

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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## CASE LAW UPDATE

### *Commission's Award of Benefits Vacated by Court of Appeals*

Griselda Gutierrez was employed by GDX as an assembler of interior automotive parts. Shortly after her employment began in July 1999, she injured her back lifting a bin of parts weighing approximately 15 pounds, received conservative treatment and was released to regular duty. She did not seek further medical treatment until eight months later, when she returned to the doctor for a right elbow injury. Six months after that, she received treatment for a severe headache. On neither occasion did she complain of back pain.

In January 2001, Gutierrez went to a chiropractor, Michael Binder, DC, reporting that for fifteen months, she had been suffering from low back pain attributable to her work. Dr. Binder immediately took her out of work, and he later placed her on restrictions which GDX could not accommodate.

Gutierrez was eventually seen by an orthopaedic surgeon, Dr. Jeffrey Baker, who ordered physical therapy and diagnosed degenerative disc disease. After GDX questioned the relationship between that condition and the injury she had suffered at work in July 1999, a hearing was held by Deputy Commissioner George Glenn, who awarded ongoing TTD and continuing medical care.

GDX gave notice of appeal, first to the Full Commission, which affirmed Deputy Commissioner Glenn's decision, and then to the Court of Appeals. On March 15, in *Gutierrez v. GDX Automotive*, the Court vacated the Commission's award and gave three reasons for doing so. First, it found that the Commission had failed to make findings of fact regarding Gutierrez's treatment with Dr. Eric Troyer, the physician by whom she was seen for her non-work-related problems, and to whom she made no mention of continuing back difficulties. The Court held that while it is not necessary to receive evidence from every doctor who treats an injured worker, the Commission is required to "enter findings of fact regarding material evidence properly presented to...[it]." Therefore, it was error for the Commission to fail to make findings regarding the credibility and relevancy of Dr. Troyer's testimony.

The Court also determined that the Commission had erred in finding that the back problems for which Gutierrez sought treatment in January 2001 were proximately caused by the injury she suffered at work eighteen months earlier, as her doctors had only said claimant's injury was a "possible" cause of her condition. This was insufficient to satisfy claimant's burden of proving causation. And, Dr. Baker's testimony that claimant's injury "could or might have resulted in the symptoms presented" was also insufficient, as in

*Holley v. ACTS, Inc.* (see *Risk Alert*, June 2003), the Supreme Court had “specifically rejected ‘could or might’ testimony to prove causation and stated, ‘mere possibility has never been legally competent to prove causation.’”

Finally, the Court of Appeals also found error in the Full Commission’s conclusion that claimant was disabled. It noted that “disability” is defined as “the impairment of the injured employee’s earning capacity rather than physical disablement.” In *Griselda Gutierrez*’s case, she failed to present evidence that she had been “unsuccessful after a diligent effort to obtain employment.” To the contrary, the record contained no evidence she had made any attempt to obtain another job after her employment at GDX ended. Likewise, claimant had offered no evidence of a pre-existing condition which prevented her from earning the same or higher wages than those she earned at GDX.

**Risk Handling Hint:** The Court of Appeals’ decision in *Gutierrez* is a useful reminder to risk managers that the burden of proof is on the injured worker in a denied claim to not only present credible medical evidence regarding causation, but also establish that her injury caused disability. Simply introducing evidence of a doctor’s work restrictions is insufficient. And, says the *Gutierrez* Court, the injured worker also has the affirmative duty of presenting evidence that she had made a diligent effort to obtain employment. Failing that, she has not proven disability, and therefore, is not entitled to an award of ongoing indemnity benefits.

### *Injury During Industrial League Basketball Game Noncompensable*

Rudolph Brown was a teacher with the North Carolina Special Care Eastern Adolescent Treatment Program (EATP). He injured his Achilles tendon playing basketball after normal work hours for a team which was part of a basketball league organized by the City

of Wilson’s Recreational Department. EATP employees organized the team on their own, EATP did not pay Brown while he was playing, and EATP did not encourage its employees to participate or promote its program if they did. An EATP staff doctor served as the team’s coach, but EATP’s only financial involvement was a one-time contribution of \$200 toward the team’s entrance fee in the year prior to Brown’s injury.

After Brown’s claim for workers’ compensation benefits was denied by EATP’s third party administrator, a hearing was requested and held and an award of benefits entered by the deputy commissioner. However, EATP appealed and the Full Commission reversed, finding that Brown’s injury did not arise out of or in the course of his employment.

On March 1, in *Brown v. Care Center*, the Court of Appeals agreed with the Full Commission, holding that under its prior decision in *Chilton v. Bowman Gray School of Medicine*, the proper analysis for determining the compensability of injuries occurring during recreational activities is as follows: (1) Did the employer in fact sponsor the activity? (2) To what extent was attendance really voluntary? (3) Was there some degree of encouragement to attend, evidenced by such factors as (a) taking a record of attendance; (b) paying for the time spent; (c) requiring the employee to work if he did not attend; or (d) maintaining a known custom of attending? (4) Did the employer finance the activity to a substantial extent? (5) Did its employees regard the activity as an employment benefit to which they were entitled as of right? (6) Did the employer benefit from the activity, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

The Court of Appeals noted that in *Rudolph Brown*’s case, none of these questions could be answered in the affirmative. Therefore, the Full Commission was correct in concluding that Brown was not entitled to benefits under the Workers’ Compensation Act.

**Risk Handling Hint:** The compensability of injuries occurring during company-sponsored events can be difficult for risk managers to evaluate. Resolving the issue of compensability needs to be done on a case-by-case basis, and determining whether benefits are owed in any particular case will require a detailed analysis of the facts presented in relation to the factors articulated by our appellate courts in *Chilton* and *Brown*. Risk managers are encouraged to contact a member of the TCDG workers’ compensation team if they are presented with a questionable fact pattern arising out of a company sponsored event.

## RUMBLINGS AT THE INDUSTRIAL COMMISSION

- Chairman Lattimore has announced the appointment of Assistant Attorney General Myra L. Griffin to the position left vacant by last year’s resignation of Deputy Commissioner Ed Garner. Myra previously served as an Agency Legal Specialist to the Full Commission (1998–2001) and Special Deputy Commissioner (2001–2002). Since September 2002, she has been assigned by the Attorney General to prosecute fraud cases and represent the Commission in cases in which it is a party.
- The Commission has announced that its 10th annual educational conference will be held October 19–21, 2005. As in the past, CEU credits will be offered. Additional information can be obtained from the Commission’s website, [www.comp.state.nc.us/ncic](http://www.comp.state.nc.us/ncic).