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NEWSLETTER ARTICLE

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Workers' Compensation

Defendants Are Winning Workplace Stress Claims

By Jeffrey A. Howle

At the pro-employee North Carolina Industrial Commission, when the Defendants go to battle and win, it is a good reason for a party to break out. There are few instances when as a defense counsel I can advise my clients that we have a no-brainer, sure-fire winner. One exception to this rule is when a workers' compensation plaintiff attempts to file a claim for an occupational disease to the back - because the Full Commission has yet to give any credence to such a claim (knock on wood).

Another type of claim which is consistently being denied by the Full Commission is the psychological claim where a workers' compensation plaintiff alleges that she has developed depression or anxiety due to the conditions of her workplace. These claims arise from either "mental-mental" claims- meaning that a mental or emotional stimulus results primarily in a psychological injury, or "mental-physical" claims- meaning that a mental or emotional stimulus results in a distinct physical injury.

An example of a case where the Full Commission denied compensability in a "mental-mental" claim is *Lane vs. American National Can Company*, I.C. File No. 963599, decision written by Commissioner Sellers (August 2005), where Plaintiff worked for the Schlitz Can Company in Winston-Salem beginning in 1975. In 1990, Plaintiff was promoted to Assistant Production Manager. In the early 1990's, American National Can Company purchased the Winston-Salem plant from Schlitz and immediately began downsizing. During Plaintiff's tenure, the new company began to downsize the Winston plant three times. As a result of each downsizing, Plaintiff's work load drastically increased. In 1999, Plaintiff sought psychiatric care and was diagnosed with depression. Plaintiff and his treating physician stated that his depression was caused by work conditions of high stress, long work hours, and low levels of discretion or control by Plaintiff at his job. In finding the claim not compensable, the Full Commission stated that there is no evidence to establish that Plaintiff's working conditions exposed him to unique or peculiar job stressors which are conditions characteristic of and peculiar to Plaintiff's employment as a line supervisor for the Employer-Defendant. Long hours, stress, and low levels of discretion were stated by the Full Commission Decision to occur in all industries and shared by such professionals as insurance administrators, teachers, and electricians. Therefore, Plaintiff's psychological issues were stated to be an ordinary disease of life to which the general public is equally exposed.

Another interesting case before the Full Commission is *Hassell vs. Onslow County Board of Education*, I.C. File No. 224099, decision written by Commissioner Mavretic (October 2005), where Plaintiff was employed as a middle school teacher and experienced disciplinary incidents with the children every week. Plaintiff testified that her students were disrespectful and unruly. Students would curse at her, walk out of class without permission, write rude remarks about her in their books, and shoot spitballs during instruction. On one occasion, Plaintiff was hit with an object in the back of the head during a

school assembly. Plaintiff said that her job was "driving her crazy." As a result of such harassment, Plaintiff alleged in a workers' compensation claim that she had developed depression and an anxiety disorder. The Full Commission denied Plaintiff's depression and anxiety disorder claims stating that her alleged occupational diseases were not characteristic of and peculiar to the teaching industry. The Full Commission Decision stated that Plaintiff's mental illnesses she stated to have resulted from her classroom arose from workplace conditions such as a person failing to perform their job duties, the lack of a support system, the perception of being undervalued, the demanding nature of the employment, and working for an abusive supervisor. The Full Commission views these conditions as being able to occur in any industry or profession and outside of the employment. As Defendants in these workers' compensation psychological claims, we should feel fortunate that the Full Commission views the general workplace as a place where abusive supervisors, stressful conditions, and an unpleasant environment rule the day.

Commissioner Thomas Bolch disagrees with the majority of the panel sitting at the Full Commission which has been denying these psychological claims, and he wrote the dissent in both of the cases mentioned above. Commissioner Bolch states that the N.C. Industrial Commission "cannot idly permit employers to subject employees to abnormal and severe levels of stress without recognizing that typical work-related stress can exceed a threshold in which it surpasses the normal level of work-related stress as borne by the general public." It will be interesting in future psychological cases to see if Commissioner Bolch can convince another Commissioner in the three person Full Commission panel to go along with his reasoning and extend the benefits of the N.C. Workers' Compensation act to an occupational disease or injury resulting from stress in the workplace.

In my opinion, Commissioner Bolch is campaigning for an expansion of the N.C. Workers' Compensation Act beyond the intent of the N.C. Legislature by designating the workplace stress claim as a compensable occupational disease claim. As defense attorneys before the N.C. Industrial Commission, we must continue to fight against the expansion of what is a compensable occupational disease. If a plaintiff were to begin collecting benefits and medical treatment on the dime of their employer and its insurance carrier as a result of stress in the workplace, then a Pandora's Box will be opened for new occupational disease claims to be filed by plaintiffs and their attorneys which will be impossible to halt save a change in the N.C. Workers' Compensation Act by the Legislature putting an end to the possibility of a workplace stress claim altogether.

Workers' Compensation Cases of Interest

- In *Everett vs. Well Care & Nursing Services*, (filed 11-21-06): The Court of Appeals overturned the Full Commission award of ongoing TTD benefits because plaintiff failed to present medical evidence that she was unable to work as a result of her compensable injury. This unique case arose out of a compensable wrist injury plaintiff suffered in an automobile accident. After surgery and returning to work, plaintiff had a second injury when she slipped and fell fracturing her left ankle. Plaintiff argued, and the Commission and this Court agreed that the ankle injury was a "natural progression" of her compensable wrist injury because she testified she was unable to grab onto something to break her fall. She further testified that after receiving physical therapy for the ankle injury she did not ask the doctor or the physical therapist if she could go back to work, nor did she contact the employer about going back to work because she "did not feel she was physically able to return to work". The Court determined that this was insufficient to support her claim of ongoing TTD benefits and ruled that this was a matter of law that they could address.

- In *Evans vs. Wilora Lake Healthcare* (filed 11-21-06), the Court affirmed the denial of plaintiff's claim finding that she failed to describe an "accident" within the meaning of the act. Plaintiff injured her lift wrist while lifting a patient out of bed using the bed pad. Plaintiff argued at the appellate level that she exerted unusual force in performing this task, but the court stated that "nothing in the record indicates plaintiff was performing unusual or unexpected job duties". Thus, they didn't really address the unusual exertion argument, simply finding that plaintiff's job duties required her to assist patients out of bed.

High Court Rejects Occupational Disease Back Injury Argument and Narrows Standard for Proving Occupational Disease Claims

On November 17, 2006, the Supreme Court issued an important occupational disease decision in *Chambers vs. Transit Management.*

In this case, the plaintiff sought benefits alleging his cervical spine injury and ulnar neuropathy were the result of an occupational disease. The Deputy Commissioner denied plaintiff's claim, but the Full Commission and Court of Appeals found that both of plaintiff's occupational disease claims were compensable. The Supreme Court overturned the Court of Appeals stating that the wrong legal standard had been applied in this case.

N.C.G.S. 97-53(13) defines an occupational disease as "any disease...which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." Claimants have used this "catch-all" provision to pursue claims for a variety of conditions from Carpal Tunnel Syndrome to overuse syndrome of the shoulder. To date, however, a claimant had never successfully convinced either appellate court to accept this argument for a back injury. Thus, it was disconcerting that the Full Commission and Court of Appeals had adopted this theory in awarding benefits to the claimant. Thankfully, the Supreme Court rejected this argument, at least in this case. In so doing, they also limited to some extend the ability of claimants to pursue occupational disease claims when they already suffer pre-existing conditions.

To be compensable, an occupational disease must be: (1) characteristic of persons engaged in the particular trade or occupation in which the (plaintiff) is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in the particular trade or occupation; and (3) there must be a "causal connection between the disease and the (plaintiff's) employment." *Rutledge vs. Tultex Corp.* 308 NC 85, 301 S.E.2d 359 (1983). In cases where the employment placed the employee at a **greater risk** of **contracting** the disease than the general public, the first two elements are satisfied. *Rutledge, Id.* The plaintiff must then prove, through medical evidence that the employment actually caused to occupational disease. But what happens if the issue concerns **aggravation** of the pre-existing condition.

The Supreme Court drew a distinction between the requirement that the employment increase the risk of ***contracting*** the condition and ***aggravating*** the condition. In order to prove an occupational disease, there must be competent medical testimony (not just mere speculation and conjecture) that the job increased the risk of developing or contracting the disease as opposed to the public in general. Thus, in looking at the first two prong of the *Rutledge* test, the medical testimony requires that the job increased the risk of developing the occupational disease as opposed to the public in general. **It is not enough** that the job increased the risk of "aggravating" a pre-existing condition; the job must increase the risk of "developing" the condition. If so, then it is compensable so long as the job actually did cause the condition or if it aggravated a pre-existing condition.

In this case, the plaintiff, a bus driver, failed to present such testimony on either the back claim or the ulnar neuropathy claim. This ruling is significant as it will apply to ALL occupational disease claims. Thus, an asthmatic plaintiff who claims her employment aggravates her condition will have to establish first that her employment would increase the risk of developing asthma before she could recover, even if there is adequate evidence that her job does, in fact, aggravate her asthma.

Also of significance in this case is that the Court found that plaintiff failed to describe a specific traumatic incident because he failed to describe any "incident" even though he could identify the time frame when his neck pain began (while driving a bus he said it came on gradually during the day). Plaintiff reported to his physicians that he had "a gradual onset of left arm pain while he was driving" and knew of "no particular inciting event." The court specifically stated that "Here, plaintiff presented evidence that he experienced pain on a particular date ***but he presented no evidence linking that pain to the occurrence of an*** injury. Thus, the Court found he had not presented a specific traumatic incident.

PRACTICE TIP: This case will apply to ALL occupational disease claims, not just alleged back injuries. Plaintiff must prove that the job increased the risk of contracting or developing the disease before addressing the question of aggravation. **Beware:** If a plaintiff can obtain medical testimony that the job did increase the risk of developing a back condition, as opposed to the general public, plaintiff might be able to prove an occupational disease claim which has, to date, still not been recognized by our courts.

Course and Scope of Employment and Attorney Fees

Sandra Rose vs. City of Rocky Mount (filed 12-5-06): Court of Appeals affirmed an award of benefits to a police officer who was struck by another vehicle while on her lunch hour. In addition, they awarded, in their discretion, attorney's fees for defendant's appeal of the Full Commission decision. In this case, Plaintiff clocked out during her lunch hour and drove her personal vehicle to run errands with another officer also on their lunch hour. On the way back, they were rear-ended by an individual. After getting out of her car, and still in uniform, plaintiff believed the individual was going to flee the scene and ordered him to stop. He promptly drove over the office twice with his vehicle.

The court determined that there were sufficient facts to support the Commission finding that plaintiff was injured in the course and scope of her employment, including the fact that there was evidence plaintiff was assaulted by the vehicle because she was in uniform and that the officer acted in accordance with her training involving situations where there may be a fleeing vehicle. The court noted that they are not the trier of fact, but must only determine if there is sufficient evidence to support the Commission's findings of fact. The court decided to award attorney's fee's in part because of the fact that the defendant had still not paid any benefits for the November 10, 2003 accident and that plaintiff was only seeking approximately 8 weeks of TTD benefits.

Medical Causation

Seay vs. Wal-Mart (filed 12-5-06): The Court of Appeals affirmed the denial of benefits to the claimant for failure to adequately prove his case on medical causation. The doctor testified that, based on assumed facts presented by plaintiff attorney that it was the doctors "medical *assumption* that his on the job injury of 4-4-03 should be ***implicated as the culprit*** of his thoracic disk herniation..." The attorney did not ask any questions to clarify this statement. The Court determined that this language was only speculative and was insufficient to prove causation because there must be a "reasonable scientific probability" that the stated cause produced the stated result. Furthermore, plaintiff's assumed facts were not supported by the evidence which showed plaintiff told at least one treating physician he had experienced back pain for 4-5 weeks prior to the incident.

It should be noted that plaintiff failed to assign error to any finding of facts which substantially limited his argument. In addition, plaintiff failed to follow the Rules of Appellate Procedure, but the court chose to address the case on its merits.

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