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CASE LAW UPDATE

Supreme Court Split on Expansion of Statutory Employer Provisions of N.C.G.S. § 97-19

In February, *Risk Alert* reported on the Court of Appeals' decision in *Masood v. Erwin Oil Company*, in which Akhtar Masood, a convenience store clerk, was injured while working for Iftikhar Abbasi, who had no workers' compensation insurance. Abbasi leased his store from Erwin Oil, which had an agreement to purchase gasoline from Amoco. Because Abbasi was uninsured, Masood brought his claim for workers' compensation benefits against Erwin Oil, alleging that it was his statutory employer under N.C.G.S. § 97-19, which imposes liability on principal contractors who fail to obtain certificates of insurance when subletting contracts to subcontractors.

The Commission denied Masood's claim, finding that Erwin Oil was not a contractor and Abbasi was not a subcontractor. However, the Court of Appeals reversed in a 2-to-1 decision, holding that Erwin Oil was a statutory employer and, therefore, liable for Masood's injuries. The majority's rationale was that, in its capacity as owner of the store, Erwin Oil had a contract with Amoco to purchase, sell and market fuel and it could not successfully fulfill its contractual obligations without access to retail outlets such as the store in which Masood worked. Judge Hunter dissented, however, observing that the majority's interpretation of N.C.G.S. § 97-19 would expand the definition of statutory employer well beyond its intended scope.

Erwin Oil then appealed to the Supreme Court, which, on October 12, issued a *per curiam* opinion indicating that its members were equally divided. As a result, the decision of the Court of Appeals has been left undisturbed, but will have no precedential value. Justice Hudson, who authored the majority opinion at the Court of Appeals, had to recuse herself and did not participate in the Supreme Court's decision.

Risk Handling Hint: Claims alleging liability under N.C.G.S. § 97-19 typically arise in the construction industry, when a general contractor has subcontracted out part of a larger project to a subcontractor. When the general

contractor fails to obtain a certificate of insurance from its subcontractor, the general contractor becomes liable for injuries sustained by employees of the non-insured subcontractor. In *Masood*, the Court of Appeals majority's opinion appeared to extend the statutory employer provisions of N.C.G.S. § 97-19 to the parties to what was essentially a landlord/tenant contract. As a result of the Supreme Court's *per curiam* opinion, the Court of Appeals' decision will have no applicability to future claims. However, with last year's election of Judge Hudson to the Supreme Court, risk managers should be aware of the possibility that there may now be a 4-to-3 majority at that Court in favor of the kind of expansive reading given to N.C.G.S. § 97-19 by the Court of Appeals' majority in *Masood*.

Lyme Disease Claim Denied

Angela Kashino's job duties as a veterinary technician for Carolina Veterinary Specialists placed her in prolonged direct physical contact with hundreds of animals, some carrying ticks. She occasionally found ticks on her body during or after work and recalled in particular one day in February 2001 when she had to remove two attached to her shoulder. She also testified that she was not significantly exposed to ticks outside of work and had no history of Lyme disease before she began working for Carolina Veterinary Specialists.

In March or April 2002, over a year after removing the two ticks from her shoulder, and while pregnant with her second child, Kashino began experiencing nausea, vomiting and headaches. Her symptoms persisted and, in April or May 2004, she was diagnosed with Lyme disease.

Kashino filed a claim for workers' compensation benefits and, in support of it, offered the testimony of Dr. Jemsek, an internist specializing in infectious diseases. He testified that Lyme disease is a tick-borne illness transmitted by infected deer or black-legged ticks. When asked by Kashino's attorney whether, "more likely than not, there is a connection between the disease and [claimant's] employment," Dr. Jemsek responded, "[t]hat's a fair statement." However, on cross-examination, he conceded that it was sheer speculation to conclude

that Kashino had contracted her condition as the result of a tick bite at work because, without the actual tick, there was no way to know whether it was infected. As a result of this testimony, both Deputy Commissioner Glenn and the Full Commission denied Kashino's claim, finding that she had failed to establish a causal connection between her condition and employment.

On October 16, in *Kashino v. Carolina Veterinary Specialists Medical Services*, the Court of Appeals affirmed the denial of Kashino's claim, noting in the process that Dr. Jemsek's testimony, when taken as a whole, was at best equivocal, and while it may have been sufficient to support a finding of causation, had the Commission chosen to do so, "the appellate court's duty goes no further than to determine whether the record contains any evidence tending to support the [Commission's] finding."

Citing *Booker v. Duke Medical Center* and *Keel v. H & V, Inc.* for the proposition that "in the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence," Kashino argued that the Commission's resolution of the causation issue should be overturned because of the circumstantial evidence she had offered, i.e., that she was frequently exposed to ticks at work, was not significantly exposed to ticks outside work, and had no prior history of Lyme disease. But, as the *Kashino* Court correctly noted, in both *Booker* and *Keel* the Commission had found that there was a causal connection between the employee's condition and his employment. In *Kashino*, however, the contrary was the case, and since the standard of appellate review calls for the Commission's findings to be affirmed on appeal if the record contains *any* evidence to support them, the circumstantial evidence claimant was relying upon did not constitute a sufficient basis for setting aside the Commission's findings.

Risk Handling Hint: While application of the proper standard of review compelled the Court in *Kashino* to affirm the Commission's finding that claimant had failed to prove a causal connection between her Lyme disease and employment, risk managers should remain cognizant of the fact that if the Commission gives credence to circumstantial evidence offered by an injured employee and finds that there was a causal connection between the two, our appellate courts will be bound by that finding and obligated to affirm the Commission's award of benefits.

Credit for Defendants' Substantial Overpayment Denied

In January 1999, Debra Bennett sustained an admittedly compensable injury at work. When she became disabled that June, her employer and its carrier initiated payment of compensation without completing either a wage chart or Form 60. They erroneously calculated her average weekly wage to be \$422.62, when it was actually much lower, and she was paid TTD at the rate of \$281.76 per week, rather than her actual compensation rate of \$143.17, from then until February 2004.

After discovery of their mistake in February 2004, defendants filed Forms 22 and 60 and unilaterally reduced Bennett's weekly TTD check to her actual compensation rate without requesting Commission approval. Claimant then filed a request for hearing, to which the defendants responded by asserting that as a result of their computational error, claimant had been grossly overpaid, entitling them to a credit against any future benefits which might be owed to her.

When the case came on for hearing before Deputy Commissioner Adrian Phillips, the parties stipulated that claimant's actual average weekly wage was \$214.75 and compensation rate \$143.17. However, the deputy commissioner found that because the defendants had not admitted the claim "on a form prescribed by the Commission" within 14 days of having received actual notice of injury as required by N.C.G.S. § 97-18 and Commission Rule 601, they forfeited their right to change claimant's compensation rate. And, the defendants were not only denied a credit for their overpayment, they were also ordered to continue paying compensation at the rate they had initially used, \$281.76 per week, despite the fact that the parties had subsequently stipulated to a much lower compensation rate.

Defendants appealed from Deputy Commissioner Phillips' Opinion and Award, but the Full Commission affirmed the denial of their request for an overpayment credit. In the process, the Full Commission characterized defendants' delay in raising the compensation rate issue as "unreasonable," found that it would be "unduly burdensome" for claimant to repay benefits she had received through no fault of her own, concluded that the defendants had "constructively admitted" Bennett's right to compensation when they made their first payment in 1999, and held that their "constructive admission" constituted an award of the Commission pursuant to N.C.G.S. § 97-87 which could only be modified upon Commission review pursuant to N.C.G.S. § 97-47. Under that reasoning, defendants' unilateral modification of claimant's compensation rate when they finally filed their Form 60 in February 2004 was contrary to law. Therefore, they were obligated to pay benefits at the initial rate of \$281.76 per week through the date of Deputy Commissioner Phillips' Opinion and Award, at which point they could commence payment at the lower rate stipulated by the parties.

Defendants appealed to the Court of Appeals, arguing that they were entitled to a credit under N.C.G.S. § 97-42 because their excessive payments to claimant "were not due and payable when made." However, in an opinion filed on October 2, *Bennett v. Sberaton Grand*, the Court of Appeals held that the decision whether to grant a credit rests within the sound discretion of the Commission, whose resolution of that issue will not be disturbed in the absence of proof of an abuse of discretion. Prior cases having held that requests for credits under N.C.G.S. § 97-42 will be disallowed when compensability has been admitted, the Court held that the Commission properly denied defendants a credit for their overpayment.

The Court also rejected defendants' argument that the sanction imposed by the Commission, i.e., denial of their request for a credit for an overpayment in excess of \$35,000, was unreasonable as a matter of law. Citing to the current version of N.C.G.S. § 97-18, which was amended in 2005 to add a provision authorizing the imposition of sanctions for failure to timely admit or deny a claim, a provision which did not even exist when this claim arose in 1999, the Court stated that the defendants failed to show that the Commission had abused its discretion.

And, finally, in response to defendants' contention that it was not necessary for them to apply to the Commission to modify claimant's compensation rate in the first instance because neither a Form 60 nor a Form 21 had been filed, the Court agreed with the Commission that defendants had constructively admitted Bennett's claim pursuant to N.C.G.S. § 97-18(b) and their constructive admission constituted an award under N.C.G.S. § 97-87. Thus, defendants' unilateral reduction of claimant's compensation rate without Commission approval was contrary to N.C.G.S. § 97-47, the section of the Workers' Compensation Act which permits the Commission to review and modify its prior awards under certain circumstances.

Risk Handling Hint: In 1999, when Debra Bennett's claim arose and defendants initiated payment of compensation, N.C.G.S. § 97-18 did not contain the provision for sanctions cited to and relied upon by the Court of Appeals in *Bennett*. It was not until 2005 that the statute was amended to include a provision specifically authorizing the Commission to assess reasonable sanctions whenever the defendants have failed to accept or deny a claim within 30 days after receiving notice from the Commission that a claim has been filed. Nevertheless, the result in *Bennett* provides risk managers with a useful reminder of the importance of complying with the statutory and Commission rule requirements that deal with the timely admission and denial of claims on Commission-prescribed forms.

Left unresolved by the holding in *Bennett* is whether defendants can reserve the right to unilaterally modify the terms of a Form 60 by utilizing the language "subject to wage chart verification." But, in any event, it is clear from the holdings in *Bennett* and *Patel v. The Stanley Works Customer Service* (see *Risk Alert*, July 2006), that neither the Industrial Commission nor our appellate courts will look sympathetically on a defendant's overpayment claim if it waits several years after an injury has occurred to prepare a Form 22 wage chart and attempt to correct its erroneous calculation of the injured worker's average weekly wage.

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