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CASE LAW UPDATE

*Benefits Suspended for Failure to Cooperate
with Medical and Rehabilitative Treatment*

Burl Brinn injured his low back while working for Weyerhaeuser, which accepted his claim for workers' compensation benefits as compensable, began paying TTD, and provided conservative medical treatment for his ongoing complaints of pain. Eventually, his orthopaedist, Dr. William Lestini, released him to return to work with lifting, bending and twisting restrictions.

At that point, Weyerhaeuser retained Voc-Med to provide vocational rehabilitation services. Soon thereafter, concerns surfaced over Brinn's level of cooperation, starting with his refusal to drive to nearby towns to apply for available jobs. He also began demonstrating exaggerated and inconsistent pain behaviors during medical appointments, including a visit with Dr. Scott Sanitate during which he complained of increased back pain when his big toe was moved. Dr. Sanitate refused to accept him as a patient because of his "high degree of self-limited behavior and exaggerated symptoms."

Later, during an examination by a physician selected by Brinn himself, pain management specialist Dr. Phillip Bryant, he demonstrated "disproportionate guarding with light touch and exaggerated pain behavior ... inconsistent with his back injury." When Dr. Bryant encouraged him to participate in vocational rehabilitation, Brinn responded "they can forget about that"

The parties eventually entered into a Consent Order in which Brinn agreed to cooperate with vocational rehabilitation, including driving reasonable distances to apply for work. But, just a few months later, he refused to take a computer-aided drafting class. At that point, Weyerhaeuser asked for a hearing to address his failure to comply with the Consent Order. Brinn responded by claiming to be totally disabled, even though he

had agreed to cooperate with vocational rehabilitation and accept Dr. Lestini's work restrictions just a few months earlier.

The Commission entered an order directing Brinn to undergo a functional capacity evaluation. He showed up for the test and completed its first nine tasks with no reported problems, but then during a sitting tolerance test began sobbing dramatically and complained about being lightheaded and experiencing severe pain. He was taken by ambulance to the hospital, where upon arrival he began yelling, screaming and banging on the doors. When hospital staff hooked him up to an IV of simple saline solution, Brinn calmed down, claimed he could "feel that morphine," and said he was feeling better. Yet, he refused to cooperate with an examination by the attending physician when he arrived, prompting the doctor to discharge him with no pain medication.

Despite testimony about his exaggerated pain behavior from Drs. Sanitate and Bryant, and even though he did not submit to another FCE, Deputy Commissioner George Glenn entered an Opinion and Award in Brinn's favor. He rejected Weyerhaeuser's argument that the parties had entered into a settlement that Brinn was obligated to consummate and ordered Weyerhaeuser to continue paying TTD benefits.

On appeal, the Full Commission vacated Deputy Commissioner Glenn's award and authorized Weyerhaeuser to suspend TTD payments as a result of Brinn's refusal to travel reasonable distances to apply for the available jobs identified by his vocational case manager and because of his failure to comply with the Commission's previous order that he submit to an FCE.

Brinn appealed to the Court of Appeals, which on May 18, in *Brinn v. Weyerhaeuser Company*, affirmed the Full Commission's decision in all respects. The Court agreed with Weyerhaeuser, which was represented

by TCDG's Matt Little, Tracey Jones and Tammy Nance, that the record was replete with evidence supporting the Commission's finding that Brinn had failed to comply with its previous orders. It noted that the relevant statute, N.C.G.S. § 97-25, provides that an employee's unjustifiable refusal to accept medical treatment when ordered by the Commission *shall* bar him from receiving further compensation. In upholding the Commission's decision allowing Weyerhaeuser to suspend payment of weekly benefits, the Court noted that "numerous physicians found plaintiff physically able to perform certain tasks that would aid in his physical and vocational rehabilitation, ... [but] plaintiff nonetheless failed to complete an FCE or ... seek available, suitable employment."

The Court also rejected Brinn's argument that the Full Commission committed reversible error by failing to address the issue of whether the parties had entered into an enforceable settlement agreement. Rather, the Court agreed with Weyerhaeuser that Brinn waived any objection he might otherwise have had in that regard by not cross-appealing from Deputy Commissioner Glenn's finding that "there was no agreement to be enforced ..."

Court Discusses the Commission's Jurisdiction in the Context of Alleged REDA Violations

Debbie Beard began working for the Cumberland County Hospital System as a housekeeping assistant on January 8, 2007. Over the course of the next seven months, she reported four separate on-the-job low back injuries, the last of which the hospital accepted as compensable. It filed a Form 60 with the Commission and commenced paying temporary total disability benefits. Notwithstanding that fact and even though she was still receiving weekly TTD checks from the hospital, Beard filed an employment discrimination complaint with the North Carolina Department of Labor in July 2008, alleging that the hospital had taken an "adverse employment action" against her in violation of the Retaliatory Discrimination Employment Act by refusing to change her treating physician to the neurosurgeon of her choice and for not returning her to an alternative light duty job.

After the Department of Labor issued a "right-to-sue" letter, Beard brought suit against the hospital in Cumberland County Superior Court. In turn, the hospital filed Rule 12(b) (1) and (6) motions to dismiss, contending that Beard failed to state a claim upon which relief could be granted and asserting that the Superior Court did not have jurisdiction over the case because "[t]he claims asserted in the ... Complaint are exclusively and properly be-

fore the Industrial Commission ..."

The trial court agreed with the hospital and dismissed Beard's Complaint for lack of subject matter jurisdiction. She appealed the court's ruling to the Court of Appeals, but on May 18, in *Beard v. Cumberland County Hospital System, Inc.*, in an opinion authored by TCDG alumnus Judge Linda Stephens, the Court of Appeals affirmed the trial court's ruling dismissing the case.

In her opinion, Judge Stephens first took note of the fact that the relevant statute, N.C.G.S. § 95-240(2), defines "retaliatory action" as "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment." In light of that definition, she held that "refusing to allow plaintiff to choose her physician cannot be considered a 'retaliatory action' against [her] ... employment." And, as for the hospital's decision not to offer Beard alternative light duty employment, she noted that "failure to return an employee to work in a position other than her own has never been held to be violative of ... REDA," because "[u]nlike the ADA ..., ... REDA does not require an employer to make an accommodation for an employee. If no position currently exists that plaintiff could perform, necessarily no adverse employment action has occurred."

In affirming the trial court's dismissal of Beard's lawsuit, the Court agreed with the defendant hospital that she was improperly seeking a collateral review of matters related to a pending workers' compensation claim, over which the Industrial Commission had exclusive jurisdiction.

In further support for the dismissal of Beard's Complaint, the Court cited a series of its past decisions, including *Johnson v. First Union Corp.*, *Riley v. DeBaer*, and *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.* In each of those cases, the Court affirmed the dismissal of a civil lawsuit brought by an employee-plaintiff seeking to recover damages for torts such as fraud, intentional infliction of emotional distress, unfair and deceptive trade practices, and bad faith in handling the underlying workers' compensation claim, as any such claim is subsumed by the Workers' Compensation Act. Therefore, because all of the claims asserted by Debbie Beard were "related to her original compensable injuries and ancillary to her original workers' compensation claims for those injuries," the Court held that they were within the exclusive jurisdiction of the Industrial Commission and, therefore, properly dismissed by the trial court.

TCDG NEWS

Recent Successes at the NCIC

In a claim brought by an insulin-dependent diabetic over-the-road truck driver, TCDG's **Matt Little** has obtained an Opinion and Award from the Full Commission finding that the truck driver lied on his employment application and again during multiple related driver fitness examinations by knowingly concealing his medical condition. Claimant testified that he advised the examining physicians about his diabetic condition and they told him it was not a problem, but when the doctors were later deposed, they testified otherwise. The Full Commission resolved the inconsistency between their testimony and claimant's in the defendants' favor, finding that he had not disclosed his diabetic condition to the doctors. It also determined that, in seeking an ongoing award of TTD, he had engaged in "stubborn, unfounded litigiousness." As a consequence, the defendants were entitled to attorney's fees under N.C.G.S. § 97-88.1.

TCDG's **Greg Horner** obtained another Full Commission decision favorable to the defense in *Clark v. A+ Communication*, in which the issue in dispute was whether mileage reimbursement moneys should be included when calculating average weekly wage. The claimant in *Clark* was a cable installer paid on a production basis. He was required to use his own vehicle while working and reimbursed for the resulting expense at the standard federal mileage rate. After his gross production pay was reduced by the amounts owed for mileage and payroll taxes, among other deductions, the mileage reimbursements were added back in. In holding that they should not have been included in Clark's average weekly wage, the Full Commission rejected his argument that they were actually an allowance made in lieu of wages. It found that, because of the costs he incurred in operating his vehicle, he realized no net economic gain from the mileage payments. Further, since he was no longer working, he was not incurring the expense of operating his vehicle, so it would create a windfall if the amounts he previously received as a reimbursement of his travel expenses were included when calculating his average weekly wage.

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