

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Principle that Admitting Compensability Does Not Create a Presumption of Disability Reaffirmed by Supreme Court

Sandra Clark, a greeter at Wal-Mart, was asked to relocate a sled that was part of a display used during the Christmas holidays. As she was moving it, the sled slipped. Clark tried to grab it to keep it from falling, and in doing so, injured her low back.

Wal-Mart admitted compensability by filing a Form 60 and began paying TTD. Later, Clark asked for an evidentiary hearing, seeking permanent and total disability benefits. At the subsequent hearing held by Deputy Commissioner Kim Cramer, Wal-Mart stipulated to its liability for Clark's injury and admitted paying TTD for all of the time she had been out of work. However, it contested her contention that she was totally and permanently disabled.

After Deputy Commissioner Cramer entered an award favorable to claimant, Wal-Mart appealed. But, the Full Commission affirmed, saying that "as plaintiff has been receiving ongoing benefits, the burden is on defendants to show that she is capable of returning to gainful employment." It then went on to find as a fact and conclude as a matter of law that Clark was totally and permanently disabled and, as a consequence, entitled to lifetime benefits.

Wal-Mart next appealed to the Court of Appeals, which in April 2004 affirmed the Commission's award, holding that its admission of compensability gave rise to a presumption of continuing disability in Clark's favor. Wal-Mart then successfully petitioned for discretionary review. And, on October 7, in *Clark v. Wal-Mart*, the Supreme Court reversed both the Court of Appeals and Industrial Commission, remanding the case for

new findings of fact and conclusions of law "in accordance with the proper burden of proof."

In support of its decision, the Supreme Court cited *Johnson v. Southern Tire Sales and Service* (see *Risk Alert*, August 2004), in which it recently held that "a presumption of disability in favor of an employee arises only in limited circumstances," such as where either a Form 21 or Form 26 agreement has been executed or the Commission has previously entered an award of disability benefits. Otherwise, the burden of proving disability remains with the claimant, even if the employer has admitted compensability along the way.

In further support for its ruling, the Supreme Court noted that the Court of Appeals' opinion was inconsistent with a long list of its own decisions, including the case upon which they were all founded, *Sims v. Charmes/Arby's Roast Beef*, which was successfully defended by TCDG in 2001 (see *Risk Alert*, February 2001). The Court also cited with approval *Brice v. Sheraton Inn*, a 2000 decision of the Court of Appeals in which it was held that even though claimant proved she was temporarily totally disabled, that did not shift the burden of proof to the defendants on the issue of her alleged permanent and total disability.

Risk Handling Hint: The principles of law established in *Sims v. Charmes/Arby's Roast Beef* and *Brice v. Sheraton Inn* provide valuable tools to the defense in responding to claims of ongoing disability. Risk managers should remain cognizant of the fact that claimants face a different burden of proof when seeking to establish permanent and total disability than they do when they are simply claiming entitlement to TTD. The holding in *Brice* provides risk managers with an argument that their admission of claimant's entitlement to TTD pursuant to a Form 21 or 26 agreement does not automatically

translate into a presumption of permanent and total disability, nor does it shift the burden of proof on that issue to the defense.

There is also established case law holding that in order for an injured worker to qualify for permanent and total disability benefits, he must prove that his wage earning capacity has been "totally obliterated." Thus, it is not sufficient for a claimant to simply show that he has satisfied the criteria for temporary total disability enunciated by the Court of Appeals in *Russell v. Lowe's* (a claim for total disability benefits successfully defended by TCDG in 1993).

Risk managers are advised to give careful consideration to aggressively defending claims for permanent and total disability, including those in which they have admitted the injured worker's entitlement to TTD, at least in part because a finding of permanent and total disability may carry with it a future prohibition against vocational rehabilitation efforts. There are other instances, however, in which defendants might actually want a finding of permanent and total disability, such as when they are seeking to cause the statute of limitations to institute a death claim under N.C.G.S. § 97-38 to begin running.

Defendants' Ability to Communicate with Physicians Narrowed Further

The Full Commission's decision in *Mayfield v. Parker Hannifin* broadly interpreting the prohibition against *ex parte* communications with treating physicians established in *Salaam v. N. C. Department of Transportation* (see *Risk Alert*, March 2003), was the lead article in the October 2004 edition of this newsletter. On November 15, the Court of Appeals affirmed the Full Commission's decision in that case to strike from the record the opinions of claimant's treating physician, Dr. Albert Bartko, because of what both the Court and Commission characterized as an "*ex parte* communication" between defense counsel and Dr. Bartko. That "communication" consisted of a letter defense counsel simultaneously faxed to the doctor and claimant's attorney posing three questions regarding Mayfield's work restrictions.

In *Mayfield*, the injured employee, Willie Mayfield, hurt his back in a compensable accident, developed numbness in his left foot and leg, and stopped working. He began receiving TTD pursuant to a Form 60, saw a series of doctors, and was eventually referred to Dr. Bartko, who is board certified in physical medicine and rehabilitation. In his initial note, Dr. Bartko observed that it was unusual for his patient's leg and foot pain to have persisted after his low back pain had resolved and he was concerned that Mayfield's leg pain might have a different cause, such as diabetes or a mini-stroke.

Eventually, Dr. Bartko concluded that Mayfield had exhausted all conservative treatment options and was at MMI. At that point, he assigned a 3% permanent partial impairment rating, released claimant from further care, and stated in an office note that Mayfield's leg pain was not causally related to his low back condition and, therefore, was not work-related. He also expressed the view that if back pain was Mayfield's only problem, he would have been capable of returning to light duty work with restrictions, but given the nature and severity of his leg symptoms, it was doubtful that he could realistically do even sedentary work.

After Mayfield filed a request for hearing, his employer scheduled him for a return appointment with Dr. Bartko. On the day before claimant was to be re-examined, defense counsel faxed a letter to the doctor, which he simultaneously copied to Mayfield's attorney. In it, he asked whether it was possible to apportion claimant's overall disability between his back and other problems, including leg pain, and if not, whether the 3% PPD rating to the back was "a substantial and material factor in his overall disability." In response, Dr. Bartko faxed both attorneys his office notes, which answered defense counsel's questions and included his opinion that Mayfield's inability to work was "solely related to his non-work-related problems."

At that point, claimant was allowed an IME with Dr. Mark Roy, who concluded that his left leg symptoms *were* causally related to his back injury at work. Thereafter, the deputy commissioner who heard the case rejected claimant's contention that Dr. Bartko's testimony was tainted by an improper *ex parte* communication from defense counsel, chose to rely on the opinions of the treating physician, Dr. Bartko, and found that claimant's left leg symptoms were *not* the result of his work-related injury.

Upon claimant's appeal from that ruling, the Full Commission reversed, concluding that defense counsel's contact with Dr. Bartko was improper under the holding in *Salaam*. It then excluded all of the opinions he expressed after the date he received defense counsel's letter, resolved the causation issue in claimant's favor, and awarded him ongoing TTD benefits.

On November 15, the Court of Appeals affirmed the Commission's award of benefits. However, in doing so it focused not so much on whether defense counsel's letter was *ex parte*, but rather, on the fact that claimant had not authorized to defendants to communicate with his doctor. The Court observed that the Commission has adopted rules covering the use of interrogatories and other forms of discovery in workers' compensation cases and held that defendants may only obtain information from

injured workers' physicians through either the discovery methods recognized in those rules or as otherwise provided by statute. Thus, instead of attempting to obtain the information they had improperly sought through their attorney's letter, the defendants should have taken Dr. Bartko's deposition.

Among the flaws in the Court of Appeals' analysis in *Mayfield* is its failure to recognize that under the Commission's current rules, defendants are *not* entitled to take depositions unless they first obtain Commission approval. And, the Commission has been extremely reluctant in the past to allow pre-hearing depositions of any type, especially those of treating physicians.

In a similar vein, the Court's decision to deny defendants the right to communicate with treating physicians, even in written form with a simultaneous copy to claimant or his attorney, also fails to recognize the significant expense which is associated with utilizing depositions as a mode of obtaining information and the deleterious effect its ruling in *Mayfield* will have on claimants if defendants are required to go through the time-consuming process of scheduling and taking depositions in order to gather the information they need to resolve the kind of issues defense counsel was attempting to address in his letter to Dr. Bartko.

Risk Handling Hint: Absent either a successful petition for discretionary review or future legislative action to reverse the holding in *Mayfield*, it is binding authority on risk managers and their counsel. At the same time, the provisions of House Bill 99, which were the subject of last month's edition of *Risk Alert*, provide at least some relief from *Mayfield* in cases of admitted liability and those being paid without prejudice, at least so long as defendants limit their communications with doctors to the set of written questions now authorized by the newly enacted statute, N.C.G.S. § 97-25.6. In "Minutes" issued on November 21, 2005, those questions and a related information sheet have now been adopted by the Full Commission and published at www.comp.state.nc.us/.

At the same time, however, neither the *Mayfield* decision nor House Bill 99 addresses those situations in which the defendants need information from a treating physician in a claim of denied liability. In such cases, it appears that defendants are limited to either obtaining consent from claimant's attorney before contacting the treating physician or getting the Commission's approval to depose the doctor. That awkward process will only increase for both claimants and their employers both the need for depositions and the costs of litigating such claims.