

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Depression Resulting from Job Placement Efforts Found Compensable

Shortly after Tom Bowen began his employment with Carolina Freight Carrier Corporation as a dock worker, he suffered a compensable back injury, which eventually required multiple surgeries, including a lumbar fusion. He stopped working on June 27, 1995 and never returned.

On January 6, 1998, after recovering from his fusion operation, Bowen was found to have reached maximum medical improvement and assigned a 25% permanent partial impairment rating. At the same time, an FCE indicated that he could return to sedentary work.

In addition to his back injury, Bowen was diagnosed with depression, chronic pain syndrome and an "adjustment disorder." He filed a hearing request, alleging permanent and total disability. In the interim, Carolina Freight, which was self-insured for workers' compensation purposes, initiated vocational rehabilitation efforts through its servicing agent. They obtained an administrative order compelling Bowen to pursue a GED at a local community college and their vocational consultant identified a promising security guard position. While Bowen interviewed for that job, it was not offered to him because of a lack of interest on his part.

Deputy Commissioner Chrystal Stanback determined that Bowen had complied with defendants' vocational rehabilitation efforts and did not unjustifiably refuse suitable employment. She then awarded temporary total disability benefits for the remainder of his life, or until

further order of the Commission. After the defendants were unsuccessful in their effort to overturn her award at the Full Commission, they appealed to the Court of Appeals.

On September 5, in *Bowen v. ABF Freight Systems, Inc.*, the Court of Appeals affirmed the Commission's award of benefits, noting that the record contained evidence to support each of the Commission's critical findings. With specific reference to defendants' effort to terminate or suspend compensation under N.C.G.S. § 97-18.1 and the issue of claimant's cooperation with vocational rehabilitation, the Court observed that although there was evidence that claimant had refused to schedule GED placement testing or enroll in GED basic skill classes and failed to keep scheduled appointments with community college personnel, the record also contained evidentiary support for the Commission's finding that he was suffering from depression "due to the demanding nature of the vocational rehabilitation assignments given to him."

The Court also noted that there was other evidence suggesting that Bowen was not a good candidate for pursuing a GED and that requiring him to do so would act as a stressor, causing "major depressive symptoms," because he had a historical lack of success during grade school and had only been able to complete the seventh grade, he was 57 years old and had no transferable vocational skills, he had worked the previous 15 years as a dock worker loading heavy freight, and his reading and writing skills were at a third grade level. Therefore, the Court affirmed the Commission's finding that claimant was not qualified for sedentary jobs due to their educational requirements and held that, as a consequence, the Commission was justified in concluding that Bowen was totally disabled.

Risk Handling Hint: For risk managers, perhaps the most distressing part of the holding in *Bowen* is the fact that, earlier in the case, the Commission had specifically directed claimant to participate in a GED program to improve his vocational rehabilitation prospects. However, when he refused to even try to complete such a program, purported to justify his refusal by testifying that he could not bear the stress of attending classes and feared being humiliated if he failed them, and offered testimony from his psychologist that pursuing a GED would cause him “major depression,” the Commission ignored its previous order.

The holding in *Bowen* also underscores the potential pitfalls associated with employing those who have either limited education or work histories primarily involving heavy labor. If such an employee is precluded from returning to heavy duty work, then vocational rehabilitative efforts can be particularly difficult, especially if claimant is permitted to escape his obligation to look for alternative work by eliciting testimony from a mental health professional that job placement efforts might depress him. While many studies have shown that injured workers are psychologically better off if they are able to return to work in some capacity, risk managers can reasonably anticipate that the holding in *Bowen* will encourage future claimants to parrot the excuses given by the claimant in this case so as to justify their refusal to cooperate in defense efforts to return them to work.

Claim Denied for Failure to Assert Change of Condition Claim Within Two Years of Last Payment of Compensation

Daphne Sharpe, a certified nursing assistant employed by Rex Healthcare, injured her back in June 1998 while repositioning a patient and eventually underwent surgery to repair a herniated disc. In May 1999, she reached MMI, lifting restrictions were imposed, and she was assigned a 10% permanent partial impairment rating. When she returned to work at a less strenuous job, Rex filed a Form 28 and ended her weekly benefits.

In August 1999, after Sharpe stopped reporting for work, she was terminated. The following April, Rex filed a Form 28B indicating that her last compensation check had been forwarded in May 1999. At that point, she

sought additional TTD, but in an Opinion and Award entered on August 31, 2001, the Full Commission determined that since she had “refused employment procured for her suitable to her capacity,” the provisions of N.C.G.S. § 97-32 barred her from further weekly compensation “until such refusal ceases.”

Sharpe did not appeal that decision. Instead, she began treating with a series of unauthorized physicians, one of whom performed additional surgery. At no time did she contact Rex for authorization either to change physicians or for the additional treatment she was receiving.

In the meantime, Sharpe requested another hearing, seeking additional TTD. Her claim was heard and denied by Deputy Commissioner Baddour, who found that she failed to prove her unjustified refusal to return to work had ceased. As a result, he determined that she was not entitled to further indemnity benefits. He also decided that her claim was untimely, having been filed more than two years after defendants’ last payment of compensation.

Deputy Commissioner Baddour’s Opinion and Award was subsequently affirmed by the Full Commission. Claimant then appealed to the Court of Appeals. On September 5, in *Sharpe v. Rex Healthcare*, the Court affirmed the Commission’s denial of her claim, finding that although the hospital had provided suitable employment within her work restrictions and at a wage comparable to her pre-injury earnings, she had unjustifiably refused to return to work. In the process, it noted that, following her termination, Sharpe failed to approach Rex about returning to work and offered no evidence she had sought alternative employment consistent with her work restrictions.

The Court of Appeals also addressed and affirmed the Commission’s decision to deny claimant’s after-the-fact request for approval of a change in her treating physicians. It noted that she never sought permission to do so from the Commission and did not raise the question of who was responsible for her unauthorized medical care for more than three years after the defendants had made their last payment of medical compensation. Therefore, the Commission had properly found that she failed to make a timely request to change treating physicians.

A 2-to-1 majority of the Court also affirmed the Commission’s determination that the two year limitation period contained in N.C.G.S. § 97-47 barred Sharpe’s claim for payment of the 10% PPD rating to her back which had been assigned in May 1999. Speaking for the majority, Judge Tyson found that the statute’s time limitation began to run on the date claimant received her last payment of compensation, not the date she received defendants’ Form 28B. Since it was undisputed that she received her last TTD check on May 17, 1999, her change in condition claim, which was not filed until October 3, 2002, was barred.

While Judge Levinson concurred with the remainder of the majority’s opinion, he dissented from that one ruling. In his view, the two year limitation period contained in N.C.G.S. § 97-47 had not yet begun to run, since Sharpe’s 10% PPD rating had never been paid and TTD benefits had merely been suspended pursuant to N.C.G.S. § 97-32 when she refused suitable employment. As a consequence, Judge Levinson did not believe that Sharpe’s claim for PPD benefits was time barred.

Risk Handling Hint: Because of Judge Levinson’s dissent, it is likely that *Sharpe* will be appealed to the Supreme Court, which is currently grappling with a similar issue in *Perez v. U. S. Airways* (see *Risk Alert*, May 2006). The *Sharpe* and *Perez* cases both underscore the difficulty risk managers face in attempting to successfully close those files which involve injured workers who have either returned to work in some capacity or refused to return to work and have had their benefits terminated. We will continue to monitor both cases and provide updates on developments at the Supreme Court as they occur.

CONTINUING EDUCATION REMINDERS

The upcoming National Worker’s Compensation Defense Network seminar is scheduled for October 12 in Atlanta. For additional details, contact Bruce Hamilton at bhamilton@tcdg.com or visit www.nwcdn.com.

The annual NCIC Educational Conference is scheduled for October 18-20 in the Research Triangle Park. TCDG will again present the case law update. Further information can be found at www.comp.state.nc.us/ncic.