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CASE LAW UPDATE

Clincher Agreement with Pro Se Claimant Voided Due to Commission's Failure to Inquire into Settlement's "Fairness"

Mona Smythe, a Waffle House waitress, slipped and fell at work, suffering tears of the medial meniscus and ACL in her left knee. After returning to light duty work following surgery, she was evaluated by Dr. Rudins, who concluded that unless she underwent an ACL reconstruction, she had reached maximum medical improvement with a 29% permanent impairment of the leg.

Smythe continued to work until she had a second operation on her knee. Later, she was advised to undergo the ACL reconstruction mentioned in Dr. Rudins' report, but while her first two operations had been covered by workers' compensation, the reconstruction procedure was not performed because Waffle House refused to pay for it.

At the time, Smythe was represented by counsel. But, six months after authorization for the ACL reconstruction procedure was refused, she fired her attorney and contacted Waffle House's third party administrator about settlement. The parties subsequently reached agreement to clincher her claim for \$24,000 plus an additional \$2000 for a separate "Release of Employment Claims." Their settlement was subsequently put in writing and approved by the Commission, settlement checks were issued, and Smythe cashed them.

Four months later, the attorney representing Smythe in her Social Security disability claim requested that an amended clincher agreement aimed at minimizing the Social Security offset resulting from her workers' compensation recovery be executed. Waffle House and its TPA agreed

to that request and a revised agreement was prepared, submitted to the Commission, and approved.

Later, still acting *pro se* in her workers' compensation case, Smythe filed a request for hearing, seeking to have the settlement with Waffle House nullified on the basis of "fraud" and/or "misrepresentation." The deputy commissioner who heard the case agreed with claimant and set aside the Commission's prior approval of the parties' settlement. However, after the defendants appealed, the Full Commission reversed, finding no evidence of "error due to fraud, misrepresentation, undue influence or mutual mistake," the statutory prerequisites for setting aside settlements under N.C.G.S. § 97-17. As a consequence, the Full Commission concluded that both the original and amended clinchers were fully enforceable and not subject to being set aside.

However, on May 17, in *Smythe v. Waffle House*, the Court of Appeals overruled the Full Commission, ordering it to vacate its prior approval of the parties' settlement. The Court held that, under N.C.G.S. § 97-17(b)(1), the Commission must review all compromise settlement agreements for fairness, since the statute provides that "[t]he Commission shall not approve a settlement agreement ... unless [it] is deemed by the Commission to be *fair and just*."

Applying that principle to the facts of this case, the Court noted that Smythe had not returned to work after her second knee operation and was not working at the time of settlement. It also observed that it could not determine which, if any, medical records had been submitted to the Commission when the clincher was

approved. Consequently, it found “no evidence from which the Commission could have determined the fairness of the agreement.” Therefore, the Court concluded that the record did not support the Commission’s determination that there was insufficient evidence to set aside its approval of the settlement in this case.

The Court went on to note that it is “statutorily impermissible for the Commission ... to approve ... [a] settlement agreement without the ... biographical and vocational information” required by Industrial Commission Rule 502, which provides that, where an *unrepresented* employee has not returned to work at a similar or greater average weekly wage, the clincher agreement must summarize the employee’s age, education, vocational training, work experience, and preexisting physical impairment, if any.

Although not specifically acknowledged in the Court’s opinion, Rule 502 has no application to cases in which the injured worker is represented by counsel. Likewise, Rule 502 does not require the clincher to contain a recitation of claimant’s age, education, vocational training, work experience, and permanent impairment, if any, if it contains claimant’s certification that total or partial wage loss benefits are not being claimed.

It does not appear as though any of claimant’s medical records accompanied the clincher when it was submitted for approval in *Smythe*, nor had claimant certified that she was not seeking additional total or partial wage loss benefits. Further, the clincher did not recite the medical treatment which *Smythe* had received for her injury. Therefore, the record in *Smythe* lacked the kind of evidence the Court of Appeals had deemed necessary under N.C.G.S. § 97-82 and Commission Rule 501(3) in *Atkins v. Kelly Springfield (Risk Alert, July 2004)*.

Risk Handling Hint: It can reasonably be anticipated that the holding in *Smythe* will cause the Commission to more closely scrutinize future clincher agreements involving *pro se* claimants. However, even prior to the holding in *Smythe*, it has been the practice at TCDG to include language in clinchers involving *pro se* claimants which satisfies Rule 502 and contains a specific certification from claimant that additional wage loss benefits are not being sought. Similarly, our standard clincher agreement contains a recitation of the injured worker’s medical treatment and

has as an attachment a complete set of all known medical records. Consequently, we remain optimistic that the *Smythe* decision will have little long-term impact on well-drafted clinchers which have been approved by the Commission, particularly those drafted by members of this firm.

Court of Appeals Rejects Chemical Exposure Occupational Disease Claim

Amanda Hayes was employed by Tractor Supply Company from 1992 through 1999. In 1998, she began experiencing an increase in headaches, sinusitis and bronchitis, which her doctors attributed to hormonal changes. While she was away from work on vacation, the store in which Hayes worked was affected by Hurricane Floyd, leading the company to begin stocking Snake-A-Way, an odiferous product containing the chemical naphthalene. After she returned to work, Hayes complained to her manager about the smell from Snake-A-Way and reported watery eyes and a scratchy throat. The next day, she experienced a severe outbreak of hives, which required emergency room treatment and, ultimately, hospitalization.

Hayes was subsequently diagnosed as having a chemical sensitivity. She continued to experience outbreaks of hives over the following months, left her employment with Tractor Supply, and attempted to work in an elementary school and at a veterinarian clinic, but she developed reactions to various substances at each job, including cleaning supplies and flea and tick shampoo.

Hayes eventually filed an occupational disease claim, which was found compensable by the deputy commissioner, but denied by the Full Commission. On May 17, in *Hayes v. Tractor Supply Company*, the Court of Appeals agreed with the Full Commission’s denial and affirmed its finding that claimant failed to prove she had contracted an occupational disease. Citing with approval its previous decisions in *Sebastian v. Hair Styling* and *Nix v. Collins & Aikman (Risk Alert, July 2002)*, the Court observed that “an individual’s personal sensitivity to chemicals does not result in an occupational disease compensable under ... workers’ compensation ...”

Although claimant’s doctors had testified that her employment at Tractor Supply placed her at a greater risk than members of the general public for

developing a chemical sensitivity, they had also testified that she had a heightened peculiar susceptibility to chemicals which predated her employment at Tractor Supply. That led the Court to hold that the Commission was correct in finding Hayes’ expert testimony insufficient to establish a causal connection between her condition and the exposure to naphthalene at work. While Hayes’ three physicians linked the two together temporally, the Supreme Court previously held in *Young v. Hickory Business Furniture (Risk Alert, January 2001)* that opinion evidence which is based upon a temporal relationship alone, applying the principle *post hoc, ergo propter hoc*, is not competent to establish medical causation.

Risk Handling Hint: Risk managers are encouraged to carefully investigate not only chemical exposure cases, but each and every occupational disease claim, to determine whether it can be established that their particular claimant’s reaction to the exposure in question resulted from personal sensitivity, rather than a risk of harmful consequences experienced by the general public. If so, then a denial of the claim would be in order. And, a key factor in resolving that question would be whether claimant’s sensitivity pre-dated her employment exposure. As a consequence, requests for prior medical records would certainly be appropriate.

EX PARTE COMMUNICATIONS UPDATE

As reported here last October, in an unpublished opinion, *Shoffner v. Wal-Mart*, the Court of Appeals reversed the Full Commission and remanded with instructions to exclude from the record the testimony of claimant’s treating doctor because of *ex parte* contacts made by the responsible claims representative. The adjuster had written three letters to the doctor asking for his opinion regarding MMI, whether claimant retained any PPD, and if she needed further treatment. On May 4, the Supreme Court denied defendants’ petition for discretionary review of the Court of Appeals’ opinion in *Shoffner*, which leaves standing the unfortunate opinion entered by the Court of Appeals in that case last fall.