

# RISK/ALERT

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## CASE LAW UPDATE

### *Supreme Court Rules that Reaching MMI Does Not Require Termination of TTD Benefits*

On March 28, the Supreme Court issued its long-anticipated decision in *Knight v. Wal-Mart Stores*, agreeing with the majority opinion entered by the Court of Appeals last year (see the March and December 2002 editions of *Risk/Alert*) that an injured employee may continue to receive TTD after reaching MMI.

While working for Wal-Mart and removing computers from a shelf, Shawn Knight fell and injured his back, aggravating an underlying, pre-existing low back condition. After MMI was reached, a dispute arose over his ability to return to work. Wal-Mart argued Knight's presumption of disability and right to TTD ended at MMI, shifting back to claimant the burden of proving what *permanent* disability benefits, if any, he was entitled to receive, and that it was error for the Commission to award *temporary* total disability benefits after MMI was reached.

In a *per curiam* opinion, the Supreme Court has now rejected that argument, adopting instead the Court of Appeals majority's holding that "the 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 MMI does not have any direct bearing on an employee's right to continue to receive additional TTD or TPD benefits once he has established a loss of wage-earning capacity pursuant to either N.C.G.S. § 97-29 or § 97-30.

The first of the three significant components of the *Knight* decision was the Supreme Court's

decision to agree with the Court of Appeals that the primary consequence of reaching MMI is merely to delineate when the "healing period" ends, at which point the employee may choose to receive benefits for permanent impairment. That is, MMI triggers the employee's right to elect, *if he so chooses*, to receive scheduled benefits for permanent impairment under N.C.G.S. § 97-31.

The second significant consequence of the holding in *Knight* is its impact on the burden of proof in establishing total disability. After Shawn Knight underwent surgery and was released to return to work, he told Wal-Mart he was unable to do so as a result of the pain he was experiencing. The treating orthopaedist, Dr. King, testified there was no *objective* medical reason why his patient could not return to work with restrictions. He also believed claimant's complaints of pain were more severe than would be expected, given his physical status. At the same time, however, Dr. King testified that the type of injury in question can be very painful and that, in his opinion, claimant's complaints were genuine.

Claimant did not seek alternative employment on his own, nor did he argue incapacity to work due to preexisting factors such as his age, education or work experience. Instead, he argued that his testimony regarding the pain he was experiencing was sufficient to establish disability for purposes of an award of benefits under N.C.G.S. § 97-29. Both appellate courts agreed, holding that "medical evidence ... plaintiff suffers from genuine pain ..., combined with the plaintiff's own *credible* testimony that his pain was so severe that he is unable to work, may be sufficient to support a conclusion of total disability ...." Because the Commission found credible claimant's testimony regarding the pain he was experiencing, its award of continuing TTD was affirmed.

The third significant consequence of the holding in *Knight* relates to its implications on the issue of whether the defense is entitled to a credit for benefits paid after MMI is reached, if claimant subsequently elects to receive PPD. In a footnote, the Court of Appeals observed that, where the employee has a specific physical impairment which falls under N.C.G.S. § 97-31 and is also able to show a loss of wage earning capacity, he may elect to seek the more favorable remedy. An argument can be made that as soon as the injured worker reaches MMI and continues to accept TTD under N.C.G.S. § 97-29, he has made his election of benefits. If he subsequently returns to work and chooses PPD under N.C.G.S. § 97-31, the defense should then argue entitlement to a credit against the PPD award for all TTD benefits paid after MMI was reached.

The holding in *Knight* also illustrates yet again the tremendous power now wielded by the Industrial Commission in workers' compensation cases. The vast majority of all claims it hears have some element of credibility in them. In *Knight*, claimant's own testimony was the largest single component of the evidence establishing his alleged disability. Because the applicable standard of appellate review provides that if the Commission's findings are supported by *any* competent evidence, they will not be disturbed on appeal, the Commission's determinations with respect to the credibility of such testimony will be critical to the final resolution of many claims of total disability.

**Risk Handling Hint:** If faced with claims in which injured workers have returned to work after receiving TTD following MMI, risk managers should explore the possibility of taking a credit against their future PPD liability for all benefits paid after the date of MMI, under the theory that claimant elected to receive compensation under N.C.G.S. § 97-31 after he reached the end of his "healing period."

#### *Supreme Court Rejects Presumption of Impairment Concept in Intoxication Cases*

In another 2-to-1 majority opinion entered in March 2002, *Willey v. Williamson Produce*, the Court of Appeals held that while employers bear the burden of proving the affirmative defenses of

impairment and intoxication under N.C.G.S. § 97-12, they are not required to disprove all other causes of an injury, nor show that intoxication was the *sole* proximate cause. Further, if the employer proves "use of a non-prescribed controlled substance, it is presumed ... the employee was impaired," and once the employer offers evidence of proximate cause, "the burden shifts to the employee to rebut the presumption of impairment or that ... [it] was not a contributing proximate cause of the accident."

However, the lengthy dissent of Court of Appeals Judge Greene gave the dependents of deceased employee in *Willey* the right to appeal to the Supreme Court. On March 28, that Court rejected the rebuttable presumption of impairment concept which had been enunciated in the majority opinion in *Willey*. Instead, it adopted Judge Greene's dissent, in which he argued that for the defense to establish that an employee's injury or death was proximately caused by his having been under the influence of a controlled substance, it must establish that the controlled substance had an impairing effect on the employee: "Without a showing of impairment, there cannot be causation, and without a showing of causation, the employer has not sustained its burden" under N.C.G.S. § 97-12. In other words, to satisfy the statute's provisions, the defense must prove impairment, which will not simply be presumed from the mere presence of a controlled substance in the injured worker's body.

In *Willey*, as is so often the situation in cases of suspected intoxication, the employee tested positive for a controlled substance, in his case cocaine. However, claimant's expert testified that it was impossible to know what level of impairment, if any, the cocaine was causing at the time of the accident, despite the existence of eyewitness testimony that before the accident in which he was killed, the deceased employee had driven his employer's tractor-trailer erratically, weaving from one lane to the other for a period of 45 minutes. The defense presented expert testimony that Willey was impaired by the cocaine he had taken and his impairment had caused the accident. However, the Full Commission chose to accept the opinion of claimant's expert that it was impossible to determine

whether the decedent was actually impaired by the cocaine in his system.

The ultimate resolution of this case again demonstrates the power the Full Commission wields when it issues its credibility determinations. If there is any competent evidence to support the Commission's findings, our appellate courts are obligated to affirm its decision, no matter how much evidence was offered to the contrary.

### *Employer's Ex Parte Conversation With Company Physician Results in Exclusion of His Opinions*

In September 1995, Mary Terry suffered a compensable injury to her left heel while working for PPG Industries. She was seen in the emergency room and then by the company physician, Dr. Strader, who referred her for an orthopaedic evaluation and treatment, but continued to follow her condition over time. Terry was paid TTD benefits for two periods of disability and eventually returned to light duty work at PPG. However, because she continued to complain of pain, her attorney sent her to Jerry Nobles, Ph.D., a psychologist, who diagnosed major depression, recommended that she not work, and referred her to a psychiatrist for psychotropic medications.

The PPG Safety Manager, Dave Ulmer, subsequently ordered surveillance, which he showed to Dr. Strader, who then testified he was "shocked" by what he saw on the videotape because his impression of his patient's condition from the very beginning was that she had a significant injury and was substantially limited in her ability to walk.

The deputy commissioner denied plaintiff's request for ongoing total disability benefits and limited her award to PPD. The Full Commission reversed and ordered PPG to pay ongoing total disability benefits, excluding not only Dr. Strader's testimony, but his medical records as well, after agreeing with claimant that Dr. Strader was a "treating physician" and that Ulmer's *ex parte* communication violated the holding in *Salaam v.*

*N.C. Dept. of Transportation.* On March 18, in *Terry v. PPG Industries, Inc.*, the Court of Appeals affirmed, broadly expanding the holding in *Salaam*, which had merely proscribed *ex parte* contacts with treating physicians by *defense counsel*. In doing so, it held that "in a workers' compensation case, a physician may not engage in *ex parte* communications with *the defendant*" (emphasis added).

**Risk Handling Hint:** As the holding in *Terry* clearly illustrates, all communications between representatives of the defense and a treating physician can be problematic. In *Terry*, the Court of Appeals rejected PPG's effort to distinguish between the defendant and its counsel, finding that the employer's *ex parte* contact with Dr. Strader invaded the confidential relationship between the doctor and his patient, putting Dr. Strader in an "untenable position."

The holding in *Terry* also further limits defendants' ability to present surveillance videotape evidence to treating physicians. Some options for doing so still remain, however, such as through taking the doctor's deposition, or by first revealing the videotape evidence to opposing counsel before providing it to the treating doctor. However, the efficacy of pursuing either of those options is questionable, and each claim will need to be handled on a case-by-case basis. It is recommended that counsel be consulted before any affirmative action is taken, as the consequence of what will likely later be characterized as an improper contact could be exclusion of what might otherwise be testimony favorable to the defense.

## RUMBLINGS AT THE INDUSTRIAL COMMISSION

On March 26, 2003, Governor Easley announced that he is replacing Commissioner Renee Riggsbee with former Deputy Commissioner Pam Young, who will be filling one of the three employer positions on the Full Commission.