

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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## CASE LAW UPDATE

### *Supreme Court Fails to Overturn Court of Appeals Decision in Perez v. American Airlines*

In May 2006, Risk Alert addressed the unfortunate decision of the Court of Appeals in *Perez v. American Airlines*, a ruling which is likely have significant, far-reaching negative ramifications for defendants in a substantial number of future workers' compensation cases. As of the time that newsletter was published, defendants' Petition for Discretionary Review had been granted by the Supreme Court and TCDG had filed an amicus curiae brief on behalf of North Carolina Citizens for Business and Industry, lending support to the defendant airline's request that the Court of Appeals' decision be reversed.

The Supreme Court heard oral arguments on defendants' appeal in September, during which all interested parties asked the Court for a definitive ruling on the issues raised. However, in a *per curiam* opinion entered on October 6, the Court stated that discretionary review had been "improvidently granted" and it had decided not to rule on the Court of Appeals' earlier decision.

#### *Background Facts*

While working as a flight attendant in July 1998, Lori Perez slipped and fell, landed on her buttocks, and experienced

pain in her right leg, right hip and low back. American Airlines admitted the compensability of the low back "sprain, strain" she suffered on a Form 60 and paid Perez weekly benefits until she returned to work that November.

In April 2000, Perez's low back pain flared up, rendering her temporarily disabled again, but she was able to return to work after receiving additional treatment. A short time after that, American filed a Form 28B stating that its last payment of indemnity compensation had been made on June 21, 2000 and it last paid medical compensation on September 18, 2000.

Perez continued to work as a flight attendant throughout the remainder of 2000 and into late 2001, but following the events of September 11, resigned from her position in the airline industry and commenced a new career in banking with RBC Centura.

In the spring of 2002, after her low back pain intensified again, Perez received treatment from a chiropractor. She then saw a neurosurgeon, Dr. Dennis Bullard, who diagnosed a herniated disc at L5-S1 and performed surgery, which caused additional lost time between late July and the end of September 2002, when she again returned to full-time work.

In the meantime, on August 29, 2002, Perez filed Forms 18M and 33, seeking

additional medical and indemnity benefits. The deputy commissioner who heard her claim awarded TTD, TPD and PPD and also found the defendants liable for future medical compensation. The Full Commission later affirmed the deputy's award.

The defendants then appealed to the Court of Appeals, arguing that since the records of the original treating physician showed that Perez had a 0% permanent impairment of the back when she was last treated, there was nothing additional which could have been done to generate a final award from the Commission and, as a consequence, the deadline for her to file a claim for additional indemnity benefits was June 21, 2002, the two year anniversary of the last payment of indemnity benefits shown on defendants' Form 28B. Therefore, as Perez's request to reopen her claim due to her alleged change in condition was not made until late August 2002, the provisions of N.C.G.S. § 97-47 barred her from further compensation.

#### *Statute of Limitations*

In the opinion it issued last October, however, the Court of Appeals rejected defendants' argument, holding that the extent of claimant's PPD had not been resolved. At most, said the Court, the payments defendants made pursuant to their Form 60 "were an interlocutory award resolving the issue of compensability, but not the nature and extent of any disability" and, as such, "did not constitute a final award." Therefore, the time limitation to file a change in condition claim under N.C.G.S. § 97-47 had not begun to run and, as a consequence, claimant's request for additional benefits was not time-barred.

#### *Parsons Presumption*

The Court also agreed with the Full Commission that since defendants'

Form 60 contained an admission of compensability, it resolved the question of whether there was a causal connection between Perez's low back "sprain, strain" and the herniated disc for which she underwent surgery four years later, by creating a presumption that Perez's subsequent medical treatment was "directly related to the compensable injury." In support of that proposition, the Court cited a decision it entered in 1997, *Parsons v. Pantry, Inc.*, in which it held that once an injury is found to be compensable, a rebuttable presumption arises that later medical treatment is related.

Although, in *Perez*, the Court initially focused on the fact that claimant's chiropractor and Dr. Bullard had rendered opinions which went beyond mere speculation in supporting claimant's argument that there was a causal connection between her original injury and the herniated disc she was found to have four years later, it went on to include in a footnote the gratuitous and disturbing observation that "[w]e can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation ... would still be upon the employer."

The potential application of that principle is far-reaching and its implications most unfortunate for risk managers and the employers whose interests they seek to protect. Thus, for example, a Form 60 acknowledging the compensability of an injury to one part of the body would lead, according to the language of that footnote, to a presumption that treatment rendered to another part of the body is also compensable, and the burden would be on the defense to prove otherwise.

In its opinion, the *Perez* Court acknowledged that the question

of whether to apply the "*Parsons* presumption" to a case in which there is neither an Opinion and Award resolving the issue of medical causation nor an Commission-approved Form 21, but rather, only a Form 60, was one of first impression. However, it then went on to determine that the presumption *should* be applied in that context, even though the facts in *Parsons* were very different from those in *Perez*.

In *Parsons*, the injured worker's claim had been taken through the entire hearing process. After it was fully litigated, the Commission found claimant entitled to future medical treatment. Later, when she complained of additional symptoms, the defendants denied that they arose out of the original injury. However, the Court of Appeals held that once claimant had established that there was a causal connection between her condition and the injury she suffered at work, she was entitled to a presumption that any future problems she might have were related to her injury. And, if the defendants wanted to contest that presumption, their remedy was to offer evidence to the contrary.

By contrast, in *Perez*, claimant had presented no expert testimony, or any other evidence for that matter, of medical causation. The defense had simply accepted the compensability of a low back "sprain, strain" on their Form 60. And, despite the fact that it was a herniated disc, not a "sprain, strain," for which additional benefits were being sought, the Court of Appeals found that the "*Parsons* presumption" applied. By doing so, it shifted the burden of proof on the issue of medical causation to the defense, and not only in this case, but in all future claims in which a Form 60 has been filed.

#### *Implications of the Holding in Perez*

The refusal of the Supreme Court to address the significant issues raised by

the Court of Appeals' decision in *Perez* will have significant ramifications on the manner in which risk managers will want to deal with certain specific kinds of claims in the future.

First, with respect to those cases in which the compensability of an injury has been accepted under a Form 60 and TTD has been paid, the injured worker has fully recovered, and he is found to have a 0% permanent partial impairment, it may not be advisable for risk managers to submit a Form 28B and close their file without first seeking affirmative action by the Industrial Commission, since the *Perez* Court clearly held that a Form 60 is *not* a final award. That being so, it does not cause the two year statute of limitations contained in N.C.G.S. § 97-47 to begin running. As a consequence, all such claims will be subject to reopening due to an alleged change in condition indefinitely and, short of claimant's death, there is no guaranty that the injured worker will not make such a request at some distant point in the future.

Unfortunately, the *Perez* Court offered neither explanation nor guidance about what defendants can do to obtain the kind of "final" award that would cause the statute of limitations to begin running. Nevertheless, it is TCDG's recommendation that risk managers seeking finality, or at least a mechanism to trigger the running of the statute of limitations, consider the following options for obtaining a "final" award from the Industrial Commission: (1) settle the claim, by clincher or otherwise, and have the settlement approved by the Commission; (2) prepare a Form 21 stating that claimant has a 0% permanent impairment and have that agreement executed, filed and approved; or (3) request a hearing, seeking an Opinion and Award in which the Commission specifically finds as a fact that claimant has a 0% permanent impairment.

While each of those options will be time consuming and cause the defense to incur additional costs, they appear to be the only ones available for obtaining the kind of "final" award needed for the time limitation provisions of N.C.G.S. § 97-47 to begin running. In their absence, should the defendants choose to simply file a Form 28B stating the date on which the last payment of compensation was made, it is clear from the holding in *Perez* that the statute of limitations will not begin to run and the claim will remain open indefinitely.

And, unfortunately, the second prong of the *Perez* decision, in which the Court applied the "*Parsons* presumption" to the facts before it, can also be expected to cause significant problems for risk managers in the future. Once a claim has been accepted as compensable, whether by virtue of an Opinion and Award, execution of a Form 21, or the filing of a Form 60, the burden will be on the defense to prove that future medical treatment of the injured body part, and perhaps other parts of the body as well, is not related to the original injury.

Barring legislative action to reverse the holding in *Perez* or a subsequent decision from the Supreme Court leading to the same result, it is TCDG's recommendation that in those cases in which weekly benefits have been paid and claimant ultimately found to be without residual impairment, risk managers give serious consideration to obtaining a "final" award by either requesting a hearing or executing and obtaining Commission approval of a Form 21 agreement for a 0% permanent partial disability. Whether the Commission will either accept or approve agreements of that type remains to be seen, since this practice has never been followed in the past, but the holding in *Perez* leaves defendants with few other options, short of being left exposed to indefinite liability for future change in condition claims.

# TCDG NEWS

## PERMANENT AND TOTAL DISABILITY CLAIMS SUCCESSFULLY DEFENDED

Two claims of alleged permanent and total disability, *Parada v. Custom Maintenance, Inc.* and *Perry v. U.S. Assemblies, RTP*, have been successfully defended in North Carolina's appellate courts by Bruce Hamilton and Julie Hooten and Jan Pittman and Jacob Wellman of TCDG respectively. Despite settlement demands in excess of \$200,000 in each case, outright denials were obtained from the Industrial Commission, and the defense victories in both cases have now been affirmed by the Court of Appeals. The Supreme Court has also denied claimant's Petition for Discretionary Review in the *Perry* case.

## RECENT TCDG PUBLICATIONS AND CONTINUING LEGAL EDUCATION LECTURES

An article by Tracey Jones entitled "The Typically Litigated Workers' Compensation Claim from Start to Finish" has been published in the most recent edition of *Course and Scope*, the newsletter of the Worker's Compensation Section of the North Carolina Bar Association.

On October 20, for the sixth consecutive year, Bruce Hamilton presented the case law update at the Industrial Commission's Annual Educational Conference. He has also provided a case law update to the membership of the Worker's Compensation Section of the North Carolina Bar Association at each of the section's Annual Meetings since 1997.

George Pender was a featured speaker at the 2006 Annual Meeting of the International Association of Rehab Professionals, lecturing on the topic of suitable employment. George has also accepted an invitation to speak at next year's IARP conference, scheduled in June 2007.

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