industrial Commission has either approved a Form 21 agreement for weekly compensation or has otherwise ordered payment of continuing benefits. In *Fuller*, the Court of Appeals rejected claimant's attempt to expand application of that presumption to all compensable cases, and in doing so, it refused to reverse our courts' longstanding rule that in order to receive an award of benefits, an injured worker must prove all of the essential elements of her claim, including disability. Risk handlers should be aware of the presumption of disability concept, its application and the limitation on its scope.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ *Public Hearing Scheduled to Address New Fraud Rules and Proposed Revisions to Rehabilitation Rules*

On March 30, the Industrial Commission is scheduled to receive comments from interested parties concerning new fraud rules and revisions to its rehabilitation rules. The former, discussed in last month's edition of *Risk/Alert*, will assist employers and district attorneys throughout the State in successfully prosecuting employees who are fraudulently receiving workers' compensation benefits. Among the rehabilitation rule modifications being proposed are the following:

Although elements of the plaintiffs' bar are interpreting action taken by the Supreme Court on March 3 in *Johnson v. First Union*

Corp., et al. and *Jenkins v. Public Service Co.* as authority for the proposition that all rehabilitation professionals (RPs) whose bills are being paid by the defense should be viewed as agents of the employer, Rehabilitation Rule I(B) has been changed to make a distinction between RPs acting independently and those acting as agents for one of the parties. In the latter situation, the RP must disclose to the doctor and other parties that he/she is not the authorized case manager.

The Commission intends on continuing application of its rehabilitation rules to both medical and vocational specialists. Over strenuous objections from defense representatives, the Commission has retained in new Rule VIII(C) the requirement that if an RP wishes to utilize written or videotaped job descriptions in the return to work process, copies must be provided to the worker and his/her attorney in advance. On the other hand, the time period for that to be done has been reduced from ten calendar days to five business days.

Also over strenuous objection from the defense, new Rule VII(D) prohibits an RP from communicating with physicians other than during a joint meeting with the worker, except in several specifically enumerated circumstances. This rule seems to be inconsistent with the holding of the Court of Appeals in *Jenkins* (see the analysis of that case in the January 2000 edition of *Risk/Alert*). However, because *Jenkins* was reversed on other grounds by the Supreme Court on March 3, the continuing validity of the Court of Appeals' holding that RPs are not presumed to be agents of employers is in dispute.

The proposed fraud and rehabilitation rules can be obtained from the Industrial Commission or by viewing its web site, www.comp.state.nc.us/ncichome.htm.

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