

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Unexplained Fall Found Compensable

Candace Hedges was employed by the Wake County Public School System in the child nutrition department at Reedy Creek Elementary School. Her normal work duties included completing paperwork for the payroll department. As she was walking into a workroom to copy payroll records, she stumbled, fell, landed on her right arm and sustained a massive rotator cuff tear, which required surgery and caused her to be out of work for several months.

Hedges' claim for workers' compensation benefits was denied because the school system believed that her condition was not the result of a risk or hazard peculiar to her employment. Because Hedges disagreed, she requested a hearing, which was held by Deputy Commissioner Kim Ledford. Hedges testified that there was nothing on the floor to impede her walking; she simply stumbled. No testimony was offered by either party about an idiopathic condition, nor was there any evidence of an external force that might have caused the fall.

Deputy Commissioner Ledford found the claim compensable and awarded temporary total, permanent partial and medical compensation. The school system appealed, but the Full Commission not only affirmed Deputy Commissioner Ledford's award of benefits, it assessed an attorney's fee against the defendants under N.C.G.S. § 97-88.1, finding that Hedges' claim had been defended without reasonable ground.

At that point, the defendants appealed to the Court of Appeals, contending that because claimant was unable to point to any causative factor in her employment that led her to fall, the injury did not arise out of her employment. In a unanimous decision filed on September 7, however, *Hedges v. Wake County Public School System*, the Court affirmed the Commission on all issues, including compensability and the Full Commission's

award of attorney's fees. In upholding the Commission's ruling on compensability, the Court cited *Slizewski v. Seafood, Inc.* for the proposition that "when a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment."

The Hedges Court explained that starting from an inference that claimant's fall arose out of her employment did not eliminate her obligation to prove causation. Citing the Supreme Court's decisions in *Taylor v. Twin City Club* and *Robbins v. Hosiery Mills*, the Court noted that it is only when the sole force involved at the time of a fall is the "employee's active exertions in the performance of his duties" and there is no known idiopathic or other cause independent of and unrelated to the employment that the injury will be found to have arisen out of the employment.

The Court found that the contested issues before it in *Hedges* were factually indistinguishable from those it had only recently resolved in *Hodges v. Equity Group*, in which it held that "an inference that the fall had its origin in employment [was] permitted ... because 'the only active force involved was the employee's exertions in the performance of his duties.'" Therefore, it affirmed the Commission's resolution of the claim in *Hedges*, both as to the question of compensability and the Commission's award of attorney's fees against the defendant school system.

Risk Handling Hint: After the Court's decision in *Hedges*, it is clear that even when the employee cannot point to any particular causative factor in her employment as an explanation for why she fell, such as an impediment on the floor, her claim will be found compensable, unless the defendants are able to affirmatively prove that the reason for her fall was an idiopathic condition or some other cause "independent of, unrelated to, and apart from the employment"

*Court Addresses Average Weekly Wage
Calculation for Retired Employee
with Asbestosis*

From January 1949 through January 1950 and then again from August 1952 through August 1968, Horace Pope worked for Johns Manville in a position in which he was exposed to asbestos fibers. He then worked for several other employers until 1986, when he became self-employed as a turkey farmer. Pope retired in 2003, having earned \$31,127 in his last year as a turkey farmer. Thus, by the time he was diagnosed with asbestosis in 2005, he was earning nothing on a weekly or annual basis.

Pope filed a Form 18, claiming to be totally and permanently disabled from asbestosis. The Industrial Commission agreed and entered an opinion and award in which Johns Manville and its insurer were ordered to pay total disability benefits at the rate of \$399.06 per week, based on the average weekly wage he was earning when he last worked as a turkey farmer. The Court of Appeals affirmed that award in an unpublished opinion filed in January, after which the defendants filed a petition asking the Court to reconsider its decision to affirm the Commission's calculation of Pope's average weekly wage.

Defendants' petition for reconsideration was granted in March and the parties filed additional briefs on the issue of average weekly wage. In a unanimous opinion filed on September 21, *Pope v. Johns Manville*, the Court has now concluded that the Commission did in fact err "by failing to adopt one of the first four methods for calculating claimant's average weekly wage set out in N.C. Gen. Stat. Section 97-2(5) without making sufficient findings and conclusions to allow use of the fifth method ... set out in that statutory provision."

In its initial appeal, Johns Manville argued that claimant's average weekly wage should have been based on his earnings on the date his occupational disease was diagnosed, a contention which, if accepted, would have resulted in claimant recovering benefits at the statutorily-mandated minimum compensation rate, as he was retired as of the date of diagnosis. Defendants' alternative argument was that claimant's average weekly wage should be calculated based on his earnings during the last year he worked for Johns Manville. But, the Court rejected both arguments in the unpublished opinion it filed in January, when its rationale for upholding the Commission's calculation of average weekly wage based on claimant's earnings during his last full year of employment was that "it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income."

Among Johns Manville's arguments upon rehearing was the contention that North Caro-

lina law, and in particular the Supreme Court's decisions in *McAninch v. Buncombe County Schools* and *Barnhardt v. Yellow Cab Company*, precludes the Commission from calculating average weekly wage by reference to the wages the employee earned while working for another employer. The Court disagreed. Rather, *McAninch* and *Barnhardt* only prohibit the Commission from aggregating or combining wages from more than one job; they do not otherwise limit the evidence the Commission can consider to "approximate the amount which the injured employee would be earning were it not for the injury," under the fifth method for calculating average weekly wage found in N.C.G.S. § 97-2(5).

In that regard, the Court noted that while the statute "sets forth in priority sequence" five methods for calculating average weekly wage, in "extraordinary circumstances," when use of the first four methods would produce a result unfair to either the employee or the employer, "[t]he Commission always retains the right ... to utilize the final method ..., which allows the use of whatever computation method 'most nearly approximates the amount ... the injured employee would be earning were it not for the injury.'" Thus, in *Abernathy v. Sandoz Chemicals*, a case which, like *Pope*, involved an employee who had not been diagnosed with asbestosis until after he retired, the Commission's "non-standard method of calculating wages" was upheld on the basis that it would be obviously unfair to determine the claimant's benefits based on his income on the date of diagnosis "because he was no longer employed and was not earning an income." The *Abernathy* Court noted that, in the absence of a specific statutory provision setting forth the manner of calculating average weekly wage under these circumstances, "the only statutory provision which may in fairness be used is the ... [fifth method]."

At the same time, however, the Court held in *Pope* that if the Commission does use the fifth method of calculating average weekly wage, it must make findings of fact specifically addressing whether use of each of the other four methods would produce unjust results. Because in *Pope* the Commission failed "to make the findings and conclusions required as a precondition for use of that computational method," the Court remanded the case back to the Commission "for recalculation of [claimant's] average weekly wage and appropriate findings of fact to support that recalculation." In remanding the case to the Commission, the Court held that N.C.G.S. § 97-54, which defines "disablement" in asbestosis cases as the claimant's inability to earn the wages he was receiving at the time of his last injurious exposure, does not control the calculation of average weekly wage, and stated that N.C.G.S. § 97-64 "explicitly rejects the use of a separate and distinct method for calculating disability benefits in asbestosis cases."

TCDG NEWS

RECENT NCIC DECISIONS

Full Commission Reverses TTD Award

In a case defended by TCDG's **Matt Skidmore**, the Full Commission has reversed Deputy Commissioner Ledford's award of TTD benefits to a deputy sheriff who suffered a compensable injury that led to RSD and depression, rendering him incapable of returning to his regular job. The deputy eventually procured part-time employment at a car wash operated by a friend that afforded a flexible schedule and did not require him to work outside his restrictions. When the county learned of claimant's part-time employment, it filed a Form 62 and unilaterally modified his weekly benefits from temporary total to temporary partial. The Full Commission found that claimant's job at the car wash was "suitable" employment and demonstrated that his wage earning capacity had not been totally obliterated, such that he was only entitled to temporary partial, and not temporary total, disability benefits. It awarded the county a credit for the TTD it paid after claimant began working at the car wash and did not sanction the county for unilaterally modifying claimant's weekly compensation check.

Presumption of Continuing Disability Rebutted

In a case involving an employee who failed to cooperate with vocational rehabilitation over a period of several years, the Full Commission has affirmed the deputy commissioner's denial of benefits because the defendant employer, represented by TCDG partner **Tammy Nance**, rebutted the presumption of continuing disability and claimant failed to come forward with evidence proving that he was disabled under the criteria established by the Court of Appeals in *Russell v. Lowes*, a case successfully defended by TCDG in 1993. The employee, who suffered an injury to his neck when the tailgate of a dump truck hit him on the head, was unable to return to his regular job after reaching maximum medical improvement. Vocational rehabilitation was assigned and efforts were made to involve him in job retraining and job placement. Although he attended most meetings with the vocational case manager, he failed to make an independent job search and resisted virtually all of the case manager's efforts on his behalf, including her attempt to involve him in retraining. In addition to testifying that claimant failed to cooperate with her rehabilitative efforts, the vocational case manager and a defense-retained vocational expert both testified that he had not made reasonable efforts to find another job, despite the fact that every doctor involved in his treatment had advised him he was capable of working with certain restrictions. The vocational expert and vocational case manager also testified that had claimant cooperated with vocational rehabilitation, it was likely he would have been able to find suitable work. From that evidence, the deputy commissioner and Full Commission found that the defense had rebutted the presumption of continuing disability and claimant had failed to prove disability under *Russell v. Lowes*.

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