

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



TEAGUE CAMPBELL
DENNIS & GORHAM
EXPERIENCE | TRUST | RESULTS

WORKERS' COMPENSATION
COMMERCIAL AND CIVIL LITIGATION
PRODUCTS LIABILITY
PREMISES LIABILITY
MEDICAL MALPRACTICE
NURSING HOME LITIGATION
REAL ESTATE LITIGATION
PROFESSIONAL LIABILITY
EMPLOYMENT & LABOR LAW
CONSTRUCTION LAW
ENVIRONMENTAL LAW
BUSINESS LITIGATION
AUTOMOBILE LIABILITY
GOVERNMENT & MUNICIPAL LAW
INSURANCE LAW & COVERAGE

PLEASE CONTACT
THE ATTORNEYS AT
TEAGUE, CAMPBELL
WITH QUESTIONS
CONCERNING THE
ARTICLES IN THIS
NEWSLETTER

(919) 873-0166
WWW.TCDG.COM

INDUSTRIAL COMMISSION COMPUTER ALERT

On December 4, the Commission announced that its e-mail system has failed, that all e-mail to or from the Commission since July may have been lost, and that, until further notice, nothing should be sent to the Commission by e-mail. The Commission's EDMS computer system, used to maintain all forms and other documents received at the Commission, is also down. It is unknown whether it can be repaired or the data in it retrieved. We will keep you advised as further notices are received from the Commission.

CASE LAW UPDATE

*Supreme Court Enters Significant Ruling for the
Defense in Occupational Disease and Specific Traumatic
Incident Case*

Hubert Chambers' job as a bus driver for Transit Management of Charlotte, by whom he had been employed for 30 years, required him to use his hands 90-100% of the time. On December 4, 2000, he was assigned a new route, and during the course of the day, began experiencing pain in his left arm, shoulder and neck, to the point he had to request that a relief driver complete the shift for him. But, it was not until ten days later that he notified the company's Director of Safety Administration of his problem, and as he was unsure whether his condition was related to his employment or had arisen from other factors, including yard work, he waited two weeks before filing an injury report.

After multiple visits to his family doctor, whose initial medical report stated that Chambers had noted no specific "inciting event" as the cause of his injury, he was sent to several orthopedists and then to a neurosurgeon, Dr. Tim Adamson, who diagnosed "double crush syndrome," which he described as the relationship between two injuries: an ulnar nerve entrapment in his left elbow and a cervical spine condition affecting Chambers' neck.

After Dr. Adamson performed two operations, an FCE indicated that Chambers was able to function

at a sedentary to light physical demand level and Dr. Adamson rated him with a 30% permanent impairment of his left arm. At that point, a dispute arose over the compensability of Chambers' condition and the extent of his disability.

Deputy Commissioner Nancy Gregory denied Chambers' claim for benefits, but the Full Commission reversed and awarded ongoing TTD after finding that the ulnar neuropathy and his cervical spine condition were both compensable occupational diseases and that the cervical problem was also caused by a specific traumatic incident. Later, a 2-to-1 majority at the Court of Appeals affirmed the Full Commission's award after concluding that the record contained sufficient evidence to support the Commission's findings and its conclusions of law.

However, Court of Appeals Judge Barbara Jackson disagreed, arguing in her dissent that not only had claimant failed to prove that his cervical spine condition was an occupational disease, but it was also not the result of a specific traumatic incident.

On November 17, in *Chambers v. Transit Management*, the Supreme Court agreed with Judge Jackson in a unanimous, well-written, opinion by Chief Justice Parker which will provide risk managers with strong legal authority to contest and defend many future occupational disease and specific traumatic incident claims.

In her opinion, Chief Justice Parker first addressed the occupational disease question, and in doing so, reiterated the Court's previous holding in *Rutledge v. Tultex Yarns* that to prove an occupational disease, claimant must show it to be "(1) characteristic of persons engaged in the particular trade or occupation in which ... [he] is engaged; [and] (2) not an ordinary disease of life to which the public generally is equally exposed ...; and (3) there must be a 'causal connection between the disease and ... [claimant's] employment.'" The Court then added that, to satisfy the first two requirements of that test, it is not necessary for claimant to prove that his disease is unique to his occupation, nor are all ordinary diseases of life non-

compensable. Rather, only those “ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.”

Thus, those claiming to have contracted an occupational disease can establish the first two prongs of the *Rutledge* rule by proving that their employment placed them at an increased risk of developing the disease as compared to the risk to which the general public is exposed, and the third prong of that test, which requires proof of medical causation, can be satisfied by showing that it was caused, significantly contributed to, or aggravated by the employee’s work.

The Court found that, in applying those legal principles to the facts before it in *Chambers*, the Full Commission had not utilized the correct legal standard when it cited *Walston v. Burlington Industries*, a case successfully defended by TCDG in 1982, and held that “Where, as here, there is evidence of both causation and aggravation connected to particular aspects of an employee’s job duties ... to which the general public is not exposed, compensability is logically and legally warranted.” Rather, while the aggravation of a pre-existing condition by an occupational disease can be compensable under *Walston*, claimant must first prove that “his employment exposed him to a greater risk of contracting his disease relative to the general public” (emphasis added).

Consequently, as the Supreme Court has now made very clear by its decision in *Chambers*, the initial focus in determining the compensability of an occupational disease claim should be on whether the worker’s employment increased his risk of contracting the disease. Only after he has proved that, thereby satisfying the first two prongs of the *Rutledge* test, can he, in addressing the third prong, take advantage of the lesser burden of proof applicable to medical causation questions by showing that his employment either significantly contributed to or aggravated a pre-existing condition.

Applying those principles to the facts in *Chambers*, the Supreme Court observed that the testimony of the treating surgeon, Dr. Adamson, was at best equivocal as to whether claimant’s employment placed him at an increased risk of contracting, as opposed to aggravating, his ulnar neuropathy. And, at the same time, Dr. Adamson was not at all equivocal when he testified that claimant faced no greater risk of developing a cervical spine problem than did the general public. Therefore, the Court determined that the record did not support the Commission’s finding that both conditions qualified as occupational diseases.

The Court then turned to the Commission’s assertion that “[t]he sudden pain to plaintiff’s neck on December 4, 2000, qualifies ... as a specific traumatic incident” under N.C.G.S. § 97-2(6) and held that this, too, was an erroneous statement of

North Carolina workers’ compensation law. In reaching that conclusion, Court noted that claimant testified to a “gradual onset” of arm pain, knew of “no particular inciting event,” and admitted that he did not know whether his injury might have resulted from yard work. Further, when asked why he believed his job had caused or contributed to his condition, the only explanation he could give was “because I had no prior problems.” And, he also had to concede that he wasn’t sure whether it was coming from something else.

Applying that testimony to existing case law defining what is a “specific traumatic incident,” the Court held that, to qualify, the injury cannot have developed gradually, but rather, “must have occurred at a cognizable time.” And, contrary to the expansive definition of “judicially cognizable” given by the Court of Appeals in *Chambers* and several other recent cases, the Supreme Court interpreted it much more narrowly, stating that “the term should be read to describe a showing by the plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration.”

For risk managers defending back injury claims allegedly resulting from specific traumatic incidents, the critical elements of that definition are the Court’s requirement of a “specific injury” and the necessity of an “event that caused the injury” before the Commission can find that a specific traumatic incident occurred. Thus, the *Chambers* Court held that since claimant did not experience “an event within a judicially cognizable time causing his back injury,” a specific traumatic incident had not occurred and his claim was non-compensable.

That ruling may have added significance in future cases because it appears to have clarified, if not impliedly overruled, the holding in *Zimmerman v. Eagle Electric Manufacturing* (see *Risk Alert*, January 2002), in which the Court of Appeals found a back injury compensable based solely on the employee’s complaint that he had developed pain during his regular work shift, with no evidence of any inciting event. In *Chambers*, the Supreme Court has made it clear that the Legislature’s use of the word “incident” has significance, and it should not be read out of the statute when the question arises as to whether claimant has suffered a “specific traumatic incident.”

In *Chambers*, the Supreme Court also noted that claimants have the added burden of proving a causal relationship between the specific traumatic event and their injury. While Chambers complained of pain on a particular date, he presented no evidence linking it to an injury. Consequently, the Court held that his testimony about the onset of pain on the date in question, without more, did not establish a specific traumatic incident: “the onset of pain is not a specific traumatic incident that will determine

whether compensation will be allowed pursuant to the Act; pain is, rather, as a general rule, the result of a specific traumatic incident.”

Risk Handling Hint: Even after the holdings in *Walston* and *Futrell v. Resinall Corporation* (see *Risk Alert*, May 2003), the plaintiff’s bar has consistently argued that compensable occupational diseases can be proven merely by establishing that the worker’s employment placed him at an increased risk of having a pre-existing condition aggravated. However, the holding in *Chambers* has now definitively resolved this issue in favor of the defense and made it very clear that in order for a claimant to establish the first two elements of the *Rutledge* test, he must prove that his employment placed him at an increased risk of contracting the disease in question. Not until that is established is the issue of medical causation, and whether his employment may have significantly contributed to or aggravated a pre-existing condition, relevant.

Thus, after the holding in *Chambers*, risk managers are advised to carefully review all available medical records before considering the possibility of accepting an occupational disease claim as compensable. Often, physicians express the opinion that their patient’s employment exposed them to certain increased risks, but such an opinion, without more, does not establish compensability. Claimant must also prove not only medical causation, but that he was exposed to an increased risk of contracting, as opposed to aggravating, the disease in question.

At the same time, the *Chambers* Court’s definition of “specific traumatic incident” may well become a particularly useful tool in defending future back injury claims. Risk managers are advised to focus in their initial investigation on the specifics surrounding back injuries, looking for situations similar to *Chambers*, in which the injured worker’s pain developed over the course of a six hour period of time. As the Supreme Court has unequivocally held in this case, back pain which develops gradually over time does not constitute a specific traumatic incident.

As such, when investigating back injury claims, risk managers will want to determine what claimant was doing when his pain began, whether it occurred gradually over time, and whether he can identify a specific event he associates with its development. If claimant was doing his normal job in the normal manner, but injured his back as the result of a specific event, he will still be found to have suffered a specific traumatic incident. However, if he was doing his normal job in the normal way and no specific event can be pinpointed as the cause of his pain, then under the *Chambers* rationale, his claim should be found non-compensable.

**PLEASE CONTACT THE ATTORNEYS
AT TCDG WITH QUESTIONS YOU HAVE
ABOUT THE ARTICLES IN RISK ALERT
(919) 873-0166 • WWW.TCDG.COM**