

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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WITH QUESTIONS
CONCERNING THE
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NEWSLETTER

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RUMBLINGS AT THE INDUSTRIAL COMMISSION

Full Commission Appointments

On February 2, Governor Easley's office announced that Commissioner Laura Mavretic, a member of the Full Commission since 1995, has been reappointed for another six year term and that Danny Lee McDonald, President of McDonald Solutions, a consulting firm, has been appointed to replace Commissioner Tom Bolch. From 1982 to 2006, Mr. McDonald served as a member of the Federal Elections Commission, to which he was first appointed by President Reagan and then reappointed by President Clinton. He has also served as General Administrator of the Oklahoma Corporations Commission and Secretary to the Tulsa County Elections Board.

Mileage Reimbursement Rate Increased

On January 1, the Commission's travel reimbursement rate increased to \$.485. To qualify for mileage reimbursement, injured workers must travel 20 or more miles round trip.

Critical Issues Task Force Appointed

Chairman Lattimore recently appointed TCDG partner Bruce Hamilton to his "Critical Issues Task Force," which is to report back to the Chairman's Advisory Council with recommendations for making the claims process more efficient and for resolving medical billing issues.

CASE LAW UPDATE

Court of Appeals Greatly Expands the Scope of N.C.G.S. § 97-19

Akhtar Masood was employed as a cashier by Iftikhar Taj Abbasi, who leased a convenience store and its equipment from Erwin Oil Company. Abbasi operated the business with his own employees as Tri-Star Amoco Food Shop. Erwin Oil purchased gasoline from a producer on a wholesale basis and then resold it on consignment to Abbasi, who earned a commission on each gallon sold.

After he was shot in the neck while working for Abbasi, who was uninsured, Masood filed a workers' compensation claim against Abbasi and Erwin Oil, contending that the latter was a statutory employer under N.C.G.S. § 97-19. However, both the Deputy Commissioner and Full Commission found that Erwin Oil was *not* a contractor, Abbasi was *not* a subcontractor, and the statute did not apply.

But, on January 16, in *Masood v. Erwin Oil Company*, a 2-to-1 majority of the Court of Appeals reversed, holding that Erwin Oil was a statutory employer and, therefore, liable for Masood's injuries, as it owned over twenty stores and had a contract with the fuel source, Amoco, to purchase, sell and use its best efforts to market fuel to an extent "necessary to satisfy public demand."

Writing for the majority, Judge (now Justice) Robin Hudson argued that Erwin Oil could not successfully fulfill its contractual obligations without access to retail outlets such as the one operated by Abbasi. She also found significance in a lease provision which required Abbasi to operate his pumps seven days a week and maintain his location consistent with Amoco's image standards. She then characterized the lease as a contract for Abbasi to perform work Erwin Oil was required to do, i.e., market and sell gasoline to meet public demand, and concluded that Erwin Oil was a statutory employer under N.C.G.S. § 97-19. As a consequence, Erwin Oil was held liable for Masood's injuries.

In dissent, Judge Hunter observed that the majority opinion would expand the definition of a statutory employer well beyond its intended scope. He agreed with the Full Commission's reasoning that Erwin Oil was not a principal contractor and Abbasi was not a subcontractor. As such, Judge Hunter felt that the provisions of N.C.G.S. § 97-19 had no application and Erwin Oil should not have been deemed a statutory employer.

Risk Handling Hint: Because Judge Hunter's dissent provides the defense with an automatic right of appeal, it is likely that *Masood* will ultimately be decided by the Supreme Court. However, in the absence of a reversal of Judge Hudson's majority opinion, the potential liability of employers under N.C.G.S. § 97-19 has been substantially expanded. In the past, it has generally only been applied to claims in the construction industry, where a general contractor has subcontracted out a portion of a larger overall project. In that setting, the case law is clear that the subcontractor's employees will be deemed statutory employees of the general contractor if the subcontractor is uninsured.

Unless the Supreme Court reverses the majority opinion in *Masood*, many

companies that enter into contracts which have not traditionally created workers' compensation exposure may need to reanalyze their contracts to assess the distinct possibility of being held liable under N.C.G.S. § 97-19, absent proof that the companies with which they contract have purchased workers' compensation insurance.

Chambers Decision Applied to Deny Occupational Disease Claim

Charlie Thomas' job as a parking attendant for McLaurin Parking Company was to check vehicles into a parking lot. The gatehouse in which he worked was situated 10 to 15 feet from the gate, a distance he walked as much as 100 times a day as he checked vehicles into the lot. While in the gatehouse, Thomas would sit on a small metal stool.

Not long after he started working for McLaurin, Thomas began experiencing left hip pain, which he attributed to the "hard metal stool." He was subsequently diagnosed with degenerative arthritis in his left hip and filed an occupational disease claim, contending that his employment had aggravated his underlying arthritic condition.

Both Deputy Commissioner Baddour and the Full Commission found that Thomas' job placed him at an increased risk of aggravating his degenerative arthritis and determined that his job duties were not activities to which the general public was equally exposed. However, they denied Thomas' claim for benefits because the record contained no evidence that claimant's job placed him at an increased risk of *contracting* degenerative arthritis. Therefore, Thomas had failed to meet his burden of proof under the recent Supreme Court decision in *Chambers v. Transit Management* (see the December 2006 edition of *Risk Alert*).

On February 6, in *Thomas v. McLaurin Parking Company*, the Court of Appeals affirmed the denial of

Thomas' claim. In doing so, it noted that while prior Court of Appeals decisions had held that aggravation of a pre-existing idiopathic condition is sufficient to establish the causal connection necessary to prove a compensable occupational disease, the Supreme Court's decision in *Chambers* is a reminder that claimants must also satisfy the other two prongs of the *Rutledge v. Tultex Corporation* test for a compensable occupational disease, which in turn require proof that the worker's employment "placed him at an increased risk for *contracting* the condition."

While claimant's attorney argued that to apply the strict *Chambers* standard of occupational disease compensability is inconsistent with previous case law and that to require claimant to prove that his employment placed him at a greater risk of not only aggravating a pre-existing condition, but also contracting the disease, would "all but abrogate occupational disease claims asserted on the premise of aggravation," the Court of Appeals held that such an argument was beyond its scope of authority and was an issue that could only be addressed by the Legislature.

Risk Handling Hint: As it is the first occupational disease case to have come down since *Chambers*, the significance of the decision in *Thomas* is that it signals an acknowledgement by the Court of Appeals that it is duty-bound to abide by the clear holding in *Chambers* and that, at least for the time being, it will not try to limit its application in any way. As such, risk managers are advised to closely examine occupational disease claims to determine whether claimant's job duties placed him at an increased risk of *contracting* the disease in question, as opposed to simply aggravating a pre-existing condition. After *Chambers* and *Thomas*, occupational disease claims should be more difficult to prove in North Carolina.