



# RISK ALERT

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## CASE LAW UPDATE

### *Unauthorized Hire Considered an Employee of the Insured*

Nelson Campos-Brizuela was born in El Salvador in 1972 and moved to North Carolina in 2000 in pursuit of greater employment opportunities. In April of 2009, Campos-Brizuela met Mr. Quintero who worked for Rocha Masonry, which had a contract to spread concrete at an elementary school in Kernersville. Campos-Brizuela discussed job opportunities with Mr. Quintero who offered Campos-Brizuela a job working on the concrete spreading project. He accepted and on April 16, 2009, while working to clean a concrete pump at the direction of Mr. Quintero, suffered a near amputation of his right hand. As a result of the injury, Campos-Brizuela underwent surgery on his right hand and was hospitalized for several days. As of the date of the hearing in 2010, he had not regained appreciable movement in his injured wrist.

In May 2009 Defendants filed a Form 19 acknowledging the injury and a Form 61 denying the claim on the grounds that Campos-Brizuela was not employed by Defendant Rocha Masonry at the time of the injury. Campos-Brizuela filed a hearing request and in February 2010 Deputy Commissioner James Gillen issued an Opinion and Award concluding that Campos-Brizuela had failed to prove that he was employed by Rocha Masonry on the date of injury. Campos-Brizuela appealed to the Full Commission and it reversed finding that he was employed by Rocha Masonry at the time of injury and directing Defendants to pay indemnity benefits, medical expenses and attorneys' fees. Defendants appealed to the Court of Appeals.

On October 4, 2011, in *Campos-Brizuela v. Rocha Masonry, L.L.C.*, the Court of Appeals affirmed the Full Commission's finding that Campos-Brizuela was an 'employee' of Rocha Masonry at the time of injury. The Court noted that "[t]he term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed." The Court noted that Mr. Quintero hired Campos-Brizuela, told him he would earn \$9.00 an hour and

directed Campos-Brizuela and other employees at the job site. There was also testimony that Mr. Quintero admitted at one point that Campos-Brizuela was an employee of Rocha Masonry when he was injured. Defendants argued principles of agency law, specifically that Mr. Quintero failed to identify Rocha Masonry when he offered the job; however, the Court refused to analyze this technical distinction. Instead, the Court indicated that the fact that Mr. Quintero was not authorized to hire Campos-Brizuela had no bearing on his status as an employee of Rocha Masonry at the time of his injury.

The Court also rejected Defendants' argument that Campos-Brizuela was not totally disabled. Instead, the Court found that Campos-Brizuela's hand was severely crushed by the concrete pump and required surgery, that he testified he was unable to work in any capacity, and that his hand was severely disfigured after the injury. The Court also noted that Campos-Brizuela had not been released to return to work, that his medical records indicated that he had no appreciable wrist motion, that the fractures in his fingers had not healed and that his physician noted that he "is not capable of working" and "will . . . need multiple reconstructive procedures" and "long term treatment."

**Risk Handling Hint:** Employers should formalize their hiring procedures to limit the authority to hire to specific individuals as well as inform all supervisors and other employees of the limited scenario in which new hires will be brought aboard as employees to protect against unauthorized hires.

### *Excusable Neglect*

Donald Sellers worked as a welder for FMC Corporation from 1974 until 2002. He began experiencing vision problems in 2000. In 2002 Sellers was diagnosed with a type of cataracts specific to welders and was taken out of work due to vision loss. Sellers subsequently filed separate workers' compensation claims for the eye injury and for asbestosis. Following a hearing on the vision loss claim, Deputy Commissioner Glenn issued an Opinion and Award granting Sellers \$654.00 per week for life and directing Defendants to pay all medical expenses.

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After receipt of the Opinion and Award, Defendants had fifteen days to file a notice of appeal. The deadline passed with Defendants failing to file the notice until several weeks later. Defense counsel subsequently testified that he prepared the notice within the deadline and assumed that it had been timely filed. During this time, defense counsel was also handling another case involving Donald Sellers, which had been consolidated since both cases had the same counsel on both sides and the parties were able to use some of the same witnesses and testimony for both cases. Defense counsel indicated that when a joint transcript was received for *Sellers* and the related case that he assumed he had properly filed his notice of appeal for this *Sellers* claim.

Sellers moved to dismiss the appeal on the eye claim as untimely and defense counsel argued excusable neglect. In August 2009 Chair Young dismissed Defendants' appeal as untimely and Defendants filed a motion to reconsider based on excusable neglect, which was also denied.

Finally, Defendants filed notice of appeal to the Full Commission challenging the previous orders dismissing the case. Sellers again moved to dismiss the appeal and this time the Full Commission vacated the previous dismissal. The Commission later determined it did not have jurisdiction over the prior Award as it was not timely appealed, but did have authority to consider Defendants' motion for relief based on excusable neglect. The parties proceeded to an appeal on the merits, and the Full Commission ultimately affirmed the earlier Opinion & Award. Sellers appealed the Full Commission's order vacating dismissal of Defendants' appeal and its modification of Sellers' attorney's fee award to the Court of Appeals. Defendants cross-appealed the Commission's conclusion that Sellers suffered from an occupational disease and awarding of the maximum compensation rate, along with attorney fees.

On October 4, 2011, in *Sellers v. FMC Corp.*, the Court of Appeals concluded that the Commission had erred in vacating Chair Young's Orders dismissing

Defendants' appeal and denying Defendants' motion for reconsideration based on excusable neglect. In rejecting Defendants' argument that there was a simple mistake due to the fact that defense counsel was handling two intertwined cases before the Industrial Commission and an email pertaining to one case caused confusion in the other, the Court noted that the test for excusable neglect generally does not allow for attorney negligence. The Court explained that failure to definitively determine whether a notice of appeal was filed did not demonstrate diligence. The Court further distinguished an earlier holding in *Egen v. Excalibur Resort Prof'l* where an attorney's clerical employee received an Opinion and Award from the Industrial Commission, but not the attorney, and noted that in the present case, defense counsel and his assistant both indicated that they did not know what happened and did not have a real excuse as to why the notice of appeal was not filed on time.

# TCDG NEWS



U.S. News Media Group and Best Lawyers® have released the 2011-2012 "Best Law Firms" rankings, marking the second edition of this highly-anticipated annual analysis. Teague Campbell Dennis & Gorham, LLP is pleased to announce that it has achieved first-tier rankings in the area of Workers Compensation – Employers in both the Raleigh and Asheville metropolitan areas. This is the second year that TCDG has been listed in the first-tier for the Raleigh area.

TCDG's Matthew Skidmore recently obtained a favorable decision from the Full Commission where TCDG represented a car dealership that employed Plaintiff as a service advisor. As part of his duties, Plaintiff was required to open a repair order for each customer. After the repairs were performed, Plaintiff was to submit orders for repairs performed under a manufacturer's warranty to the manufacturer within 30 days otherwise the dealership would not be reimbursed by the manufacturer. A parts audit performed by the dealership revealed that Plaintiff was not only delinquent in submitting warranty claims, which cost the dealership approximately \$12,000.00, but also that he had been moving the parts and labor listed on the repair order approaching the 30-day deadline to a new repair order and voiding the old ticket – a practice which constituted warranty fraud. Accordingly, the dealership's management

held a meeting and decided to terminate Plaintiff. Plaintiff was out of work the day the meeting was held so the employer planned to terminate him when he returned to work the following day. Likely aware that his job was in jeopardy, Plaintiff called his supervisor numerous times but avoided coming in to work. As a result, the supervisor terminated him over the telephone. Phone records revealed that immediately after the supervisor's conversation with Plaintiff, the supervisor called the dealership and Plaintiff's replacement; however, Plaintiff denied being fired by his supervisor that day.

The morning after the termination, Plaintiff came to work at 5:00 a.m. and used a key, which he had not returned, to get into the building. Plaintiff proceeded to the back area of the shop and he allegedly fell in the back of the shop, called 911, and was transported to the hospital. Prior to the hearing, three witnesses came forward testifying in essence that Plaintiff knew he may be terminated and planned to fall in the back of the shop because "there were no cameras back there and he wanted worker's compensation." Plaintiff disputed this testimony.

Deputy Commissioner George Glenn heard the case, found in favor of Plaintiff, and sanctioned defendants for an unreasonable defense under N.C.G.S. § 97-88.1. Defendants appealed to the Full Commission, who reversed the award of benefits as well as the assessment of sanctions, holding that based upon the totality of the evidence, Plaintiff was not an employee at the time of the incident and did not sustain a compensable injury by accident. Plaintiff has appealed to the Court of Appeals.

John Kubis of TCDG's Asheville office also recently received a favorable decision from Deputy Commissioner George Hall. In that case, Plaintiff alleged he was totally disabled and owed indemnity benefits for the past several years in excess of \$100,000.00, in addition to ongoing future medical and indemnity benefits. He argued that he had developed a chronic mid-back condition and chronic pain syndrome as the result of operating a machine

at one of the employer's manufacturing facilities. Deputy Commissioner Hall ultimately was persuaded by the evidence that Plaintiff had, in fact, sustained a prior injury to the back while working for a different employer which had resulted in permanent light-duty work restrictions that he failed to disclose to the current employer upon hire. Plaintiff argued that his current injury was to the mid-back and unrelated to any prior injury, which he claimed was only to the lower back. However, the Deputy Commissioner concluded that during a seven year period before and after the alleged injury, Plaintiff consistently treated for his prior back condition, including treatment for the mid-back, but never mentioned any new work place injury to his medical providers. Plaintiff also argued that he had been wrongfully terminated because of his work-related injury. Defendants argued that Plaintiff's termination was justifiable for causes unrelated to the alleged injury, including sleeping at work, insubordination, absenteeism, chronic tardiness and other job performance issues. Ultimately, Deputy Commissioner Hall was persuaded that Plaintiff's allegations of a work-related injury were not credible and that any disability was caused by his pre-existing back condition and his constructive refusal of suitable employment as a result of his justifiable termination.

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