

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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WITH QUESTIONS
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NEWSLETTER

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RUMBLINGS AT THE INDUSTRIAL COMMISSION

Commission Amends Its Rules

The April 2006 edition of *Risk Alert* included an analysis of a series of proposed rule changes then under consideration by the Industrial Commission. Following a public hearing held in May, those changes were adopted, effective August 1.

The most significant change has been to Rule 601, which obligates employers to decide about the compensability of a claim "at the earliest practicable time." Revised Rule 601 eliminates the former requirement that action be taken within 14 days. Now, the employer or its insurance carrier has 30 days (or 90 days in occupational disease cases in which an exposure to chemicals or fumes is alleged) *after notice is received from the Commission that a claim has been filed* to accept, deny or initiate payment without prejudice.

The defendant's decision in that regard must in writing, and failure to act within the specified deadline may result in the imposition of "reasonable sanctions." At the same time, however, the rule as amended specifically provides that "reasonable sanctions" do *not* include barring the defendants from contesting the compensability of an employee's claim. The revised rule also gives authority to the Commission's Executive Secretary to grant an extension of time for the defense to decide on its response to a claim after it has been filed.

Another change of particular significance to risk managers is that which has been made to Rule 903, under which employees can be required to complete a Form 90 "Report of Earnings" stating the amount and source of all post-injury earnings. While the revised version of Rule 903 still requires risk managers to serve the Form 90 by certified mail, along with a self-addressed, stamped envelope in which the form can be returned, it now provides that if the employee is represented by counsel, service should not be directly on the employee: "When the employee is represented by an attorney, the Form 90 shall be sent to the attorney for the employee and not to the employee."

Rules 501 and 502, which pertain to form agreements and clincher agreements respectively, have both been amended to provide that the parties need only submit "*material* medical and vocational records" when settlement agreements are submitted for approval, thereby eliminating the prior requirement that the parties produce "*all* medical, vocational and rehabilitation records known to exist."

At the same time, unless the defendants have agreed to pay all related medical expenses through the date of settlement, Rule 502 now requires that clinchers include a list of all known medical expenses related to the employee's injury, including those in dispute. Moreover, if there are unpaid medical expenses which the defendants have agreed to pay as part of the settlement, they must also be listed, if they are known.

The last change of particular significance to risk managers is that made to Rule 104, which dictates when a Form 19 “Employer’s Report of Injury” must be filed. Rule 104 previously provided that a Form 19 was not required unless the injury caused the employee to miss more than one day of work *and* his medical expenses exceeded the “amount ... established periodically by the ... Commission in its Minutes,” which is currently \$2000. Both Rule 104 and Rule 404A, which deals with trial returns to work, contain definitions of “medical only” cases. They now provide that the employer must file a Form 19 if the injured employee misses more than one work day *or* his medical expenses exceed \$2000.

Revised Rule 104 also mandates use of the Commission’s new Form 19, which prominently displays on its face a notice to the employee that it does not constitute a claim and that, in order for the employee to assert one, he must file a Form 18 within the time prescribed by statute. The rule also continues to require that the employer give a blank Form 18 to the injured employee when it provides him with his copy of the Form 19.

CASE LAW UPDATE

Court of Appeals Creates New Exception to “Going and Coming Rule”

Norma Hollin was employed by the Johnston County Council on Aging as a health care aide. Her job duties involved providing assistance to patients in their homes. She worked regular hours, from 8:00 a.m. to 4:00 p.m. Monday through Friday, saw the same patients each week, was required to use her personal vehicle to travel to her patients’ homes, and received reimbursement for travel between job sites at the rate of \$.31 per mile. She was paid \$6.72 per hour, but was not considered to be working or “on the clock” while traveling from her residence to her first patient’s home in the morning or from her last patient’s home back to her residence in the afternoon, nor did she receive mileage reimbursement at the beginning or end of the workday.

Hollin was seriously injured in a head-on collision while traveling from her

residence to the home of her first patient on May 20, 2003. She argued to the Industrial Commission that her claim was compensable under the “traveling salesman” and “contractual duty” exceptions to the “going and coming rule,” a well-settled principle of workers’ compensation law under which injuries sustained by employees while going to or coming home from work are not ordinarily compensable because the risk of injury while traveling to and from work is common to the public at large, as the employee is not normally engaged in her employer’s business when operating a personal vehicle during such travel. The Commission rejected Hollin’s argument that one or both of the exceptions she was relying on applied. As a result, it concluded that her injury did not arise out of and in the course of her employment and denied her claim.

However, on January 2, 2007, in *Hollin v. Johnston County Council on Aging*, the Court of Appeals reversed the Commission’s denial of benefits, finding that Hollin’s claim was compensable despite the fact that none of the four established exceptions to the going and coming rule were applicable. In reaching that result, the Court first articulated those four exceptions as follows: (1) the “premises exception,” which applies when an employee is traveling to or heading home from work, but is on the employer’s premises when the accident occurs; (2) the “special errand exception,” which applies if the employee is engaged in discharging a special errand, mission or duty while in the process of going to or coming home from work; (3) the “traveling salesman exception,” which applies to those employees who are making a journey to perform a service on behalf of their employer and who have no definite time and place of employment; and (4) the “contractual duty exception,” which applies whenever the employer has either contractually provided the employee’s transportation or pays an allowance to cover its cost.

In analyzing the potential application of the four established going and coming rule exceptions to the facts presented in *Hollin*, the Court of Appeals agreed with the Commission that the traveling salesman

exception did not apply because claimant had fixed job hours and a fixed job location, as she worked in the same patients’ homes until they either died or no longer needed her services. The Court also agreed that the contractual duty exception did not apply, as claimant was not reimbursed for travel from her home to the residence of her first patient, nor was she paid mileage for her return trip home at the end of the workday.

Nevertheless, despite the fact that all four of the established exceptions to the going and coming rule were inapplicable, the Court found Hollin’s claim compensable because she “was required as a condition of her employment to use her personal vehicle while at work.” In support of that conclusion, it cited Arthur Larson’s treatise, *Workers’ Compensation Law*, for the proposition that “if the employee as part of ... her job is required to bring along ... her own car, truck or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.” By requiring its employee to furnish and use her private vehicle while at work, her employer “compell[ed her] ... to submit to the hazards associated with private motor travel, which otherwise ... she would have the option of avoiding.” Thus, the Court concluded, the journey to work became “a service to the employer,” as claimant had been required to “convey to the premises a major piece of equipment devoted to the employer’s purposes.”

Risk Handling Hint: The Court of Appeals’ decision in *Hollin* represents a dramatic expansion of defendants’ liability for injuries which occur while employees are traveling to or from work in their own automobiles. It appears that, by virtue of the holding in *Hollin*, among the very limited options employers may now have to avoid liability for injuries suffered by employees with fixed hours and places of employment, but who might be called upon to use their personal vehicles at any time during the course of the workday, even if only occasionally, would be to suggest, encourage or perhaps even require the use of either a company-owned vehicle or a rental car for work-related travel. Presumably if the

employee is permitted, but not “required,” to use her own automobile for work-related travel, then the holding in *Hollin* would not apply and accidents occurring on the way to or from work would not be compensable, absent proof by the employee that one of the other exceptions to the going and coming rule is applicable.

Supreme Court Denies Compensation to Employee Injured in Go-Cart Accident at “Fun Day” Event

Last March, *Risk Alert* reported on *Frost v. Salter Path Fire & Rescue*, in which a divided panel of the Court of Appeals upheld the Industrial Commission’s award of benefits to a volunteer EMT injured in a go-cart accident at a “Fun Day” event held for the fire and rescue squad’s volunteers. By virtue of Judge John Tyson’s dissent, the defendants were accorded the right to have their appeal heard by the Supreme Court, which on January 26, 2007 agreed with Judge Tyson, reversed the decision of the Court of Appeals’ majority, and held that claimant’s injury did not arise out of her employment.

In reaching that result, the Court relied on its earlier decision in *Perry v. American Bakeries Co.*, a case in which the injured employee suffered a broken neck diving into a swimming pool at a hotel while attending a sales meeting. In *Perry*, the Court held that “where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment.” It also noted that swimming was neither a function nor duty of the employment, was not calculated to further the employer’s business, and “was authorized only for the optional pleasure and recreation of plaintiff while off duty” during his stay at the hotel.

The Supreme Court found *Perry* to be directly on point in resolving the issues before it in *Frost*, inasmuch as the injured EMT worker had been invited, but was not required, to attend and participate in

the purely voluntary “Fun Day” activities arranged as a matter of good will by her employer. Because claimant’s activities were merely for her optional pleasure and recreation while she was off-duty, the injuries she sustained did not arise out of her employment. In so holding, the Court noted that while the *Chilton* factors summarized in the risk handling hint set forth below “may serve as helpful guideposts in this inquiry, this Court has never recognized these factors as controlling and we decline to do so here”

Risk Handling Hint: In 1980, in *Chilton v. Bowman Gray School of Medicine*, the Court of Appeals articulated a six question analysis to aid in determining whether an injury which occurred during recreational activities arose out of the employment: (1) Did the employer in fact sponsor the event? (2) To what extent was attendance really voluntary? (3) Was there some encouragement to attend, evidenced by such factors as (a) taking attendance, (b) paying for the time spent at the function, (c) requiring employees to work if they did not attend, or (d) maintaining a known custom of attending? (4) Did the employer finance the occasion to a substantial extent? (5) Did its employees regard the event as an employment benefit to which they were entitled as a right? (6) Did the employer benefit from the event, not merely in a vague way through better morale and goodwill, but through such tangible advantages as having an opportunity to make speeches and awards? Risk managers are advised that, while the Supreme Court declined to adopt the *Chilton* analysis as controlling in *Frost*, it is likely that the Industrial Commission and Court of Appeals will continue to use the *Chilton* criteria as a guide when ruling on the compensability of injuries sustained by employees participating in off-duty functions associated with their employments.

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TCDG NEWS

NEW TCDG PARTNERS

TCDG is pleased to announce that Tracey Jones and Jennifer Milak have become partners in the firm, effective January 1, 2007. Tracey, a 1997 graduate of Wake Forest University Law School, specializes in the field of workers’ compensation and has extensive experience defending asbestosis and other occupational disease claims. Jennifer, who is a 1997 graduate of Campbell Law School, divides her practice between the defense of medical malpractice and other professional liability claims and general personal injury defense work, including premises and products liability cases.

TCDG SUPER LAWYERS

TCDG is also pleased to announce that two of its other partners, Dayle Flammia and Bruce Hamilton, were recently selected for inclusion in the 2007 edition of *North Carolina Super Lawyers* in the field of workers’ compensation. *North Carolina Super Lawyers* recognizes attorneys who have attained a high degree of peer recognition and professional achievement.

ADDITIONAL TCDG CONTINUING LEGAL EDUCATION LECTURES

On January 19, Bruce Hamilton was a featured speaker at a professionalism seminar for workers’ compensation attorneys jointly sponsored by the North Carolina Association of Defense Attorneys and North Carolina Academy of Trial Lawyers. Bruce is also on the faculty of the annual continuing education program which will be presented by the Workers’ Compensation Section of the North Carolina Bar Association in Greensboro on February 16 and 17.