NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

summer 16

Employers seek reversal of court decision

The North Carolina Association of Self-Insurers is among employer groups and insurers asking the state Supreme Court to reverse a lower court ruling in *Wilkes v. City of Greenville*. The groups contend the appellate court's decision threatens to make employers liable even for medical conditions unrelated to a work-related injury.

Joining NCASI in supporting the appeal by Greenville are North Carolina Chamber, North Carolina Retail Merchants Association, North Carolina Home Builders Association, Employers Coalition of North Carolina, North Carolina Association of County Commissioners, North Carolina League of Municipalities, and the North Carolina School Boards Association.

The Property Casualty Insurers of America and American Insurance Association are also part of this effort, which consists of two amici curiae briefs and an appeal by Greenville. NCASI president Jay Norris says "our association had no hesitation in joining this fight and supporting it financially. Every employer should pay close attention to this case as it could have far-reaching implications."

In *Wilkes v. City of Greenville*, the Court of Appeals ruled that it is the employer who must prove the injured worker's anxiety and depression are not related to his physical injuries, rather than putting the burden of proof on the claimant, as traditional. Wilkes was driving a truck when a third party ran a red light and collided with his vehicle, causing injuries to his head, ribs, neck, back, pelvis, and left hip.

The Court ruled that by filing a Form 60 the City of Greenville had accepted his injuries as work-related and, therefore, Wilkes was entitled to the presumption that the additional medical treatments he sought for his symptoms of anxiety and depression were directly related to his compensable injury (the so-called Parsons presumption).

"Our case law since *Perez* has made clear that the Parsons presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable," the Court ruled.

The parties filing the amici briefs contend the Form 60 filed by Greenville expressly limited the injuries accepted as those sustained to Wilkes's "ribs, neck, legs and entire left side." They argue North Carolina appellate courts have consistently held that the Parsons presumption does not extend to alleged injuries or conditions which have not been accepted by defendants or ruled compensable by the Industrial Commission.

"To allow an employee to recover benefits for a new condition without the production of medical evidence documenting a causal link would violate one of the most basic tenets of civil law and inappropriately transition the Workers' Compensation Act to the field of general health insurance," one of the briefs states.

The employer groups also warn that if the appeal court's decision is allowed to stand it would drive employers to contest even seemingly acceptable claims out of fear that if they accept a claim they may be accepting unforeseeable liability.

"Since the inception of North Carolina's workers' compensation system, establishment of a causal relationship between an employee's injury and his or her employment has been a fundamental requirement to receive workers' compensation benefits,' they say, in urging the Supreme Court to intervene in this matter.

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CASE LAW UPDATE

By Courtney Britt

Injury by Accident Revisited

To prove that an acute injury is compensable in North Carolina, an employee must show that there was an injury by accident, arising out of and in the course and scope of employment. The term "accident" has been defined by our Courts as the introduction of an unusual or unexpected condition or an interruption of the normal work routine. Our Court of Appeals recently revisited North Carolina's injury by accident standard in *Barnette v. Lowe's Home Centers, Inc*.

Joseph Barnette was a 59 year old delivery driver for Lowe's Home Centers, Inc. On August 8, 2012, he was delivering a refrigerator with a co-worker when he lost all feeling in his right hand and forearm. Barnette and his co-worker were moving the refrigerator into a home with a second floor kitchen accessible via a narrow staircase.

Barnette subsequently sought medical treatment for right arm pain and numbness. The parties disagreed about when Barnette reported his symptoms. Barnette filed a claim five months later, contending his right arm condition was the result of performing an, "unusually difficult delivery of a refrigerator up and down a narrow set of stairs." Defendants denied the claim and Barnette requested a hearing.

Following a hearing, Deputy Commissioner Phillip A. Holmes denied Barnette's claim. He appealed to the Full Commission, which affirmed the Deputy Commissioner's Opinion and Award, with modifications. Based on the greater weight of the evidence, the Full Commission concluded that Barnette had not proven that his injury was caused by an accident. Barnette appealed.

On April 19, 2016, the Court of Appeals reversed the Full Commission in *Barnette v. Lowe's Home Centers, Inc.,* focusing on the Full Commission's conclusion that Barnette failed to show that his right arm condition was the result of an accident. The Court explained that when unusual conditions are introduced which are likely to result in unexpected consequences, it can be inferred that an injury is by accident. Also, unusual conditions can exist even where the employee's normal job is physically strenuous or awkward.

The Court noted that in Barnette's claim, the Full Commission made findings that: the customer's staircase was unusually tight and narrow; Barnette and his co-worker were unable to get the refrigerator into the customer's kitchen because of the size of the staircase; and they made it two thirds of the way up the staircase before deciding the refrigerator was not going to fit and returning downstairs without a break or opportunity to reposition the refrigerator.

The Court concluded that these findings did not support the Commission's conclusion that Barnette's injury occurred during the course of his normal work duties. Rather, the Court observed that Barnette's normal work routine was interrupted when he had to carry the refrigerator back down the unusually narrow staircase without a break or pause.

This is not the first time the Court of Appeals has determined that the Full Commission's conclusions regarding an injury by accident were unfounded. The Court of Appeals reached a similar conclusion in *Calderwood v. Charlotte-Mecklenburg Hospital Authority*. Rozanne Calderwood worked for Charlotte-Mecklenburg Hospital Authority (CMHA) as a labor and delivery nurse. Her job duties included working with patients of a variety of ages and sizes, small and large, including patients who had received epidurals.

Of those patients who received epidurals, Calderwood's supervisor testified that some patients experience a "total block" following an epidural, meaning they cannot move their legs or assist with delivery. On October 2, 1995, Calderwood suffered an injury to her right shoulder while assisting a 263 pound patient who experienced a total block.

Calderwood later filed a claim, which was denied by CMHA. The Full Commission concluded that Calderwood did not suffer an accident and denied her claim. On appeal, the Court of Appeals reversed the Full Commission. The Court relied heavily on testimony by Calderwood that this was the first time in 11 years of work with CMHA where she was required to lift the leg of a 263 pound patient during delivery without any assistance.

The Court also noted that, although Calderwood's normal work routine required her to assist patients who had received epidurals, this was not dispositive. Rather, the specific instance where a 263 pound patient experienced a total block and could not provide any assistance moving her legs resulted in an interruption of Calderwood's work routine.

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President's Note

The employer's voice in workers' comp

Employers who wonder rhetorically what good is the self-insurers' association should read carefully the cover story in this issue of our newsletter. Once again, the North Carolina Association of Self-Insurers is speaking up for employers in a case with high stakes for the business community.

We were active in a similar manner in reforming the state's workers' compensation system a few years ago. Our efforts in reform legislation have been beneficial for both employers and workers, and a win-win for both parties is what makes for a healthy workers' compensation system in North Carolina.

We are an invaluable resource for employers because no organization in the state can match our expertise and experience in workers' compensation. We live it every day. No other organization exists solely to advocate for employers in workers' compensation. Excuse the chest-thumping here, but even now many employers don't recognize the valuable services we provide them. As we have said often, if the self-insurers' association did not exist, employers would be scrambling to form one.

The status quo is always changing in workers' comp. A climate favorable to business interests can quickly be altered by an unfortunate court decision, by ill-advised legislation, and even by hasty regulations. That's why it pays to have a well-informed group like ours serving as a watchdog and a restraint on the system.

For a mere $350 per year, you can help amplify the employer's voice in workers' compensation and strengthen our hand before the General Assembly and the North Carolina Industrial Commission.

With very best wishes,

Jay Norris

Injury by Accident Revisited *continued from page 2*

Our courts have also demonstrated a willingness to overturn an accident finding in certain circumstances. In *Bowles v. CTS of Asheville*, the Court of Appeals reversed the Full Commission's conclusion that an accident had occurred. Evelyn Bowles worked as a parts inspector for CTS of Asheville for several years. Her job duties required her to pull 10 to 60 metal pans across a rough floor each day. For three to four years prior to her injury, Bowles observed that the metal pans were sometimes difficult to pull apart because they were warped, bent or stuck together. She also reported that she had experienced back pain when pulling pans apart and that her symptoms gradually worsened.

On April 6, 1983, Bowles was performing her regular job when she had difficulty pulling apart two pans and felt back pain worse than she had experienced before. She later filed a claim, which was denied by CTS of Asheville.

Following a hearing, the Deputy Commissioner denied Bowles' claim, concluding she had not suffered an injury by accident, the standard at that time for proving a compensable back injury. The Full Commission reversed and found the claim compensable. CTS of Asheville appealed to the Court of Appeals, who reversed the Commission, concluding that Bowles did not suffer an injury by accident.

Specifically, it noted that Bowles testified that she frequently had to separate pans which were stuck together as part of her normal work duties. In addition, the Court determined that there was no discrete event that occurred, only a gradual onset of pain reported by Bowles. The Court also observed that although Bowles may have an unusual job or a job that is unusually strenuous, that alone did not meet her burden of proof.

Barnette, Calderwood and *Bowles* remind us that the Court of Appeals will carefully review the Full Commission's findings of fact and conclusions of law to ensure they are properly supported. These decisions are often very fact-specific. As there are cases on both sides of this issue, risk managers are encouraged to consult with their defense counsel to develop appropriate strategies to assess and handle injury by accident questions.

Courtney Britt, a partner in Teague Campbell's Raleigh office, has been recognized as a "Rising Star" by her peers in the 2010-2013 North Carolina editions of Super Lawyers *and has been listed in* Best Lawyers in America *for Workers' Compensation-Employers since 2013.*

coming up

March 29-31, 2017

Annual Conference, NC Association of Self-Insurers. **Holiday Inn Resort, Wrightsville Beach**

April 5-7, 2017

Annual Conference, SC Self-Insurers Association. **Hilton Myrtle Beach Resort**

NC Workers' Comp News is produced quarterly by the North Carolina Association of Self-Insurers. To be added to our distribution list, please contact Moby Salahuddin, executive director, at msalahuddin@sc.rr.com

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NORTH CAROLINA
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The employers' voice in workers' comp

NC Industrial Commission News

Commissioner Christopher Loutit was sworn in on May 11, 2016. He was appointed a year ago but his nomination was delayed until his confirmation in the recent session by the General Assembly. Commissioner Loutit's term will expire on April 30, 2021.

Commissioner Linda Cheatham was confirmed by the General Assembly for a second six-year term. Her term begins July 1, 2016 and expires June 30, 2022.

Commissioner William "Bill" Daughtridge, Jr. was confirmed by the General Assembly to complete the remaining term of former chairman Drew Heath. His term runs from February 18, 2016 until April 30, 2019.

William Peaslee was appointed Chief Deputy Commissioner by Chairman Charlton Allen on May 18, 2016 and Theodore Danchi was appointed byGeneral Counsel effective June 1, 2016.

Also, on April 1, 2016 the Industrial Commission publicly released a study on the implementation of a drug formulary and Worker's Compensation claims filed by state employees. The study was completed at the directive of the General Assembly in 2015.

In other developments, Chairman Allen appointed Matthew McCall as Administrator/ Chief Operating Officer of the Commission. The Administrator is a senior-level position tasked with overseeing the Commission's budget, personnel, and other managerial operations.

McCall was serving his second term as the elected Register of Deeds for Iredell County. In that capacity he cut the agency's budget by approximately 46%, while enhancing customer service, including opening a second office, and initiating significant technological improvements.

McCall is a graduate of North Carolina State University, and prior to his service in elected office was a licensed insurance agent and manager of his family's insurance agency.