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CASE LAW UPDATE

Late Payment Penalty

On November 5, 2008, William Norman suffered an injury while working at Food Lion's distribution facility. Defendants denied the compensability of the claim via a Form 61. After an evidentiary hearing, Deputy Commissioner Rideout issued an Opinion and Award on October 20, 2009 granting temporary total disability benefits to Norman. Defendants appealed the decision to the Full Commission which, on April 27, 2010, affirmed the Deputy Commissioner's Opinion and Award. Defendants did not appeal that decision and paid the award to Norman on June 2, 2010. On June 4, 2010, Norman filed a motion with the Full Commission seeking a 10 percent late payment penalty under N.C.G.S. § 97-18(g) for Defendants' failure to timely pay indemnity benefits pursuant to the Deputy Commissioner's October 20, 2009 Opinion and Award because of their purported failure to file a stay of the award prior to their notice of appeal. The Full Commission entered an Order granting Norman's motion and assessed a 10 percent late payment penalty. Defendants appealed.

On July 19, 2011, in *Norman v. Food Lion*, the Court of Appeals concluded that the Full Commission erred in awarding Norman a 10 percent late payment penalty. According to the Court, N.C.G.S. § 97-18(g) notes that if compensation is not paid within 14 days after it becomes due, a penalty of 10 percent should be added to the unpaid installment. The Court further noted, that under N.C.G.S. § 97-18(e), the initial payment of benefits pursuant to an award of the Commission is not payable until 10 days after the time for appeal has expired. As such, the Court noted that the language of the statute implicitly provides for a stay of a deputy commissioner's award when appealed before the first installment is due. The Court further found that Defendants provided timely notice of appeal from the Deputy Commissioner's Opinion and Award and that

under N.C.G.S. § 97-86, had 30 days to appeal following the award of the Full Commission. Accordingly, defendants had a total of 40 days to pay Norman after the date of the award because it was not due during the pendency of an appeal.

Employee/Employer Relationship Under the Hayes Test

Rufus Capps injured his left foot when he fell while performing installation work for Southeastern Cable in 2007. Defendants denied Capps' claim on the basis that he was an independent subcontractor. Defendants' evidence showed that all installers were treated as independent subcontractors and were required to obtain their own workers' compensation insurance prior to starting work. Capps obtained a "ghost" insurance policy that excluded him from its coverage. Capps filed a Form 33 and Deputy Commissioner Baddour subsequently issued an Opinion and Award concluding that Capps was an employee of Southeastern Cable and awarding him medical and disability benefits. After an appeal by both parties, the Full Commission issued an Opinion and Award in which it concluded that Capps was an independent contractor and, as such, the Industrial Commission lacked jurisdiction over the claim.

On August 2, 2011, in *Capps v. Southeastern Cable*, the Court of Appeals reversed the Full Commission and found that Capps was indeed an employee of Southeastern Cable. The Court applied the well-known, multi-factor test set forth by the Supreme Court in *Hayes v. Elon College*. According to *Hayes*, while several factors are considered, the most significant is whether the alleged employer retained the right to control the details of the work. The Court noted that Capps was not allowed to operate an independent cable installation business while employed with Southeastern Cable and that it "controlled" most aspects of Capps' work schedule as well as the manner in which he performed his work. Southeastern Cable also asserted supervisory authority over and the right to discipline Capps. The Court

reversed the Full Commission's jurisdictional decision and remanded the case to the Commission for further proceedings consistent with the opinion.

Risk Handling Hint: Employers, in particular, should be mindful of the various ways in which an individual can be considered an employee as opposed to an independent contractor. It is not enough to simply pay someone pursuant to a 1099; an employer must also be careful not to control the work of the independent contractor.

Compliance with Vocational Services

Mary Frances Powe sustained a compensable injury to her low back and left hip in 2001 for which she received weekly indemnity benefits and vocational rehabilitation provided by Defendants. In 2005, a deputy commissioner suspended Powe's benefits due to her noncompliance with vocational rehabilitation, which decision was subsequently affirmed by the Full Commission and Court of Appeals. Defendants continued to provide vocational rehabilitation through February 22, 2008 when the vocational case manager terminated her services. Although Powe had been showing up for vocational meetings, she had consistently failed to follow through on the case manager's suggestions and recommendations.

In 2009, a second hearing occurred after Powe filed a motion for reinstatement of indemnity based on assertion of compliance. The Deputy Commissioner found that Powe continued to be non-compliant with vocational rehabilitation but since Defendants had stopped offering vocational rehabilitation services, Powe was entitled to reinstatement of temporary total disability benefits from the date such services were stopped. Both parties appealed to the Full Commission who found that Powe had not 'fully complied' with vocational rehabilitation efforts and was not entitled to indemnity benefits up through the date vocational rehabilitation services ceased. The Commission ordered Defendants to reinstate indemnity benefits as of the date vocational services were stopped and to resume vocational rehabilitation so long as plaintiff fully complied with same. Both parties appealed.

On September 6, 2011, in *Powe v. Centerpoint Human Services*, the Court of Appeals remanded the case to the Full Commission for further findings. Specifically, the Court noted that when an employee is participating to some degree in vocational rehabilitation services, the Commission must determine, in deciding whether to reinstate benefits, whether the employee is substantially complying with those services and not significantly interfering with the vocational rehabilitation specialist's efforts to assist the employee in returning to suitable employment, not whether the employee failed to "fully comply" – the standard used by the Commission.

The Court also directed the Commission to address in more detail why vocational rehabilitation was not being provided. The Commission had

previously found that the vocational specialist discontinued her services because she felt she could not find work for plaintiff under the "present circumstances" and that plaintiff's vocational rehabilitation efforts had "plateaued;" findings the Court found vague.

Risk Handling Hint: House Bill 709 includes new provisions with regard to vocational rehabilitation. N.C.G.S. § 97-32.2 defines vocational rehabilitation, the basis for which parties can request this service as well as mandates a directive from the Commission when benefits are suspended for failure to comply with vocational rehabilitation services. Powe further clarifies that "full" compliance with vocational rehabilitation services is not required; rather the standard is whether the employee was substantially complying with vocational rehabilitation and not significantly interfering with the vocational rehabilitation specialist's efforts.

TCDG NEWS

TCDG's Matt Little and Brian Love recently received a favorable decision from the Court of Appeals in *Fuller v. Best Services, Inc.* in a case involving an insulin-dependent diabetic truck driver who failed to disclose his diabetic condition in the pre-employment fitness exam. Pursuant to federal regulations, the employee's application for employment would have been denied if it were known that he had diabetes.

In August 2007, employee sustained a compensable injury by accident to his back. He later underwent surgery for this injury, and in January 2009, was released to full duty work. After this release, employee complained to his treating physician that he was still experiencing back pain and could not perform full duty work and ultimately secured light duty work restrictions from his treating physician.

During the course of medical treatment, it was discovered that employee was an insulin-dependent diabetic and his employment was terminated as a result. Defendants filed a Request for Hearing contending that employee was no longer disabled or entitled to receive workers' compensation benefits based on the misrepresentation he made regarding his diabetic history while seeking employment.

In the pre-employment physical, employee completed a health history questionnaire and checked the box stating that he did not have diabetes but later at a hearing before Deputy Commissioner Brad Donovan, employee testified that a medical provider completed the questionnaire, not employee. Subsequent depositions of the medical staff who examined employee entirely discredited

his testimony. Though Deputy Commissioner Donovan found that employee was entitled to ongoing indemnity benefits and that his claim was not barred based on his failure to disclose his status as a diabetic, the Full Commission reversed and concluded that employee was only disabled until January 2009 when he reached maximum medical improvement, after which time he failed to undertake reasonable efforts to obtain suitable employment and otherwise failed to prove that he was still disabled as a result of his injury. The Full Commission also concluded that Defendants were entitled to sanctions, including attorney's fees, based upon employee's unreasonable litigation and the unnecessary costs Defendants incurred in having to depose the medical staff who examined him. The Court of Appeals affirmed the Full Commission's Opinion and Award.

TCDG's Greg Horner also recently received a favorable Opinion and Award from the Industrial Commission. TCDG represented an employer in a case in which a welder filed a claim for De Quervain's tenosynovitis. When employee presented to his doctor, he reported no injury and the claim was assessed as an occupational disease. At the hearing, employee and one of his witnesses provided two separate accounts of the onset of the condition which described accidents as the causative factor. When deposed, the treating physician testified that either of the events could have caused the condition. Ultimately, Deputy Commissioner Harris found in Defendant's favor on the basis of the insufficient expert medical causation testimony. In addition, he commented that employee had significant credibility, employer/employee, disability, average weekly wage and unemployment credit issues. The case has been appealed to the Full Commission.

TCDG is proud to announce that George Dennis has been named Best Lawyers' 2012 Raleigh Workers' Compensation Law - Employer Lawyer of the Year. Only a single lawyer in each specialty in each community is named by Best Lawyers as a "Lawyer of the Year."



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