

# RISK ALERT

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## CASE LAW UPDATE

### *Commission Abused Its Discretion in Ruling for Pro Se Claimant*

Despite a right hand injury suffered in November 1999 and non-invasive pain management treatment received thereafter, Anne Wade was able to continue working for her employer, Carolina Brush Manufacturing Company, for the next 3½ years, until she began a medical leave of absence to undergo surgery for a cervical problem in June 2003. A month later, Wade requested a hearing before the Industrial Commission, claiming that her neck condition was causally connected to the hand injury she suffered almost four years earlier.

Wade's claim eventually came on for hearing before Chief Deputy Commissioner Gheen. The treating surgeon later testified by deposition that her hand injury was not the cause of her degenerative disc disease, although the kind of trauma she experienced at the time could have aggravated it. However, Chief Deputy Commissioner Gheen ultimately denied Wade's claim, finding that she failed to prove that her cervical condition had been aggravated by the injury to her hand.

Wade's attorney withdrew from the case after entry of Chief Deputy Commissioner Gheen's opinion and award. Wade then filed a *pro se* notice of appeal to the Full Commission. The Commission's docket director acknowledged her notice of appeal in a letter which informed claimant that the Commission's rules required her, as the appealing party, to file a Form 44 setting forth the grounds for her appeal within 25 days after receipt of the hearing transcript.

After the respective deadlines for claimant to file her Form 44 and Full Commission brief had both passed with no action on her part, defense counsel moved to dismiss the appeal. However, a 2-to-1 majority of the Full Commission, with former Chairman Lattimore dissenting, denied that motion, waived oral argument, vacated Chief Deputy Commissioner Gheen's Opinion and Award, and awarded claimant indemnity and medical compensation for the disability caused by her neck condition.

In explanation for its decision to deny defendants' motion to dismiss despite claimant's failure to comply with the requirement contained in Commission Rule 701 that appellants state the grounds for their appeal "with particularity," the Full Commission's majority held that, under Rule 801, the "interests of justice" obligated them to exercise their discretionary authority to waive that requirement because claimant was pursuing her claim *pro se*. The Full Commission then found that claimant met the statutory requirements for pursuing an appeal and excused her failure to satisfy all of the other requirements of the Commission's rules.

Defendants appealed from that decision to the Court of Appeals, citing as error not only the Full Commission's denial of their motion to dismiss, but its award of benefits for the disability claimant suffered as a result of her cervical condition. In an opinion handed down on November 20, *Wade v. Carolina Brush Manufacturing Company*, the Court of Appeals agreed with the defendants, vacated the Commission's award, and remanded the case for entry of an order granting defendants' motion to dismiss claimant's appeal.

In reaching that result, the Court first noted that Rule 701 specifically provides that "particular grounds for appeal not set forth in the application for review shall be deemed abandoned ...." It then cited its holding two years ago in *Roberts v. Wal-Mart Stores, Inc.* that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal *may not be waived* by the Full Commission" and observed that without notice of the grounds for appeal set forth on a Form 44, an appellee would have no notice of what will be addressed by the Full Commission.

Although the underlying facts in *Wade* were substantially identical to those in *Roberts*, when the Full Commission's majority excused Anne Wade's failure to file a Form 44, it relied upon a rule, Rule 801, which had not been raised as an issue in *Roberts*. As a consequence, the *Wade* Court was faced with the question of whether application of the provisions of that rule would change the result which had been reached in *Roberts*. In particular, it was called upon to address those portions of Rule 801 which provide

that (a) “in the interest of justice, these rules may be waived by the Industrial Commission” and (b) “the rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.”

In its analysis of the first of those provisions, the Court observed that while Rule 801 clearly and unequivocally vests authority in the Commission to waive violations of its rules “in the interest of justice,” that authority is “discretionary and not obligatory.” And, the Court also noted, while that same rule provides that a *pro se* party shall not be prejudiced by a “mere failure to strictly comply” with the rules, Anne Wade’s failure to articulate any grounds at all for her appeal constituted “total noncompliance with a fundamental rule of the Commission ... which ... specifically requires that the grounds for the appeal be stated ‘with particularity.’” Therefore, the Court found that while the Commission *does* have the discretionary authority to apply Rule 801 when a *pro se* litigant fails to strictly comply with its rules, it was an abuse of discretion for the Commission to invoke Rule 801 in the context of Anne Wade’s total failure to comply with Rule 701.

**Risk Handling Hint:** It is noteworthy that, in reversing the Commission’s award of benefits in *Wade*, the Court of Appeals characterized the Commission’s actions as “troublesome.” The Court also observed that when the Full Commission combined a denial of defendants’ motion to dismiss with its decision to not only resolve the case without oral argument, but then enter an Opinion and Award favorable to claimant, it had, in essence, ruled without notice and a hearing, and “by doing so ... placed itself in a dual role of advocate for the plaintiff and adjudicator of the case.” While the Court made it clear that the Commission has the authority to apply Rule 801 so as to waive strict compliance with its rules, it may not do so in total disregard for the fundamental rights of defendants.

*Court of Appeals Split Over Whether to Include Retirement Fund Contributions in Employee’s Average Weekly Wage*

Curry Shaw, a fleet service worker for U.S. Airways, was a member of the International Association of Machinists and Aerospace Workers. Under the terms of the contractual agreement reached by U.S. Airways and the union, he was entitled to participate in two separate retirement programs. The first, the “Employee Savings Plan,” was a 401(k) plan which allowed employees to defer a certain percentage of their eligible income for retirement and called for U.S. Airways to match 50 % of the employee’s contributions, up to 4 % of the employee’s income. The second, the “Employee Pension Plan,” was funded entirely by U.S. Airways’ contributions, with the amount contributed determined by the employee’s income and age.

When Shaw sustained an admittedly compensable injury to his back in July 2000, U.S. Airways calculated his average weekly wage without including the amounts it had contributed to the two retirement programs on Shaw’s behalf during the year prior to his injury. More than four years later, in November 2004, Shaw requested a hearing, contending that the company’s retirement plan contributions should have been included in computing his average weekly wage. But, both Deputy Commissioner Holmes and the Full Commission disagreed and denied his claim for additional benefits. In their view, the company’s retirement contributions were fringe benefits properly excluded from the calculation of claimant’s average weekly wage.

On November 6, in *Shaw v. U.S. Airways, Inc.*, a 2-to-1 majority of the Court of Appeals reversed the Full Commission and remanded the case for further findings, holding that not all fringe benefits should be excluded in calculating average weekly wage. Citing as authority its decision in *Kirk v. North Carolina Department of Corrections* and another from the United States Supreme Court, *Morrison-Knudsen Construction Company v. Director, Office of Workers’ Compensation Programs*, cases in which, interestingly enough, it was held that the fringe benefits at issue should not be included when calculating the injured worker’s average weekly wage, the *Shaw* Court’s majority set forth two factors that the Commission should consider when it determines on remand whether U.S. Airways’ contributions on claimant’s behalf to either of its retirement programs should be included in calculating his average weekly wage.

The first of those factors is whether the employee was “entitled to an unconditional tangible benefit” as a result of his employer’s contribution, even if that benefit might not be received until sometime in the future. To Judge Geer, the author of the majority opinion, the Commission erred when it acknowledged the speculative nature of the benefit conferred by the employer’s contribution and focused on whether claimant could actually withdraw it from his retirement account at any given time. Rather, Judge Geer sees as the critical question whether the benefit paid by the employer was convertible into a cash equivalent, and she believes that should be determined on payday, not at some unspecified date in the future.

The second factor Judge Geer found relevant to the question of whether a retirement program contribution should be included when calculating an injured worker’s average weekly wage is “whether the employer’s contributions measure plaintiff’s benefit or his compensation.” Since for every hour claimant worked, a specific amount of money was deposited into his individual retirement account, Judge Geer concluded that “the record contains evidence from which the Commission could find that the employer’s cost in at least The Pension Plan measured the employee’s benefit and his compensation.”

In a vigorous, rather pointed dissent, Judge Robert Hunter described Judge Geer’s majority opinion as one which “is based on misinterpretations of the relevant statute and case law, expanding the meaning of each to an impermissible and illogical extent.” He went on to note that the Workers’ Compensation Act makes no mention of fringe benefits and observe that, in his view, it is not the place of the state’s courts to impose either a concept or language it believes the legislature should have included in the Act, but did not. As a consequence, Judge Hunter finds the majority opinion in *Shaw* to be in direct conflict with *Deese v. Lawn and Tree Expert Co.*, in which the Supreme Court held that “the judiciary should avoid ‘ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.’”

Judge Hunter’s dissent also draws a distinction between such fringe benefits as “board, rent, housing or lodging,” which an employee “could in all likelihood choose to have provided to him as a cash payment,” and employer contributions to a pension fund, which the employee could not reasonably expect to be ceased upon request and replaced with a cash equivalent. And, his dissent concluded with the observation that “[t]his Court’s engaging in this type of judicial expansion, without the benefit of debate in the legislature as to benefits and drawbacks, will harm those employees not receiving workers’ compensation: Employers will be encouraged to abandon their pension plans due to the unanticipated increase in costs this holding would allow. Any general expansion of the types of compensation to be covered by this statute must come from our legislature.”

**Risk Handling Hint:** Judge Hunter’s dissent provides the defendants in *Shaw* with an automatic right of appeal to the Supreme Court, and it is anticipated that they will avail themselves of that right. Risk managers will want to closely monitor the status of this case, as the majority opinion in *Shaw*, if upheld by the Supreme Court, would represent an unprecedented and dramatic judicial expansion of the benefits which are payable under the North Carolina Workers’ Compensation Act. Were that to occur, risk managers and the defendants whose interests they seek to protect would face a significant increase in potential exposure, not only in terms of indemnity compensation owed to injured workers, but the additional defense costs that will accompany the increase in litigation that will inevitably flow from those disagreements which will arise over whether other fringe benefits should also be included in calculating the injured worker’s average weekly wage.

If the Supreme Court fails to reverse Judge Geer’s opinion in *Shaw*, fringe benefits will undoubtedly be at the top of employers’ legislative agenda when the General Assembly reconvenes in 2008.

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