

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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NEWSLETTER

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## RUMBLINGS AT THE INDUSTRIAL COMMISSION

*Commissioner Pamela Young Appointed Chair of the Industrial Commission*

On September 26, Governor Easley announced the appointment of Pamela Young as Chair of the Industrial Commission. Buck Lattimore, who had held that position for seven years, will remain as one of the Commission's seven Commissioners.

*Twelfth Annual North Carolina Workers' Compensation Educational Conference  
Set for October 10-12, 2007*

The Commission will hold its Twelfth Annual Workers' Compensation Educational Conference from October 10 through 12 at the Sheraton Imperial Hotel and Convention Center in Durham. The program includes a claims compliance seminar offered by the Commission's Claims Department, medical seminars entitled "Workers' Compensation Treatment Guidelines" and "The Next Frontier in Spine Care - Beyond Artificial Discs," and an update on significant workers' compensation appellate court decisions from Bruce Hamilton of TCDG.

*Commission Considering Procedural Changes to Expedite Resolution of Contested Cases*

We understand that the Commission is currently undergoing an extensive review of its procedures in an attempt to expedite resolution of contested cases and reduce the amount of time between when a hearing is requested and the date on which the case is ultimately decided. Among those changes being considered are: reducing the time for filing a Form 33R from 45 days to 30 days; reducing the time for filing Designation of Mediator forms from 55 days to 35 days; revising the Designation of Mediator form to require the parties to indicate the date their mediated settlement conference has been scheduled; imposing fines whenever cases are returned to mediation from preliminary hearing

calendars because the parties failed to request an extension of the mediation deadline; adoption of a new mediated settlement agreement form; and revising the Commission's rules to only permit the use of certified mediators.

The procedural changes now under consideration could have a dramatic impact on the manner in which workers' compensation claims are adjusted by risk managers and handled by defense counsel. It is apparent that the Commission's goal is to significantly reduce the amount of time between when claims are filed and their ultimate resolution. The proposed rules now under consideration will likely lead to earlier hearing dates, a reluctance to grant continuances and the possibility that fines or other sanctions will be imposed for delaying the hearing of a claim. It is also likely that they will lead to increased litigation costs, since much of the formal discovery and informal information exchange which now takes place following mediation would have to occur in advance, as hearing dates will follow shortly on the heels of unsuccessful mediations.

Updates regarding these and other proposed revisions to the Commission's rules, forms and procedures will be provided in future editions of *Risk Alert*, as developments occur.

*2008 Maximum Compensation Rate Set*

The maximum weekly benefit for 2008, applicable to all injuries occurring on or after January 1, 2008, has been set at \$786.

## LEGISLATIVE UPDATE

*Strategic Plan Ordered by Legislature*

In House Bill 1473, the General Assembly has included a special provision in the state budget which directs the Commission to issue a report no later than April 1, 2008, containing a strategic plan for (1) tracking compliance with N.C.G.S. § 97-18(b), (c) and (d), the statutory provisions dealing with admissions and denials of liability,

the timing of compensation payments in admitted cases and payments without prejudice and (2) establishing a procedure for enforcing compliance with each of those statutory requirements. The Commission has also been directed to implement a strategic plan for expeditiously resolving disputes involving medical compensation under N.C.G.S. § 97-25, including issues arising out of the treatment being provided and the selection and changing of physicians.

In its report, the Commission has been ordered to include the total number of claims made during the preceding calendar year and the number in which compliance with N.C.G.S. § 97-18(b), (c) and (d) was not achieved. For each such claim, the Commission has been directed to provide the date on which it was filed, the date by which compliance was required, the date of actual compliance, and any sanctions or other remedial actions imposed.

The Commission has also been ordered to provide information concerning the total number of motions and other pleadings requesting medical compensation under N.C.G.S. § 97-25 in which final disposition could not be accomplished within 45 days of filing, and for each such request, the date it was filed, the date on which final disposition occurred and, where reasonably ascertainable, the date on which any ordered medical treatment was actually provided.

Before he stepped down, Chairman Lattimore appointed an advisory group, including Bruce Hamilton of TCDG, to make recommendations to the Commission regarding appropriate procedures for resolving medical motions under N.C.G.S. § 97-25. It is anticipated that a similar working group will be appointed to assist the Commission in addressing the compliance issues raised by the Legislature under N.C.G.S. § 97-18.

The impetus for and exact purpose of the General Assembly in seeking the report mandated by House Bill 1473 is unclear. No evidence is available to suggest that these special provisions were inserted into the budget at the request of the North Carolina Academy of Trial Lawyers (plaintiff's bar). At the same time, it appears that pressure will be put on the Commission to provide detailed information regarding "compliance" with both the provisions of N.C.G.S. § 97-18 and the time frame for resolving medical motions.

It is also unclear what definition the Commission will use in determining whether the parties have complied with the provisions of N.C.G.S. § 97-18. It is likely that further action will follow issuance of the Commission's report sometime next spring. Updates on changes in the Commission's operating procedures resulting from House

Bill 1473 will be provided in future editions of *Risk Alert*.

## CASE LAW UPDATE

### *Burden of Proof in Temporary Total and Temporary Partial Disability Claims Clarified*

Bobby Britt was employed by Gator Wood as a timber buyer. After the company lost a major contract, he was told he would be laid off on May 31, 2002. But, on May 1, he sustained an admittedly compensable injury to his right knee when he tripped and fell at work.

Britt did not seek immediate medical treatment and kept working despite his knee injury. When he finally went to the doctor, he was diagnosed with a mild knee strain. However, his knee became progressively worse, so that by the time he was laid off, he was unable to perform his regular duties as a timber buyer.

Britt was referred to an orthopaedist, Dr. Scott Hannum, who ordered an MRI, which revealed a torn medial meniscus. Surgery was eventually performed, at which point Gator Wood's insurer voluntarily initiated payment of TTD benefits.

On December 2, 2002, Britt was found to have reached MMI by Dr. Hannum, who gave him a 7% PPD rating and released him to return to work without restrictions. However, Britt then sought and obtained opinions from two other orthopaedists, each of whom assigned him a 12% PPD rating and imposed restrictions on his activities, including no lifting or carrying over 30 pounds. Dr. Hannum eventually agreed that their disability ratings and activity restrictions were "reasonable."

Britt was out of work from June 1, 2002 until February 6, 2003, when he obtained employment in a new line of work at a lower average weekly wage than he had previously earned as a timber buyer. After the parties were unable to agree on the compensation to which he was entitled and a hearing was held, the Commission awarded temporary total disability benefits from June 1, 2002 through February 6, 2003 and temporary partial disability benefits thereafter, for the remainder of 300 weeks from the date of injury.

On appeal, the defendants contested claimant's entitlement to TTD from June 1 through June 16, 2002, as he had not been written out of work until seen by Dr. Hannum on June 17, 2002. However, on September 4, in *Britt v. Gator Wood, Inc.*, the Court of Appeals affirmed the Commission's award, finding that it could have reasonably inferred from claimant's testimony that his condition on June 1, 2002 was the same as when he was seen and found disabled by Dr. Hannum 16 days later. The net

effect of the Court's holding was that claimant was not required to offer direct medical evidence of disability going back to when he stopped working, as long as the evidence as a whole, including his own testimony, tended to establish that his condition was essentially the same then as it was when he was finally seen by the doctor.

At the same time, however, the Court remanded the case for additional findings with respect to the period of time between January 13 and February 7, 2003, because claimant failed to prove he was totally disabled during that timeframe. The Court noted that he had been released to return to work without restriction in December 2002 and was not entitled to a presumption of ongoing disability, as there was neither an executed Form 21 nor a prior disability award from the Commission. Therefore, claimant had the burden of proof under *Russell v. Lowe's*, a case successfully defended by TCDG in 1993, to establish his alleged disability during that time period by producing evidence that he had, after reasonable effort on his part, been unsuccessful in obtaining employment or by producing evidence that it would have been futile for him to seek other employment because of preexisting conditions, such as his age, inexperience or lack of education.

Although the defendants also contested the Commission's award of ongoing temporary partial disability benefits following claimant's return to work on February 7, 2003, the Court rejected their position in that regard, finding that claimant had satisfied the fourth prong of the *Russell v. Lowe's* test for proving disability by obtaining other employment at a wage less than he had earned prior to his injury, at which point the burden of proof shifted to his employer to establish that he could have obtained a higher-paying job.

**Risk Handling Hint:** The holding in *Britt* provides risk managers with a useful reminder that the mere fact that an injured worker has returned to work at lower wages than his pre-injury average weekly wage is not dispositive of the issue of whether claimant is entitled to temporary partial disability benefits. At the same time, however, it *does* shift the burden to the defendants to present evidence establishing that claimant could have obtained employment paying higher wages, had he tried. Normally, evidence of this type will come in the form of the results of a labor market survey or from the testimony of defendants' vocational expert.

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