

RISK/ALERT

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CASE LAW UPDATE

Multiple Stressful Events Occurring Over Extended Period of Time Do Not Constitute "Injury by Accident"

On October 3, the Court of Appeals reversed a Full Commission decision awarding workers' compensation benefits to a plaintiff's personal injury attorney arising out of "an acute cardiac incident" which necessitated emergency coronary bypass surgery.

After recuperating from his operation, claimant filed a workers' compensation claim, contending that during the 8 to 9 months before his heart attack, several stressful events had occurred in his practice which aggravated and/or accelerated preexisting risk factors for the development of coronary artery disease: diabetes, his smoking habit and a family history of heart disease. Those stressors included the resignation of multiple members of his firm's staff, including two attorneys, a legal assistant and his paralegal/office manager, which dramatically increased his workload, a malpractice lawsuit against the firm, an IRS audit resulting in a substantial personal tax liability, and an audit of the firm's trust account. Claimant alleged that this series of events constituted an interruption of his normal work routine and was, therefore, an accident which aggravated and/or accelerated his preexisting cardiac condition.

That claim was denied by the deputy commissioner, who concluded that claimant's cardiac surgery did not result from an accident. After claimant appealed, the Full Commission reached a different conclusion, finding that the series of work-related stresses preceding claimant's

heart attack *did* constitute an interruption of his normal work routine, rendering his treatment and disability compensable.

However, the Court of Appeals reversed the Full Commission's award of benefits, disagreeing with claimant's argument that in the Workers' Compensation Act "the Legislature has not excluded all multiple events occurring over a period of time from the definition of accident." To the contrary, held the Court, it is well established that an accident must result from "an ... event" and, therefore, *multiple* events occurring over a period of time do *not* constitute an accident. *Lovekin v. Lovekin and Ingle*.

This case reaffirms well-established North Carolina law that, generally, in order to recover benefits under the theory of injury by accident, a worker must show a *specific incident* interrupting his work routine. A series of events occurring over time will not suffice. It must be remembered, however, that back claims are treated differently, since they can also be found compensable as the result of a "specific traumatic incident." And, the appellate courts have given a very expansive definition to that phrase, holding that a specific traumatic incident can happen over a "cognizable period of time," such as the length of an employee's work shift.

In an interesting footnote, the *Lovekin* Court rejected claimant's alternative argument that his cardiac condition qualified as an occupational disease. Although the medical testimony quoted in the opinion suggests that occupational disease might have been a better argument for compensability than injury by accident, the Court found that claimant had failed to cross-assign as error the Full Commission's failure to award benefits on that basis. As a consequence, the

occupational disease issue was not properly before the Court and, therefore, no basis for awarding benefits to claimant.

Risk Handling Hint: This decision emphasizes for risk managers the importance of obtaining early and accurate histories from claimants regarding the causes of their injuries.

Failure to File Form 28B Does Not Estop Defendants From Asserting Two Year Limitation Period

Claimant suffered a compensable injury in 1990, was paid benefits pursuant to a series of awards by the Industrial Commission and, following a final agreement in May 1992, served with a Form 28B. Later she suffered a change of condition resulting in an increase in her PPD rating from 30% to 40%. The parties then entered into a Form 26 agreement for additional PPD benefits, at which point, claimant filed an application for lump sum payment, which the defendants made on March 3, 1994. However, the lump sum application was not actually approved by the Commission until April 20, 1994. Defendants failed to file a new Form 28B after making their lump sum payment.

On April 3, 1996, claimant filed another change of condition claim. The deputy commissioner concluded that claimant was no longer capable of gainful employment and awarded total disability benefits, finding that the two year limitation period did not start to run until the Commission approved the lump sum application on April 20, 1994. She also found that the defendants were estopped to raise the two limitation period by their failure to file a Form 28B.

However, the Full Commission disagreed and reversed the deputy commissioner's award. Then, the Court of Appeals affirmed that ruling, finding that the key for determining the beginning of the two year change of condition limitation period was the date claimant received her last payment of compensation and not the date on

which the Commission approved the lump sum application. *Hunter v. Perquimans County Board of Education*.

The *Hunter* Court also affirmed the Commission's determination that defendants' failure to file a Form 28B did not estop them from pleading the limitation period as a bar to further benefits. It noted that although defendants should have filed that form and sent claimant a copy, the plain language of the statute provides a remedy only to the Commission and not to claimant. That remedy is a \$25 civil penalty.

Risk Handling Hint: Risk managers should be advised that although the Court of Appeals' decision in *Hunter* establishes that the only consequence of defendants' failure to file a Form 28B is a \$25 fine, the better practice is to complete one in each case. Not only will the form's contents provide defendants with evidence of the date claimant received her last payment of benefits, it will also provide support for a finding that the payment in question was a "final" one, thereby triggering the beginning of the two year limitations period. An even better practice is for risk managers to have the injured worker sign and return a copy of the Form 28B, acknowledging its receipt and confirming the date on which the last payment of compensation was made.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

✓ At a recent North Carolina Association of Defense Attorneys educational seminar, new Industrial Commission Chief Deputy Commissioner Stephen T. Gheen warned that the Commission is considering conducting hearings for the purpose of holding in contempt those carriers that terminate an employee's benefits without first obtaining Industrial Commission approval.

We will continue to monitor and advise you of developments in connection with each of the above areas of interest and concern.