

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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NEWSLETTER

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## RUMBLINGS AT THE INDUSTRIAL COMMISSION

*Commission Requires Submission of  
Clinchers in PDF Format*

Effective January 1, 2007, all compromise settlement agreements and their supporting documentation must be submitted to the Commission in Adobe PDF format via e-mail or CD, along with a proposed order of approval in MS Word or ASCII format. Agreements submitted via e-mail should include the IC file number in the subject line and be sent to [clinchers@ind.commerce.state.nc.us](mailto:clinchers@ind.commerce.state.nc.us). If a hearing has been held by either a deputy commissioner or the Full Commission, it is not necessary to include medical records already submitted as exhibits.

*Revised Form 60 Adopted*

The Form 60 (Employer's Admission of Employee's Right to Compensation) has been revised to include a box to check in "medical only" cases. Previously, there was some confusion about which form should be used to admit liability in such cases. With the revised Form 60, risk managers can now admit liability in medical only cases without conceding the employee's right to indemnity compensation.

*Update on Commission's Computer Problems*

As reported in last month's edition of *Risk Alert*, the Commission recently announced that its e-mail system had failed. In a subsequent update, it reported that most of the system

had been restored, but work was still ongoing to restore its Electronic Document Management System (EDMS). Until confirmation is received that all EDMS files can be accessed, risk managers are advised to regularly check the Commission's website for further updates and other procedural changes.

## CASE LAW UPDATE

*Medical Evidence of Disability Required  
to Support Award of Benefits under  
Russell v. Lowes*

In *Terasaka v. AT&T* and *Everett v. Well Care & Nursing Services*, North Carolina's appellate courts have each recently reversed Full Commission awards of ongoing temporary total disability (TTD) benefits because they were unsupported by *medical* evidence of disability and, therefore, did not satisfy the requirements for proving disability established in *Russell v. Lowes Product Distribution*, a landmark case successfully defended by TCDG in 1993.

Last December, *Risk Alert* reported on the Court of Appeals' decision in *Terasaka*, in which Amy Terasaka, a records clerk, developed bilateral carpal tunnel syndrome while participating in an intensive, three-day customer service training course. Terasaka alleged that hand pain prevented her from performing her old job, driving, dressing herself, or doing household chores. She also testified that she had made approximately 500 attempts to

find a new job, to no avail. In addition, Terasaka's treating doctor testified that it was unlikely she would be able to return to any position which involved repetitive hand or wrist motion. Based on that testimony, the Full Commission found that she was unable to work in any capacity and awarded her ongoing TTD.

AT&T appealed to the Court of Appeals, which reversed the Full Commission in a 2-1 decision after concluding that Terasaka had failed to satisfy her burden of proof on the issue of disability. Writing for the majority, Judge Calabria stated that the burden of proof is on the claimant to establish the extent of her disability according to the criteria outlined in *Russell* and Terasaka could have met that burden in one of four ways: (1) producing medical evidence that her injury had caused physical or mental incapacity to work in any employment; (2) producing evidence that she was capable of some work, but after a reasonable effort on her part, had been unsuccessful obtaining alternative employment; (3) producing evidence that while she was capable of some work, it would have been futile for her to seek other employment because of preexisting conditions, such as her age or lack of education; or (4) producing evidence that while she had obtained other employment, it was at wages less than those she earned prior to her injury.

The Court's majority held that the only applicable prong of the *Russell* test was the first, and for claimant to have proven disability under it, "she had to produce *medical evidence* that she is physically or mentally, as a consequence of the work related injury, incapable of work in *any* employment." Because claimant's medical evidence only established an inability to perform repetitive work, as opposed to *all* types of employment, the Full Commission had erred in concluding that claimant was temporarily totally disabled.

In dissent, Judge Geer cited *White v. Weyerhaeuser*, a case decided by the

Court of Appeals last year, in which it held that "[t]he absence of medical evidence does not preclude a finding of disability under one of the other three [*Russell*] tests." Her dissent gave claimant an automatic right of appeal to the Supreme Court, which Terasaka exercised. However, in a *per curiam* opinion filed in October, the Supreme Court affirmed the majority opinion written by Judge Calabria.

As a result of the Supreme Court's ruling in *Terasaka*, it is clear that claimants seeking to prove total disability under the first prong of the *Russell* test must offer competent medical evidence of an inability to perform any type of employment. At a recent meeting of the North Carolina Academy of Trial Lawyers, Chief Deputy Commissioner Stephen Gheen stated that he considers *Terasaka* to be one of this year's most significant appellate decisions, particularly in light of the Court of Appeals' subsequent ruling in *Everett v. Well Care & Nursing Services*, which came down only six weeks after the Supreme Court's decision in *Terasaka*.

*Everett* involved an admittedly compensable right wrist injury suffered by Charlene Everett in an automobile accident which occurred during the course of her employment as a social worker. The insurer for her employer, Well Care, admitted liability on a Form 60 and began paying TTD. Everett also received treatment for her wrist, including arthroscopic surgery, until December 2001, when she reached maximum medical improvement and was found to have suffered a ten percent permanent partial impairment of her right hand.

The treating physician testified that Everett's injury did not impair her ability to perform her job as a social worker. However, claimant contended otherwise, testifying that she was unable to be employed in any capacity because she "was not physically able to work." In response, the deputy commissioner asked "but how do you know ... if you

never asked the doctor, work restrictions have never been addressed, how is it that you determined you are not able to work at all?" In reply, claimant attributed her alleged disability to a "constant pain level" and she asserted that she was "barely able to move ...."

On that evidence, the deputy commissioner denied Everett's request that she be awarded ongoing TTD. Rather, he limited her recovery to compensation for the ten percent rating to her hand. However, the Full Commissioner reversed, finding that claimant was unable to work and, therefore, entitled to an ongoing award of TTD benefits.

Defendants appealed to the Court of Appeals, which in a decision issued by Chief Judge John Martin last month, reversed the Full Commission, holding that claimant "did not meet the burden established in *Russell* of showing '*medical evidence* that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment.'" Therefore, the Court found that the Commission's award of TTD was in error and it remanded the case for entry of an award limited to PPD under N.C.G.S. § 97-30.

**Risk Handling Hint:** It appears from these recent appellate court decisions that complaints of disabling pain and reports of failed job searches may no longer be sufficient to support an award of TTD when the medical evidence indicates that the injured worker is capable of some types of gainful employment. The holdings in *Terasaka* and *Everett* provide risk managers with a strong argument that, to support an award of total disability benefits under the first prong of the *Russell* test for disability, claimant must present competent *medical evidence* of an inability to work in any capacity.

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