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RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS

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(919) 873-0166
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TCDG IS MOVING

Effective April 1, TCDG's office is moving to 4800 Six Forks Road, Suite 300, Raleigh, NC, 27609. **The firm will have a new mailing address, P. O. Box 19207, Raleigh, NC 27619-9207,** but our telephone numbers and e-mail addresses will remain the same.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

The Industrial Commission has announced that its 76th Annual North Carolina Statewide Safety Conference will be held at the Joseph S. Koury Convention Center in Greensboro from May 9 through 12. Although no attendance fee is charged, registration is required. For further details, including exhibition and corporate sponsorship opportunities, see the Commission's website, www.comp.state.nc.us/ncic.

CASE LAW UPDATE

Injury in Go-Cart Accident at "Fun Day" Found Compensable

Tammy Frost, a waitress at The Crab Shack in the Town of Salter Path, was also a volunteer emergency medical technician with Salter Path Fire and Rescue. In time, she became its captain of emergency medical services.

On October 3, 2001, the fire and rescue squad held its annual "Fun Day" event at Lost Treasures Golf and Raceway, and all of its volunteers, including Frost, were encouraged to attend. Frost and her husband drove the rescue squad ambulance to Treasure Island, where she was injured in a go-cart accident. After being transported to the hospital and treated for a contusion and cervical and thoracic strains, Frost was told not to go back to work as a waitress, but was eventually authorized to return to other restricted duty work.

Frost then filed a workers' compensation claim, contending that her injuries arose out of and in the course of her employment as a fire and rescue squad worker. But, her claim was denied by the deputy commissioner to whom it was assigned for hearing. However, Frost appealed to the Full Commission, which reversed and awarded benefits after finding that the event was essentially an appreciation day on which the unpaid fire and rescue volunteers were thanked for their contributions to the community, and the event's other purposes included boosting volunteer morale and helping develop camaraderie. The Commission also found that the fire and rescue squad paid the volunteers' admission charges and provided them free lunches. Further, while it was a voluntary event, the unit's members were urged to attend, if possible, those in attendance signed in and were given passes for free rides, and before she was injured, claimant had planned to give a pep talk to thank the other volunteers, encouraging them to continue volunteering.

From those findings, the Full Commission concluded that the fire and rescue squad had received a tangible benefit from the event, since it helped to improve morale and provided the unit's leaders with an opportunity to encourage continued participation. The Commission then found that four of the six criteria for determining whether compensation is owed when an injury is sustained during a recreational

event set forth in ***Chilton v. Bowman Gray School of Medicine*** were present. Therefore, it entered an award of benefits to claimant.

On March 7, in ***Frost v. Salter Path Fire & Rescue***, a 2 to 1 decision written by Judge Robin Hudson with Judge John Tyson dissenting, the Court of Appeals affirmed that award. In doing so, the Court's majority reiterated the ***Chilton*** criteria: (1) Did the employer in fact sponsor the event? (2) To what extent was attendance really voluntarily? (3) Was there some encouragement to attend, evidenced by such factors as (a) taking attendance, (b) paying for the time spent, (c) requiring employees to work if they did not attend, or (d) maintaining a known custom of attending? (4) Did the employer finance the event to a substantial extent? (5) Did its employees regard the event as an employment benefit to which they were entitled as a right? (6) Did the employer benefit from the event, not merely in a vague way through better morale and goodwill, but through such tangible advantages as having an opportunity to make speeches and awards?

Noting that the purpose of "Fun Day" was not simply to foster personal camaraderie, since without continued participation by its volunteers, Salter Path Fire and Rescue would cease to exist, the Court of Appeals' majority agreed with the Full Commission that at least four of the ***Chilton*** factors were satisfied in this case.

In his dissent, however, Judge Tyson argued that the Commission had drawn erroneous conclusions from its findings. In his opinion, virtually *none* of the six ***Chilton*** factors were present. He noted, for example, that it was the general Salter Path community, not Salter Path Fire and Rescue, which paid for the event. Its expenses had been paid out of a special donations fund, not the fire and rescue squad's operating budget. Further the event was purely voluntary, only six volunteers actually attended, attendance was taken merely to compute the amount to pay the amusement park, it was open to *all* volunteers, whether they were "active" or not, claimant was only planning to make some impromptu comments regarding her appreciation for the volunteers' work, not a formal speech, and the anticipated benefit to the fire and rescue squad was no more than the same type of vague and intangible benefit which was found by the ***Chilton*** Court to be an inadequate basis for a finding of compensability.

Risk Handling Hint: As a result of Judge Tyson's dissent, it is anticipated that this case will eventually be resolved by the Supreme Court. *Risk Alert* will monitor and report on the Supreme Court's ultimate resolution of that appeal. In the meantime, risk managers are advised to look for and investigate each of the ***Chilton*** factors when faced with claims arising out of injuries which occur during company-sponsored events to determine whether they bring the employee's injury within the course and scope of employment. Claims of this type are generally hotly contested and, as evidenced by both ***Chilton*** and ***Frost***, their ultimate outcome is often a close call for the Commission and our appellate courts to make.

Delayed Cervical Injury Following Shoulder Injury Found Compensable

On January 3, 1996, Tony Avery fell backward while stepping off a stool, striking his back and right shoulder on a concrete block. Although his shoulder received both immediate and follow up treatment from a series of doctors, including Dr. Steven L. Wooten, for what was later determined to be a rotator cuff tear, it was not until that August, seven months after the fall, that the possibility of a cervical condition was first mentioned.

Avery was seen for the first time by Dr. Kurt Voos, an orthopaedic surgeon, in March 2002. Dr. Voos reviewed a recent MRI of Avery's cervical region and found evidence of a herniated disc at C5-6 and C6-7. When asked whether he believed Avery's disc herniation might have been caused by his fall six years earlier, Dr. Voos replied "I think it could have been, yes." Then, after reviewing Dr. Wooten's records from 1996, Dr. Voos went even further, stating that the disc herniation was "likely to be related to the injury." And, he concluded that it was "very likely" Avery's pain from his rotator cuff tear had initially masked the symptoms he would have had from his herniated cervical disc.

After Avery filed a claim seeking compensation for his cervical difficulties and resulting disability, the deputy commissioner who heard the claim denied it, finding that the majority of the medical evidence in the record indicated that claimant "could or might" have suffered a cervical spine injury when he fell, which the deputy commissioner found to be an insufficient basis for establishing a causal connection between that accident and claimant's cervical condition. However, the Full Commission reversed, finding that Dr. Voos' testimony was sufficient to establish causation.

On March 7, in ***Avery v. Phelps Chevrolet***, the Court of Appeals affirmed the Full Commission's award, noting that the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and finding that Dr. Voos' statement that it was "likely" Avery's cervical disc herniation was related to his fall in January 1996 was sufficient support for the Full Commission's findings of fact.

Risk Handling Hint: The ultimate outcome in ***Avery*** is another reminder to risk managers of the immense power the Full Commission routinely exercises in resolving cases in which there is a disagreement among experts on issues such as medical causation. Even if numerous doctors have testified that they are unable to find causal connection to a reasonable degree of medical certainty, or their opinions are equivocal, or they find no connection at all, the Full Commission is still within its authority to accept the testimony of one expert over that of all the others in finding the claim compensable. Likewise, ***Avery*** points out our appellate courts' limited power to set aside a Commission award of benefits in such cases, since the standard of appellate review is whether there is *any* evidence to support the Commission's findings. If there is, both the Court of Appeals and Supreme Court are bound by those findings and obligated to affirm the Commission's award.