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CASE LAW UPDATE

*Court Upholds Attorney Fee Award
Against Defendants Seeking Finding of
Permanent and Total Disability*

Billy Meares, a salesman for the Dana Corporation, suffered an injury to his right leg that necessitated a total knee replacement. He later developed complications, including deep vein thrombosis, which led him to rely more heavily on his left leg when he walked. He then began having problems with his left knee, which was afflicted with pre-existing arthritis. The aggravation of that condition caused him to need a total knee replacement in that leg as well.

In an Opinion and Award filed on July 13, 2004, later referred to as "*Meares I*," the Full Commission found Meares' right knee injury compensable, determined that he had aggravated the pre-existing arthritic condition in his left knee, concluded that he had not yet reached MMI because both knees required further treatment, and held that he was entitled to ongoing TTD benefits.

Dana Corporation gave notice of appeal, seeking a credit for the severance payments it had made to Meares. While its appeal was still pending, it requested a hearing to determine whether Meares was permanently and totally disabled. After that hearing was held, the Full Commission found that claimant's left knee condition had not reached MMI, as he had not undergone the total knee replacement procedure he needed. It also found that the defendants "did not present sufficient facts for a declaration of permanent and total disability..." and concluded that they had brought Meares' claim to hearing without any factual basis to support their legal theory of the case. As a result, the Full Commission refused to disturb its previous award of TTD and ordered the defendants to pay a \$10,000 attorney's fee under N.C.G.S. § 97-88.1 and another \$5,000 under N.C.G.S. § 97-88.

The defendants appealed to the Court of Appeals, but on October 7, in *Meares v. Dana Corp.* ("*Meares II*"), it affirmed the

Commission in all respects. In providing the rationale for its decision, the Court stated that before reaching the question of whether claimant was totally and permanently disabled, the threshold issue was whether the evidence supported a reopening of the Commission's previous award of TTD in "*Meares I*" due to a change in claimant's condition under N.C.G.S. § 97-47. Noting that defendant's Form 33 did not even allege a change in condition, the Court cited *Pratt v. Central Upholstery Co.*, a 1960 decision of the Supreme Court, for the proposition that "[c]hanges of condition occurring during the healing period and prior to the time of maximum recovery ... are not changes of condition within the meaning of G.S. 97-47."

The Court went on to add that although Meares' right knee injury had reached MMI, the defendants did not establish a change in his condition under N.C.G.S. § 97-47 because his left knee had not also reached MMI. Therefore, "(1) because the incapacity is 'of the same kind and character' as the incapacity for which plaintiff was previously awarded benefits, (2) because there has been no change in plaintiff's 'physical capacity to earn,' ... and (3) because it occurred 'during the healing period and prior to the time of maximum recovery,'" the Commission was correct when it determined that the defendants did not meet their burden of proving a change in condition sufficient to support a reopening of the claim so as to modify the previous award in "*Meares I*."

The Court also rejected the defendants' appeal from the Commission's award of attorney's fees under N.C.G.S. § 97-88.1, finding that they "lacked reasonable grounds to litigate the permanence of plaintiff's disability." As a result, that award could only be disturbed if the defendants were able to establish that the Commission abused its discretion in entering it. But, the Commission found that "... one apparent reason why the defendant would ask the Commission to declare the plaintiff to be permanently and totally disabled is to expedite the running of the limitations period in N.C.G.S. § 97-38 with a 'final determination' of the plaintiff's disability in order to deprive

the plaintiff's dependents of compensation [for death benefits] under that statute." Because there was evidence that claimant might suffer life-threatening complications if he were to undergo another total knee replacement, the Court felt that "the Commission's inference as to defendants' motives for asking the Commission to declare plaintiff permanently disabled was based on reason." Therefore, its decision to award an attorney's fee was not "manifestly unsupported by reason or ... so arbitrary that it could not have been the result of a reasoned decision" and did not constitute an abuse of discretion.

Risk Handling Hint: Under N.C.G.S. § 97-38, a deceased employee's dependents are not entitled to death benefits unless the death occurs within six years of the date of injury or within two years of the final determination of disability, whichever last occurred. In *Estate of Apple v. Commercial Courier Express*, the Court of Appeals held that a Form 21 for TTD was merely a "preliminary agreement for disability" and not a final determination of disability that would start the two years running for filing a death claim.

Therefore, in any case in which there is no question that the injured employee is permanently and totally disabled, particularly one in which it is foreseeable that the employee might die as a result of his injury, it behooves risk managers to enter into a form agreement for permanent and total disability, so that if the employee does die more than two years later and more than six years after the date of injury, his dependents' death claim would be barred.

For that very reason, however, claimant attorneys often refuse to enter into such an agreement. When that occurs, the defendants' only recourse is to request a hearing and seek a determination that the injured worker is, in fact, permanently and totally disabled. In order to prevail in that regard and avoid having an attorney's fee assessed against them, defendants should be prepared to present evidence not only that the injured worker reached MMI with regard to all of his injuries, but also that he had in fact undergone a change of condition since entry of the prior award in the case. It appears from the holdings of the Court of Appeals in *Estate of Apple* and *Mears II* that the Court has drawn a distinction between an Industrial Commission Opinion and Award for temporary total disability benefits, which apparently is considered a final award for purposes of N.C.G.S. § 97-47, and a Form 21 agreement for temporary total disability benefits, which is not considered a final award for purposes of either G.S. § 97-47 or G.S. § 97-38.

*Claim Remanded for Further Findings
Regarding Cause of Claimant's Disability*

In January, *Risk Alert* reported on *Williams v. Law Companies Group, Inc.*, in which

a 2-to-1 majority of the Court of Appeals reversed an Industrial Commission award of ongoing TTD because the injured worker, Zoraida Williams, failed to establish a causal connection between her on-the-job injury and the medical condition that was causing her to remain disabled.

Williams was involved a work-related auto accident in September 2000, twelve years after having suffered bilateral femur fractures requiring rod placement in an earlier, non-work-related, auto accident. After she complained of chronic leg pain following the second accident, it was discovered that her right femoral rod had broken. When Williams' doctor was asked whether the work-related accident had caused the rod to break, he said it was unlikely. He also found it possible, but not probable, that claimant's leg pain was caused by the broken rod. That testimony led the Court of Appeals' majority to hold that the Commission erred when it concluded that claimant's ongoing disability was attributable to her work-related accident, as evidence sufficient to establish medical causation must be "such as to take the case out of the realm of conjecture and remote possibility," whereas the opinions expressed by claimant's doctor did not do that.

Although Judge Martha Geer agreed with the Court's majority that testimony from the treating physician that claimant's job-related accident "could have" caused the rod in her leg to break was insufficient to support a finding of medical causation, she nevertheless dissented, arguing that the case should be remanded for additional findings because she felt it was unclear whether the Commission had based its finding of causation solely on the broken rod or was also relying on claimant's chronic pain syndrome, which the treating doctor felt "likely occurred as a result of [the] back injury" that was caused by her job-related auto accident. Because Judge Geer felt it unclear "what the Commission intended to find or whether its conclusions would change with the omission of the broken rod," she argued that the Commission's findings were insufficient to determine the rights of the parties and additional findings were needed.

Judge Geer's dissent provided claimant with an automatic right of appeal to the Supreme Court, which she exercised. In a *per curiam* opinion filed on October 10, the Supreme Court adopted Judge Geer's dissent and remanded the case to the Court of Appeals for a further remand to the Commission "to make findings of fact regarding whether plaintiff's current disability was caused by the 21 September 2000 accident without consideration of the broken rod in plaintiff's femur."

Risk Handling Hint: Of note to risk managers attempting to weigh the significance of the Supreme Court's ruling in *Williams* is that

implicit in the Court's remand for further findings is its assumption that Zoraida Williams remained disabled and unable to work despite the fact that, as Court of Appeals majority noted in its opinion, one of her doctors testified that he could find no basis for restricting her work activities on the basis of any consequence of her job-related auto accident and her other doctor was of the opinion that she had no impairment, no work restrictions, and a 0% disability rating as a result of that accident.

LEGISLATIVE UPDATE

The March 2007 edition of *Risk Alert* reported on several bills introduced at the General Assembly that, if passed, would have significantly increased defendants' workers' compensation liability. While the General Assembly has now wrapped up its 2008 short session without passing any of the following bills, they might well be reintroduced at some time in the foreseeable future:

House Bill 1623, which sought to amend N.C.G.S. § 97-26 so as to require the injured worker's attending physician to select the health care provider and diagnostic services center to administer and analyze any diagnostic tests ordered by the physician, passed the House with 116 votes, but subsequently died in Committee.

Senate Bill 995, which would have amended N.C.G.S. § 97-31 by providing for payment of up to \$100,000 in cases of serious injury to the brain, heart or reproductive organs, also died in Committee, as did **Senate Bill 997**, which would have increased from \$20,000 to \$50,000 the maximum amount payable for permanent loss of or injury to any "important internal or external organ or part of the body."

Senate Bill 996, which sought to amend N.C.G.S. § 97-29 so as to provide for an annual three percent cost-of-living increase in total disability payments to permanently and totally disabled employees in each year in which the Consumer Price Index increases by three percent or more.

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