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WORKERS' COMPENSATION ESSENTIALS FOR NORTH CAROLINA EMPLOYERS

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Melissa R. Cleary
Julia S. Hooten

TEAGUE CAMPBELL DENNIS & GORHAM, L.L.P.

P. O. BOX 19207
RALEIGH, NC 27619-9207

TELEPHONE: 919-873-0166
FACSIMILE: 919-873-1814

22 S. Pack Square, Suite 800
Asheville, NC 28801

TELEPHONE: 828-254-4515
FACSIMILE: 828-254-4516

WWW.TCDG.COM



Melissa R. Cleary



Partner

mcleary@tcdg.com

Telephone: (919) 873-0166

Facsimile: (919) 873-0166

Areas of Practice

Employment Law

Government and Municipal Law

Premises Liability

Professional Liability

Workers' Compensation

In 1992, Melissa graduated *magna cum laude* from Saint Mary's College in Notre Dame, Indiana with a Bachelor of Arts degree in Economics. She received her Juris Doctor degree from the University of North Carolina in 1995. Melissa's practice includes workers' compensation, employment law, professional malpractice, including medical malpractice, and general insurance defense cases.

Melissa brings a commitment to advocacy to each of her cases. She understands that every case is important to each client and works diligently to address client needs and concerns. Her trial experience includes cases in both the Civil District and Superior Courts of North Carolina, the North Carolina Court of Appeals, the North Carolina Industrial Commission and the EEOC and she has handled matters in all three Federal District Courts in North Carolina. Melissa is a member of the North Carolina Association of Defense Attorneys, the North Carolina State Bar, the North Carolina Bar Association and the Wake County Bar Association.

In 2009 and 2010, Melissa was chosen by her peers to be listed as a "Rising Star" in *North Carolina Super Lawyers*. She became a Fellow in the Litigation Counsel of America in 2009 and was selected for membership in the Council on Litigation Management in 2010. Melissa is approved by the North Carolina Department of Insurance to present seminars approved for continuing education for adjusters and enjoys speaking to clients on current legal issues.



Julia S. Hooten



Associate

jhooten@tcdg.com

Telephone: (828) 254-4515

Facsimile: (828) 254-4516

Areas of Practice

Employment Law

Insurance Law and Coverage

Workers' Compensation

Julie graduated from Appalachian State University in 1994 with a Bachelor of Arts degree in Philosophy. She received a Master of Arts degree in American History from Western Carolina University in 2000 and her Juris Doctor degree from Campbell University in May 2003. While in law school, Julie was Notes & Comments Editor for the *Campbell Law Review*. Her article "Caught Between a Rock and a Hard Place, Fringe Landowners Can't Get No Satisfaction; Is it Time to Re-Think Annexation Policy in North Carolina?" appeared in the Spring 2002 edition of the *Campbell Law Review*. She also traveled to Vienna, Austria when her team advanced in the Wilem C. Vis International Commercial Arbitration Moot Court competition. Julia was President of Women in Law, a member of the Lonestar Trial Team, and received several awards upon graduation, including one from the National Association of Women Lawyers.

Julie joined our firm in September 2003 and, in April 2008, became part of the firm's Asheville office. She is a member of the North Carolina Bar Association's Workers' Compensation Section Council, the North Carolina Association of Defense Attorneys, North Carolina State Bar, North Carolina Bar Association and Buncombe County Bar Association. Julia is licensed to appear in all of our state courts and the United States District Court for the Eastern District of North Carolina.

This paper provides an overview of the North Carolina workers' compensation system. The goal of the paper is to assist employers in understanding how the workers' compensation system operates so that they are prepared to handle claims when they arise. The paper reviews all stages of a claim as well as the process a claim will go through at the Industrial Commission (I.C.). This paper should be used as an initial resource and does not cover every issue that may arise in a claim.

A. A NEW CLAIM

1. Initial Investigation

When a claim is first reported to you, you are presented with the best opportunity to gather information about the accident or claim. After advising your workers' compensation carrier or third party administrator (TPA), conduct a thorough initial investigation. Your carrier or TPA may have some guidance to give or protocols they would like you to follow.

It is a good idea to have a form ready for completion by supervisors that reviews all of the questions to ask when investigating a claim. If possible, obtain a written statement from the injured employee as to what happened. If the claim involves an accident (as opposed to an occupational disease), nail down the specifics of what happened. Find out who else was present when the accident occurred. Ask the employee to identify who s/he reported the injury to at the time it happened and follow up with all witnesses who are indentified. If you are not able to speak with the injured employee right away, if they later hire an attorney, you need permission from his/her counsel to discuss the incident. Documentation will be so important down the road as the claim moves through the I.C.

Interviews of witnesses are also important because, by the time the claim moves to a hearing, witnesses may be gone. Hearings can occur years after an accident. Statements will provide contact information as well as a witness' recollection of events. There have been times in hearings when employees will mention little known facts about the injured employee's story about the accident or hobbies that caused the injury. At that point, particularly, if the case is already

accepted, it can be too late for your attorney to use the information to defend the case. And remember, once a claim has been accepted, it is very difficult to undo it.

2. Form 18

The Form 18 is the Employee's Notice of Accident. It is to be completed by the employee, or counsel, and filed with the I.C. The employee has two years from the date of injury to file notice of the claim with the I.C. The filing of the Form 18 starts the clock for the 30 days to admit or deny the claim.

3. Form 19

The I.C. Form 19 is the appropriate form for the employer to use whenever an employee has developed an occupational disease or has been involved in a work-related accident and should be completed as soon as the accident or occupational disease is reported to the employer. The Form 19 contains self-explanatory blanks for information associated with the employee; the job title, supervisor, and wages; the reporting of the accident; and other identifying information. When a Form 19 is completed and sent to the I.C., a copy must be sent to the employee, along with a blank Form 18, for the employee to complete.

When completing a Form 19, it is helpful to complete as much information as possible up front, rather than trying to fill in the blanks months or years later. Forms 19 often contain telling information which can be later used against the employer, for example, the date of notice or the description of the accident. It is very important to include a detailed description of the body parts the employee is alleging to be affected by the injury or disease; if the description is too broad, an employer may find it facing exposure for unrelated conditions. For example, if an employee slips and falls at work, scratching her right knee, the employer should include all that information in the injury description. A description of simply "slip and fall" may seem clear to the author at the time, but if, several months or years later, the employee claims to have injured her back, head, or hip as a result of the slip and fall, the employer will have trouble denying having received notice of that condition when the description is too broad.

Similarly, the top right side of the Form 19 **must** be completed in its entirety. In recent months, the I.C. has been sanctioning employers with fines for failing to complete basic claims information such as carrier code, I.C. file number, and employer code. That information can be found on the I.C. website, at <http://www.comp.state.nc.us> or by calling the I.C. Statistics Section at (919) 807-2506.

When a Form 19 is completed, the I.C. requires that a copy be given to the employee along with a blank Form 18 for the employee to complete.

4. When is an Accident or Injury Compensable (When Does it Qualify as Workers' Compensation)

Under N.C.G.S. § 97-18 the employer has **30 days** from receipt of notice from the I.C. that a Form 18 has been filed to promptly investigate each injury and to file a Form 60 (accepting the claim), Form 61 (denying the claim) or Form 63 (payment without prejudice.) Your carrier or TPA usually handles the filing of all forms with the I.C. The failure of the employer to accept or deny the case may result in the imposition of sanctions. The I.C. can grant extensions to the 30-day time period if needed. When a Form 63 is used and benefits are paid without prejudice, the employer has **90 days** from the employer's notice of the injury to notify the I.C. that it is denying compensability. The Form 63 must indicate if indemnity and medical benefits are being paid. Any denial after a Form 63 has to be very specific, because the employer could be limited to these defenses.

a. Was there an accident?

There are many issues that are taken into consideration in deciding whether to accept or deny a claim. One of the first questions that is asked is: "Was there an accident?" An accident is an interruption of the regular work routine and the introduction of unusual circumstances, such as a slip, trip or fall or other unusual activity, likely to result in unexpected consequences. Determining if there was an interruption of the regular work routine is very fact specific and the definition of the "regular work routine" can be quite narrow. For example, in *Legette v. Scotland Memorial Hospital*, 640 S.E.2d 744, N.C.App. (2007), the Court found that an accident

occurred when a nurse had to reposition a patient by herself. The evidence showed that she had repositioned patients before but that she usually did it with another nurse.

Back injuries and hernias are different and do not have to be caused by an accident; all an employee must show for those claims is that a specific traumatic incident occurred. A specific traumatic incident does not require an accident or any type of trauma really. The employee can be doing their normal job when the injury occurs, but there generally does have to be some event associated with the injury. For example, an administrative assistant can be lifting a box of documents and feel pain in her back – that is a specific traumatic incident.

For occupational disease claims, like carpal tunnel syndrome, the employee must demonstrate that (a) the employee was exposed to an increased risk of developing or contracting the disease, as compared to the general public, and (b) the conditions of employment were significant contributing factors.

b. Did the accident arise out of/in the course of employment?

In order to be compensable under the North Carolina Workers' Compensation Act, an injury must arise out of and in the course of employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980.) In general, the term “in the course of” refers to the time, place, and circumstances under which an accident occurs. An accident arising “in the course of” the employment is one which occurs while the employee is doing “what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing or one which occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.” *Hildebrand v. McDowell Furniture Co.*, 212 N.C. 100, 109, 193 S.E. 294, 301 (1937.)

The term “arising out of employment” refers to the origin or causal connection of the accidental injury to the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531-32 (1977.) There must be some causal relation between the employment and the injury. *Bass v. Mecklenburg Co.*, 258 N.C. 226, 231, 128 S.E.2d 570, 574 (1962.) An injury arises out of the employment when it comes from the work the

employee is to do, or out of the service he/she is to perform, or as a natural result of one of the risk of the employment; the injury must spring from the employment or have its origin therein. *Williams*, 65 N.C. App. at 7, 308 S.E.2d at 482. Our Supreme Court has stated that where any reasonable relationship to the employment exists, or employment is a contributory cause, the Court is justified in upholding the award as “arising out of employment.” *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960.)

The following categories of cases involve special rules pertaining to the notions of “arising out of” and “in the course of employment.” These categories include “the going and coming rule,” break time injuries, assaults, horseplay and athletic/social events.

1) **The going and coming rule**

In general, injuries sustained by an employee going to or from work are not ordinarily compensable under workers' compensation principles because those injuries do not arise out of or in the course of employment. This general rule is known as the “coming and going rule.” However, there are 5 noted exceptions to the “coming and going rule.” These 5 exceptions are as follows:

1. **Special errand exception** - the employee is engaged in discharging a special errand, mission, or duty;
2. **Traveling salesman exception** - the employee who is making a journey to perform a service on behalf of his/her employer and who has no definite time and place of employment;
3. **Contractual duty exception** - the employer has either contractually provided the employee's transportation or pays an allowance to cover its cost;
4. **Personal vehicle exception** - the employee is required to use his/her personal vehicle while at work as a condition of employment; and
5. **Premises exception** - the employee is traveling to or heading from work but is on the employer's premises when the accident occurs. In order for the premises exception to apply, the employer must own, maintain, provide, control or exercise dominion over the premises.

Examples

Deseth v. Lens Crafters, 160 N.C. App. 180, 585 S.E.2d 264 (2003): Sharing maintenance costs for parking with other mall tenants does not rise to the level of “maintenance” for employer to exercise control under the premises exception.

Jennings v. Backyard Burgers, 123 N.C. App. 129, 472 S.E.2d 205 (1996): Another non-compensable case involving the premises exception. Employer instructed employees to park in a parking lot behind the building next door. The lot was accessible only by using a steep stairway. Employer did not own, control, or maintain the stairway or parking lot. Employee’s claim from falling down the steps of the stairway was not compensable.

Glassco v. Belk-Tyler, 69 N.C. App. 237, 316 S.E.2d 334 (1984): The North Carolina Court of Appeals found that the employer did not control the premises even though the employer enforced the landlord’s parking condition against employees.

Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966): employee’s claim was compensable even though he was pushing an inoperable car in the employer-owned parking lot at the end of the day.

Arp v. Parkdale Mills, 356 N.C. 657, 576 S.E.2d 326 (2003): Yarn worker used employer’s back parking lot. The back lot had a chain link gate (6 feet high) with an additional one and a half foot barbed wire. On the date of his accident, the gate was locked and plaintiff could not squeeze through the gate. He therefore climbed over the gate. He slipped and fell, breaking his leg. The Deputy Commissioner, the Full Commission, and the North Carolina Court of Appeals found the claim to be compensable. However, the North Carolina Supreme Court, adopting the dissent of Judge Tyson from the Court of Appeals’ opinion, held that the premises rule will not apply when a plaintiff is injured by getting into places where he has no right to go. Judge Tyson stated that scaling a 7 and a 1/2 foot tall locked chain link and barbed wire gate is an unreasonable activity for egress when the employer provided a safe and secure exit.

2) **Break time injuries**

An employee is injured in the course of employment when the injury occurs under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the

employer's business. In tending to personal physical needs, an employee is indirectly benefiting the employer. Thus the course of employment continues when the employee goes to a wash room, takes a smoke break or takes a break to partake of refreshment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968.)

Examples

Lewis v. Orkand Corp., 147 N.C. App. 742, 556 S.E.2d 685 (2001): Plaintiff was going to the cafeteria during one of her allowed 15 minute breaks. The cafeteria was within the employer's place of business. Plaintiff had to pass by a security area on the way to the cafeteria. While passing the security area, she attempted to catch a falling table, sustaining multiple injuries. The Deputy Commissioner and Full Commission found the case compensable. The Court of Appeals affirmed, holding that plaintiff was obtaining refreshment during a scheduled break in a manner approved by the employer. The Court also noted that plaintiff was trying to benefit the employer by attempting to catch the table.

Forsythe v. Inco, 95 N.C. App. 742, 384 S.E.2d 30 (1989): Plaintiff choked on a peanut butter sandwich she brought from home. Employer required employees to remain on premises during lunch and breaks. Plaintiff died as a result of the choking. The Court of Appeals held that the plaintiff's death did not arise out of her employment.

Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976): The firefighter plaintiff worked 24 hour shifts. After working a 24 hour shift, he would have the next day off. While working a 24 hour shift, the plaintiff would sleep and eat at the fire station. When off duty, he would report for emergencies in his personal car. One day while on shift during lunch, plaintiff cleaned the oil cap on his personal vehicle by setting it on fire. An explosion ensued, and plaintiff was burned. The fire chief said that firefighters were allowed to make minor repairs on their personal automobiles. It was well known to plaintiff's superiors that firefighters made such repairs to their personal automobiles. The Deputy Commissioner, Full Commission and Court of Appeals found that the accident was compensable. The North Carolina Supreme Court affirmed. The Supreme Court found that the injury arose out of employment. It was noted that firefighters made minor repairs to their vehicles

during their lunch hour, the practice was well known by superiors, and the repairs were to an appreciable extent a benefit to the Fire Department since the employees used the cars off duty to report to an emergency.

3) Assaults

Workplace assaults by one co-worker against another are compensable if the resulting injuries arose from the employment, when the assault is “directly connected with” or “rooted in” the employment. Conversely, an employee’s injuries do not arise from the employment and are not compensable where the assault was not related to the employment, regardless of whether the assault was committed by a co-worker or a third party.

Examples

a) Attack by co-worker

Pittman v. Twin City Laundry, 61 N.C. App. 468, 300 S.E.2d 899 (1983): Plaintiff was an assistant manager of employer’s entire laundry operation. It was not unusual for plaintiff to work at the Trade Street plant. Plaintiff, the Trade Street plant manager, and another Trade Street employee, Whitted, were at the Trade Street cleaners waiting for the dryer to complete its cycle. The plant manager and Whitted got in an argument as to whether the plant manager had fired Whitted 2 weeks earlier. Whitted kicked the plant manager in the mouth and fatally shot plaintiff. The Court of Appeals found that the shooting arose out of employment. Plaintiff’s employment was the cause of the accident in that it demonstrates that but for his employment, plaintiff would not have been exposed to an equal risk of injury.

Hauser v. Advance Plastiform, 133 N.C. App. 378, 514 S.E.2d 545 (1999): Employer laid off several employees, including Mann. Plaintiff was instructed to prepare and distribute a memo regarding unemployment benefits to those laid off. Mann did not receive the memo but the other employees had. Mann was eventually informed to discuss unemployment with the plaintiff. Plaintiff told another employee that she was meeting Mann for lunch and that she was carrying him a piece of paper. The I.C. found as a fact that there was overwhelming evidence that the piece of paper that

plaintiff was taking to Mann was the memo explaining the unemployment benefits. Plaintiff was kidnapped and murdered by Mann. The Court of Appeals held that the nature of plaintiff's employment, rather than some personal relationship, created the risk of her attack. Thus, plaintiff's death arose out of and in the course of her employment.

Sisk v. Tar Heel Capital Corp., 166 N.C. App. 631, 603 S.E.2d 564 (2004): Plaintiff was sexually harassed by her manager. The Court of Appeals held that the claim was not compensable. If the motive surrounding the assault is personal in nature and unrelated to the employment, resulting in injuries are not compensable. Sexual harassment is a risk the public is generally exposed to.

b) Attack by a third person

Dildy v. MBW Investment, 152 N.C. App. 65, 566 S.E.2d 759 (2002): Plaintiff was a cashier at a gas station. Prior the incident in question, plaintiff's ex-boyfriend constantly threatened plaintiff and caused plaintiff psychological distress. Plaintiff never told her co-workers or supervisors about her relationship with her ex-boyfriend. On the day in question, the ex-boyfriend entered the store while plaintiff was working and threw a six pack of beer at her face. After he left, plaintiff asked the store supervisor to call the police because she was scared that the ex-boyfriend would come back and kill her. The supervisor asked plaintiff to continue working. He did not call the police and he told the plaintiff that the ex-boyfriend would not be back. Twenty minutes after his first visit to the store, the ex-boyfriend returned and shot plaintiff in the right hand and leg. The Court of Appeals also upheld the denial of benefits. In so doing, it stated that an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as a result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment. For an assault by an outsider to be compensable, the assault must have had such a connection with the employment that it can be logically found that the nature of the employment created the risk of the attack.

D'Aquisto v. Mission St. Joseph's Health System, 171 N.C. App. 216, 614 S.E.2d 583 (2005): Plaintiff, a cancer analyst, left her office on the first floor to go to the morgue on the second floor. She was carrying paperwork to the morgue to confirm the causes

of death of several patients. While waiting for the elevator, a man wearing scrubs assaulted her. Plaintiff testified that she did not know her attacker. The Deputy Commissioner and the Full Commission found the claim compensable. The Court of Appeals upheld the award of benefits. The Court found that (i) the employment was a contributing cause of the injury - plaintiff's job duties included her having to leave her office and walk to the morgue; and (ii) a contributing proximate cause of the injury was a risk inherent or incidental to the employment, to which the employee would not have been equally exposed apart from the employment - plaintiff's job duties took her to an area of the hospital where there were few other people around. Plaintiff was at an increased risk of being exposed to an assailant not by virtue of her job as a cancer analyst, but rather because of where her job duties took her, including the morgue and other such places with few, if any, people in her vicinity.

4) Horseplay

In general, claims involving horseplay are compensable. The workers' compensation system is based upon the realities of human conduct, and that workers occasionally relieving the tedium of their labors by sportive and foolish acts is routine and accepted incident of employing them.

Example

Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984): Plaintiff worked as a chicken deboner on an assembly line. While working on the assembly line, plaintiff playfully cut the strings on a co-worker's apron. The co-worker retaliated and tried to cut plaintiff's apron, but instead cut plaintiff's thigh. The I.C. found that it was a common practice of employees to play around with the knives. The injury occurred during the course of employment and arose from plaintiff's employment.

5) Athletic/Social Events

The general rule involving athletic/social events is: where, as a matter of goodwill, 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.

Examples

Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964): employer required plaintiff to attend a sales meeting at a hotel. The employer paid all of the plaintiff's expenses. The meeting was not going to start until Monday, but the employer asked everyone to be there on Sunday for a social event. After the social event, plaintiff went to dinner and later returned to the hotel pool to go swimming. While diving, he fractured a cervical vertebra. The North Carolina Supreme Court held that plaintiff's activity of swimming was not a function or duty of his employment, was not calculated to further directly or indirectly his employer's business to an appreciate degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the hotel. The injury did not have its origin in or arise out of the employment.

Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 262 S.E.2d 347 (1980): The Radiology Department of the hospital organized and paid for a picnic for members of the faculty and new residents to become acquainted. Employees felt no direct pressure to attend, but felt that they should go to the picnic. During a volleyball game at the picnic, plaintiff broke his ankle.

The Court of Appeals listed factors from Larson's *Worker's Compensation Law* treatise to consider in determining whether an injury occurring at an employer-sponsored recreational activity is compensable. Those factors include: (i) did the employer in fact sponsor the event; (ii) to what extent was attendance voluntary; (iii) was there some degree of encouragement to attend evidenced by such factors as taking a record of attendance, paying for the time spent or requiring the employee to work if he did not attend, or maintaining a known custom of attending; (iv) did the employer finance the occasion to a substantial extent; (v) did the employees regard it as an employment benefit to which they were entitled as of right; and (vi) 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.

After consideration of the factors cited in the Larson treatise, the Court of Appeals found the injury not to be compensable. The Court of Appeals held that it was not clear that the Radiology Department sponsored the picnic; the event seemed to be a self-perpetuating one that occurred each year more because of tradition than from any initiative taken by the Department heads; attendance was voluntary; no record of attendance was taken; the participants were not paid for the time spent, nor was any employee required to work at the medical school if he did not attend; the picnic was not an event that employees regarded as being a benefit to which he was entitled as a matter of right; and the Radiology Department did not utilize the picnic as an opportunity to give a “pep” talk or grant awards.

Martin v. Mars Mfg. Co.; 58 N.C. App. 577, 293 S.E.2d 816 (1982): The employer sponsored a Christmas party for its employees. The Christmas party was held at the Moose Lodge. All employees were encouraged to attend, but attendance was voluntary. The plant manager considered the party an employee fringe benefit. At the party, the plant manager made a speech praising employees. Plaintiff twisted her ankle while dancing. The Court of Appeals applied the *Chilton* factors and found the claim compensable. The Court found that the event was clearly employer-sponsored (factor i); employees were encouraged to attend, by being paid for the time spent and plaintiff had attended all but one of these annual events in her 7 years of employment with employer, thus maintaining a known custom of attending (factor iii); the employer paid all the expenses for the event (factor iv); and the employer benefited from the event through such tangible advantages as having an opportunity to make speeches and present awards (factor vi.)

Frost v. Salter Path Fire & Rescue, 639 S.E.2d 429 (2007) (N. C. Supreme Court): Employer arranged a fun day at an amusement park for fire and rescue squad volunteers which was paid for by community donations. Participation was voluntary, but attendance was encouraged. Plaintiff was injured in a go-cart accident at the fun day. The Supreme Court followed *Perry* and found that the injury did not arise out of the employment. The fun day was purely voluntary and plaintiff’s operation of the

go-cart was not a function of her duties or responsibilities. In so holding, the Court noted that while the *Chilton* factors “made several helpful guideposts in this inquiry, this Court has never recognized these factors as controlling and we decline to do so here.”

c. Pre-existing conditions

You’ve heard it said before: “You take an employee as you find him.” A claim may still be compensable despite the fact that an employee has some problem of health issue before the workplace injury or accident. If an injury materially aggravates or accelerates a pre-existing condition, thereby making the employee unable to work, the injury is compensable. If you are in a situation where an employee has many pre-existing problems but was able to perform the job for an extended period of time and then is out of work due to the new injury, the claim is probably compensable.

5. Form 61

If the decision is made to deny the claim, a Form 61 needs to be completed. The Form 61 specifically states that the employer/insurance carrier must provide a detailed statement of the grounds for denying the compensability of the claim where payments have previously been made under the Payment Without Prejudice option (Form 63/N.C.G.S. 97-18(d)) In addition, N.C.G.S. 97-18 requires a detailed statement of the grounds upon which the right to compensation is denied in any case. If the employer or carrier, in good faith, is without sufficient information to admit or deny, it is acceptable to deny the case but make sure to detail your efforts to investigate the claim; for example, if the employee has not provided you with some information that you have requested, put that in the Form 61.

When completing the Form 61, it is a good idea to indicate that you are reserving the right to allege other grounds of which you are currently unaware as further investigation and discovery may provide additional defenses. The Form 61 needs to be sent to the employee and his/her attorney.

6. Form 60/Form 63

The Form 60 is the form that is used to formally accept a claim. Whether a Form 60 is necessary when only medical benefits are being paid (“a med-only claim”) is the subject of some debate. As of August 1, 2008, the I.C. has designated the Form 63 as the proper Form for accepting a medical only claim. When completing the Form 60, be very specific when completing the portion of the form that asks for a description of the injury by accident or occupational disease. List the specific body parts (ie., which hand, leg), including areas of the back (cervical, lumbar, low back, neck) and the type of injury.

B. PAYMENT OF COMPENSATION

i. Indemnity Benefits

Indemnity benefits are the payments an injured employee receives for time out of work (disability) or a reduction in earnings (partial disability or wage loss.) The inability to work as a result of a workplace injury is known as disability.

a. Total disability (TTD)

Once a claim has been accepted, an employee who is out of work as a result of the injury he/she is entitled to receive weekly benefits, called temporary total disability (TTD) benefits are paid at a rate of $\frac{2}{3}$ of the employee’s average weekly wage (AWW).

Example

An employee was earning \$600 per week at the time of the accident. If s/he is unable to return to work as a result of the accident s/he will receive \$400 ($\$600 \times \frac{2}{3}$) a week in TTD benefits until able to return to work. This employee’s compensation rate (also known as comp rate) is \$400 per week.

There is a seven day waiting period before TTD benefits should start. Once the employee is out of work seven days, TTD benefits should begin. If the employee is out of work 21 days, the initial seven days, that constituted the waiting period, is also paid.

b. Partial disability/wage loss

If an employee is still working, but is earning less money as a result of the injury, either due to decreased hours or a move to a lower paying position, s/he is entitled to receive weekly benefits known as temporary partial disability benefits (TPD.) TPD benefits are calculated at $\frac{2}{3}$ of the difference between the average weekly wage the employee was receiving at the time of the accident and the wage the employee receiving upon the return to work.

Example

Before employee's injury, he earned \$1,000 a week. Following the injury, he is only able to work part time so he is earning \$700 a week. So, the employee is entitled to receive \$200 per week ($\$1,000 - \$700 = \$300 \times \frac{2}{3} = \200) in temporary partial disability (also known as wage loss and TPD.)

The employee is entitled to receive TPD payments for up to 300 weeks from the date of the accident, regardless of when s/he returned to work. In other words, if an employee is out of work for 200 weeks and then returns to a light duty job or a job that pays less, s/he will be able to receive $\frac{2}{3}$ of the difference for another 100 weeks.

c. Permanent partial disability (PPD)

When a doctor is finished treating an injured employee, s/he will say the employee is at maximum medical improvement (MMI) and will assign a permanent partial impairment rating, simply called "a rating", to the employee. (There can be a 0% rating assigned.) Permanent partial disability (PPD) is payable under N.C.G.S. § 97-31 based on application of that rating assigned by the doctor to the particular body part. N.C.G.S. § 97-31 contains the schedule for all of the different parts. For example, if a person receives a 10% rating to the back, s/he is entitled to 30 weeks of benefits (300 weeks (set by § 97-31 for a back) \times 10%=30 weeks.) Payment for the rating, if the claim is not being settled through a clincher, is made on a Form 26A.

If a rating is assigned and never paid, the two year statute of limitations on change of condition does not begin to run. Also, if a rating is not assigned but should have been, the statute does not begin to run.

d. Bodily disfigurement/scarring/loss of organ

Bodily disfigurement awards are limited to \$10,000. Awards for facial or head disfigurement and permanent injury to an organ or part of the body are limited to \$20,000. Employees can not receive both PPD and disfigurement for the same body part.

e. Deadlines for indemnity payments

All indemnity payments are late when they are not paid within **14 days** of becoming due. A 10% late payment penalty may be assessed to late payments.

f. Calculation of average weekly wage

The average weekly wage is calculated using the Form 22. The employee's wages for the 52 weeks before the accident are used to calculate the average weekly wage. The Form 22 has specific instructions on the back for completion. If an employee missed a week or more of consecutive days, that time needs to be deducted from the 52 week period. If an employee worked less than 52 weeks before the accident, you may need to get another employee's wage information to calculate the average weekly wage. The other employee needs to be employed in a similar situation with that same employer.

2. Medical Benefits

Under the Workers' Compensation Act, employees are entitled to have the medical treatment they undergo, as a result of the accident, paid for by the employer. Once a claim has been accepted as compensable, the employer has the right to pick the physician and direct medical care. After the approved physician finds that the employee is at maximum medical improvement (MMI) and assigns a rating, the employee is allowed to seek a second opinion from another doctor as to the amount of the rating. Employees can also file a Motion with the I.C. if they want to change their treating physician.

Travel

Employees are entitled to payment for mileage to and from medical appointments only if the medical appointments result in travel that is 20 miles or more round trip. A Form 25T is the form that an employee must complete to receive reimbursement for mileage. Make sure that the employee has signed the form certifying that the mileage has been incurred. It never hurts to check MapQuest or another service to confirm the mileage is accurate.

Trips to the pharmacy for prescriptions are not reimbursable unless they are medically necessary. N.C.G.S. 97-25 requires medication and supplies to be purchased on visits to medical providers.

Employees are also entitled to reimbursement for lodging and meal expenses when it is medically necessary for them to stay overnight.

C. CESSATION OF WEEKLY BENEFITS

1. Return to Work

When an employee is able to return to work but is under restrictions, then a Form 28T must be filed with the Commission. This type of return to work is known as a trial return to work. On No. 4 on the Form, you indicate the date employee is returning to work and then indicate whether s/he is returning at the same wages s/he was earning at the time of the accident or at lower wages. If the wages are lower, write the word "varies" in the blank requesting the new rate.

If an employee returns to work under restrictions, a Form 28T must be filed, in order to have benefits reinstated, the employee's treating physician has to complete the Form 28U. Any of the approved physicians who have treated employee can sign this form. Benefits do not have to be reinstated until the Form 28U is completed.

If an employee returns to work without restrictions, a Form 28 should be filed with the I.C. If the employee becomes completely disabled again after that return to work and benefits are reinstated, a Form 62 should be filed with the Commission to document that benefits have been reinstated.

2. Getting an Employee Back to Work

During a case, there may come a time when you have a position for the employee or a voc case manager has found a position within the employee's restrictions. If a voc case manager is involved, s/he should follow The North Carolina I.C. Rules for Utilization of Rehabilitation Professions in Workers' Compensation Claims and obtain approval of the job from the treating physician. If there is no case manager, the Commission has formulated questions that can be sent directly to the treating physician, with a copy of the job description attached. The letter must be copied to the employee or the employee's attorney.

If you have a position approved by the physician and the employee does not appear for it, you can then, through your carrier or counsel, file a Form 24 with the Commission seeking to terminate the payment of weekly benefits. The Form 24 has specific instructions on it for service of the document and it **is to be sent to the employee** as well as the employee's attorney. The Form 24 will be set for a telephonic hearing with one of the Special Deputy Commissioners. If the Form 24 is not granted, you can appeal the decision by filing a Form 33, Request for Hearing. That appeal must be filed within 15 days.

Frequently, when you are attempting to bring someone back to work, you will hear objections that the position that the employee is being offered is not a real position or "make work." A full discussion of this issue is best reserved for another paper but, generally, you can not make up a position for an employee – it has to be an actual position with the company. However, if an employee is still treating with a doctor and is not at maximum medical improvement, it is acceptable for you to create a job for the employee as part of the rehabilitation process.

If you do not have a job available for the employee, the burden falls on the employer/carrier to try and find the employee a job. Usually, this is when vocational rehabilitation gets assigned to the file. This is also a good time to talk about resolving the case by a clincher agreement.

D. MOTIONS PRACTICE

If an employee has filed a Motion with the Industrial Commission, the employer and/or carrier will have 10 days to respond to that Motion. On the whole, most Motions are directed to the Executive Secretary of the I.C., currently Tracey

Weaver. The Motion does not need to be a formal document – a simple letter from the employee will do. The Executive Secretary’s office will sometimes notify the defendants that a Motion has been received and that they have 10 days to respond but often do not. Defendants should receive a copy of any Motion that is filed.

Extensions, especially if consented to by opposing counsel, are usually granted. Any decision rendered by the I.C. in response to a Motion is an Administrative Decision that can be appealed by the filing of a Form 33. An administrative Decision must be appealed in 15 days of the date of the decision. Medical Motions, however, have their individual considerations.

Emergency Medical and Expedited Medical Motions

The I.C. has recently implemented new procedures with respect to Motions involving urgent medical treatment.

1. Emergency Medical Motions

In compliance with N.C.G.S. § 97-78(f), the Commission has memorialized its procedures for processing medical motions regarding an *emergency* situation through their Minutes dated July 22, 2008. These procedures went into effect August 1, 2008. You may send an Emergency Medical Motion to one of three departments at the Commission: 1) The Executive Secretary’s Office, Tracey Weaver; 2) The Chief Deputy Commissioner’s Office, Wanda Taylor; or 3) The Chair of the Industrial Commissioner, Pamela Young.

a. Motions Addressed to the Executive Secretary’s Office

As Motions are received at Executive Secretary Tracey Weaver’s office, they are reviewed by the staff and those Motions marked “urgent” or “emergency” or “for expedited review,” or otherwise designated as potentially needing expedited handling, are brought to the attention of the Executive Secretary or a Special Deputy Commissioner, on the same day of receipt, for consideration of shortening the time frame for response pursuant to Rule 609(4) or acting on the Motion pursuant to Rule 609(5.)

The Executive Secretary or Special Deputy reviews the Motion and the file and assesses whether and how much to shorten the time frame for a ruling. The request should fall into one of the following categories:

i) Same day review – For example, the Motion is seeking the filling of a prescription that is about to run out.

ii) One or Two day review – For example, the Motion is seeking the authorization of a procedure or appointment that is already scheduled and is imminent.

iii) Shortened period for response – The circumstances are urgent, but there is no specific date at issue. A five-day time period is generally allowed in such cases.

A fax memorandum or e-mail notice is sent to counsel and/or the parties informing them of receipt of the Motion and the shortened response deadline. If same day review is allowed, an Order may be filed without a response pursuant to Rule 609(5.) Upon receipt of a response or expiration of the deadline, whichever comes first, the Motion is reviewed and evaluated, then an Order is issued and e-mailed to counsel/parties.

b. Motions Addressed to the Chief Deputy Commissioner’s Office

When the Deputy Commissioner Section receives an Emergency Medical Motion, it is first to be given to the Chief Deputy Commissioner, who promptly records receipt of the Motion and gathers all relevant facts. Upon completion of a brief fact-finding stage, the Chief Deputy renders a decision. The Chief Deputy prepares a written Order and sends it to all parties. If the Chief Deputy is absent from the office upon receipt of an Emergency Medical Motion, the Chief Deputy’s Legal Secretary refers the matter to any available Deputy Commissioner who, after attempting to contact the Chief Deputy, decides the matter. If the Chief Deputy and the Chief Deputy’s Legal Secretary are both absent from the office, the recipient of an Emergency Medical Motion delivers it to any available Deputy Commissioner whose Legal Secretary records receipt of the Motion and returns it to the respective Deputy Commissioner who, after attempting to contact the Chief Deputy Commissioner,

may decide the matter. That Deputy Commissioner's Legal Secretary prepares the written Order and sends it to all parties. A copy of the Order is forwarded to the Chief Deputy's office.

c. Motions Addressed to the Chair of the I.C.

When the Office of the Chair receives an Emergency Medical Motion, it is first be given to the Chair's Agency Legal Specialist, who promptly records receipt of the Motion and gather all relevant facts. Upon completion of a brief fact-finding stage, the Motion and related information is immediately forwarded to the Chair for decision. Upon the Chair's timely decision, the Agency Legal Specialist prepares a written Order and sends it to all parties. If the Chair is absent from the office upon receipt of an Emergency Medical Motion, the Chair's Agency Legal Specialist refers the matter to any available Commissioner who, after attempting to contact the Chair, shall decide the matter. If the Chair and the Chair's Agency Legal Specialist are both absent from the office, the recipient of an Emergency Medical Motion delivers it to the Chair's Administrative Assistant, who records receipt of the Motion and delivers it to a Commissioner who, after attempting to contact the Chair, may decide the matter. That Commissioner's Agency Legal Specialist prepares the written Order and sends it to all parties. A copy of the Order is forwarded to the Chair's office.

2. Expedited Medical Motions

Pursuant to the mandate set forth in N.C.G.S. § 97-78(f)(2), and after extensive deliberations by a task force comprised of North Carolina I.C. staff and plaintiff and defense counsel, the I.C. has adopted a Expedited Medical Motion procedure, which was implemented and became effective August 1, 2008 through the Commission's Minutes.

a. Motions Addressed to the Executive Secretary's Office

Medical Motions filed with the Executive Secretary's Office by plaintiffs pursuant to N.C.G.S. § 97-25 should be filed by e-mail to *medicalmotions@ic.nc.gov*. Responses to such Medical Motions should also be submitted to the same address. An

Administrative Order will be filed after administrative review, upon expiration of the response period.

Either party is allowed 15 days to appeal the Administrative Order, and should clearly indicate on the Form 33 or letter of appeal that the only issue to be considered is medical. Also, if you are appealing an Administrative Order, you should attach a copy of the Order with the Notice of Appeal.

b. Orders Appealed to the Deputy Commissioner Section

When Notice of Appeal from the Executive Secretary's Office or from a Form 33 is filed, with the only issue being a Medical Motion, the processing of the appeal through the Dockets Department will be expedited, and under normal circumstances, the Motion or the Form 33 bypasses mediation, unless the parties indicate a desire to mediate. The appeal is docketed before one of the two designated Deputy Commissioners, five days from the date of appeal. A telephonic Pre-Trial Conference will be held immediately to clarify the issues, to encourage the parties to consent to a "paper" review of the contested issues (parties submitting the medical records and opinion letters via e-mail), to fashion the medical evidence to be presented if there is to be a hearing, and to explore settlement possibilities. The Deputy Commissioner will then file an Automatic Stay Order electronically signed by the administrative officer from the Executive Secretary's Office. If the Deputy Commissioner determines that the case needs to go to a full evidentiary hearing, then the Deputy Commissioner will refer the case to mediation. If depositions are necessary, then only a brief time will be allowed. The taking of lay testimony is discouraged. Any such lay witnesses will either come to Raleigh, or the designated Deputy Commissioner may request another Deputy Commissioner hearing cases near the witness's location to gather such testimony and then refer it back to the designated Deputy Commissioner. A transcript will be immediately ordered by the designated Deputy Commissioner, initially at the defendants' expense. The preparation of the transcript is expedited.

Deputy Commissioners are authorized to: a) deny requests for independent medical examinations, unless there is a valid need for this evaluation; b) deny

requests for depositions; and c) where the parties are granted the opportunity to depose medical providers, impose time limits on the scheduling and the taking of depositions, as well as the delivery of transcripts. Contentions and briefs should be limited in length, and are to be filed, at most, within five days after the record is closed. The Deputy Commissioner will issue an Order, at most, within five days after receipt of contentions and briefs. The overall process at this level should be approximately 30 days from the Notice of Appeal of the Executive Secretary's Office or filing of a Form 33, with the Medical Motion being the only issue.

c. Orders Appealed to the Full Commission

An appeal of the designated Deputy Commissioner's Order will be acknowledged by the Dockets Department within three days by sending either the Represented Party Order or the *Pro Se* Order under the name of the Chair of the Panel. The Docket Department will then set the appeal before the earliest Full Commission panel that will allow time for briefing. Represented parties will be ordered to agree to an abbreviated schedule if they are given an opportunity to file briefs. When the plaintiff is *pro se*, the panel chair will telephone the parties to schedule filings within five (5) days of the Docket Department acknowledgement. In either case, the panel chair will determine if oral arguments are to be by telephone, in person, or waived. The Full Commission panel will file an Order within five (5) days after the designated hearing date, or sooner if the situation permits. The overall process at this level should be approximately 30 to 45 days from the Notice of Appeal.

E. THE HEARING PROCESS

When a party wants to take a case to hearing, they file a Form 33 - Request for Hearing. This form is normally filed by the employee and it states the issues to be heard, and (hopefully) it specifically enumerates what benefits employee is seeking.

Once a Form 33 is filed, the other side has 45 days to file a Form 33R - Response to Request for Hearing. However, if an employer/carrier files a Form 33, an employee

is not required to file a Form 33R. Both the Form 33 and Form 33R should be sent to the Docket Director at the I.C.

i. The Mediation

In workers' compensation cases, there is a mandatory mediation requirement unless the employee is without counsel or pro se. Once a Form 33 is filed, the parties have 55 days to select a mediator and 120 days to schedule and complete the mediation. It is fairly easy to obtain an extension of time to complete the mediation. More often than not, a file requires a significant amount of discovery and investigation before it is ready for mediation, so extensions often are requested and granted. Request for extensions of time to complete mediations are sent to the Dispute Resolution Coordinator (currently Deputy Commissioner John Schafer).

There are two ways a mediator is assigned to case – s/he is either designated or appointed. A mediator is **appointed** when the parties miss the deadline to pick a mediator and the I.C. appoints a mediator for the parties from the approved list. A mediator is **designated** when the parties agree on a mediator, and file a Designation of Mediator Form with the Dispute Resolution Coordinator at the I.C. It is always best to have a say in who will mediate the case so it is important to let your carrier or counsel know immediately if you receive a Form 33 from an employee. If the 55 days is close to running, an extension of time to choose the mediator can be requested from the Dispute Resolution Coordinator. If the I.C. appoints a mediator and the parties agree to use a different one, they can substitute mediators with approval of the I.C., but there will usually be a \$100 fee payable to the Commission as well as payment of the administrative fee to the original mediator.

There are a few cases where mediation would not be helpful, and accordingly, a party can file a Motion with the Dispute Resolution Coordinator to dispense with mediation.

Mediation can be a good discovery tool, and even if discovery responses are outstanding or additional investigation may be necessary, you can learn a lot at the mediation. You can get a better understanding of the other side's position and get a look at the employee.

The I.C.'s Rules require that the employee be present at the mediation and that a representative for the employer and/or an agent for the insurer be present as well. If there is a "suitable employment" issue, the rules require the attendance of an employer representative. As a practical matter, defense counsel can write opposing counsel and request that his or her client is allowed to attend by telephone, and normally, that is in fact what happens.

When the actual mediation occurs, all parties will meet at an agreed upon location - usually the office of the attorney representing the employee. At the beginning of the mediation, known as the general session, all parties and the mediator are together in one room. The mediator will explain the mediation process to everyone and then each side will do a short presentation of their position. Then the parties break up into separate rooms, known as private sessions, and the mediator goes back and forth between the parties, attempting to resolve all or part of the case. The mediator is not an arbitrator - s/he does not make any decision nor can s/he force the parties to do anything. The mediator simply encourages communication between the parties.

2. The Hearing

If the parties are not able to reach an agreement at mediation (also called "reaching an impasse"), the case will be placed on a hearing docket. The time between the impasse and when the case will show up on a hearing docket varies; however, it is usually within 60 to 90 days. The I.C. now posts on their web site cases that will be placed on a hearing docket for the next available month, usually two months out. The I.C. requests that attorneys check the list and let the Commission know if a case is not ready for hearing. If the parties do not let the Commission know, the case will be placed on the hearing docket, and it will be extremely difficult to get it removed or continued.

Once a case is placed on the hearing docket, the parties will normally have to submit a Pre-Trial Agreement the third Thursday of the month prior to the hearing to the Deputy Commissioner who is hearing the case. The parties can request that they be allowed to submit the Pre-Trial Agreement on the date of the hearing. The typical Pre-Trial has stipulations, issues to be addressed, witnesses and doctors to be deposed

after the hearing, list of exhibits and estimated length of the hearing. An example is attached.

The hearing will take place in the county where the injury occurred. A Deputy Commissioner runs the hearing and acts like a judge. If you attend a hearing, you will hear the attorneys refer to the Deputy Commissioner as “Your Honor.” Hearings can be held in various locations; some are formal courtrooms; others are conference rooms. There is a court reporter at the hearing recording everything. Unlike at trials, attorneys do not make formal opening or closing statements to the Deputy Commissioner, although some Deputies will ask for a brief summary before the hearing begins.

At the hearing, lay (non-expert) witnesses will testify, but all expert witnesses, including doctors who treated the employee, will testify by deposition after the hearing. The parties have either 60 or 90 days to complete these depositions. In the normal injury by accident case the parties are given 60 days to complete depositions, and in an occupational disease case the parties are given 90 days to complete depositions.

After the hearing and medical depositions have been completed, the parties will normally have 30 days from the close of the record to submit briefs and/or a proposed Opinion and Award. The decision that a Deputy reaches after a hearing is called an Opinion and Award. Deputies have 180 days to file their Opinion and Award; however, most decisions are filed well within the 180-day deadline.

F. THE APPELLATE PROCESS

1. Appeals to the Full Commission

If you are displeased with the decision you receive from the Deputy Commissioner, you can appeal to the Full Commission. The Full Commission consists of seven Commissioners and they sit in groups of three. A party has 15 days from receipt of an Opinion and Award to appeal from that decision. The Notice of Appeal should be sent to the Docket Director at the Commission. Thereafter, the Commission will acknowledge the Appeal and will eventually produce a transcript of the hearing.

Once the appealing party (appellant) receives the transcript, s/he has 25 days to submit a brief and Form 44. The non-appealing party (appellee) has 25 days from receipt of appellant's brief to submit his or her brief. The parties can stipulate to a one time 30-day extension if the matter has not been calendared for hearing. If the appellant does not submit a brief, than the appellee has 25 days from the date s/he would have received the appellant's brief had it been written. Appealing parties must file a Form 44 identifying their grounds for review.

The case will then be placed on a hearing calendar, hopefully within 90 days, and oral arguments will be held in Raleigh at the Dobbs Building before three of the seven Commissioners.

2. Appeals to the Court of Appeals

If a party is dissatisfied with a decision from the Full Commission, they can appeal to the Court of Appeals. The deadline for filing an appeal to the Court of Appeals is thirty days from the date of an award of the I.C. or thirty days after receipt of notice to be sent by registered or certified mail of such award. The Notice of Appeal is filed with the I.C., and the appeal is thereafter governed by the Rules of Appellate Procedure.

Although the Full Commission may make a complete review of all evidence of record and make findings of fact which are completely contrary to those made by a Deputy Commissioner, the review by the Court of Appeals on factual issues is limited to a determination of whether there is competent evidence in the record to support the findings of fact made by the I.C.. If there is any competent evidence in the record to support the findings made by the I.C., those findings will be upheld on appeal. The Court of Appeals may also review all questions of law, and therefore may consider whether the Commission properly applied the relevant law to the findings of fact.

3. Appeals to the Supreme Court

Appeals to the Supreme Court are Governed by Rules 14 and 15 of the Rules of Appellate Procedure, which reference N. C. G. S. § 7A-30 and 7A-31. Rule 14 applies to cases in which there has been a dissent in the Court of Appeals, which creates an

automatic right of appeal to the Supreme Court. Rule 15 sets out the requirements for a discretionary review by the Supreme Court. An appeal under Rule 14 based upon a dissent in the Court of Appeals requires filing of a notice of appeal with the clerk of the Court of Appeals and the clerk of the Supreme Court within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal, which would be the I.C. The Chair of the I.C. must also be served with the notice of appeal. Unless otherwise specified in the Opinion of the Court of Appeals, the mandate is deemed to be issued twenty days after the written Opinion of the Court has been filed with the clerk. The Record on Appeal filed in the Court of Appeals constitutes the Record on Appeal for review by the Supreme Court.

G. SETTLEMENT AGREEMENTS

Once an employee has been found to be at maximum medical improvement and a rating has been assigned by the physician (on a Form 25R) it is time to resolve the case.

I. Form 26A

The Form 26A is typically used in situations when an employee has returned to work and wants to be paid for any rating received. N.C.G.S. §97-31 sets out the schedule of injury and assigns a certain number of weeks to each body part. If payment for a rating is made on a Form 26A, the employee can continue to receive medical treatment as long as one year of time does not pass between appointments. The employee also has two years from the last payment of indemnity compensation to allege a change of condition.

The Form 26A has to be submitted to the I.C. along with a Form 25A which certifies that all medical and vocational records are submitted. The employee must sign both sides of the form.

The I.C. carefully scrutinizes Form 26A Agreements and will expect to see that every form documenting employee's time out of work, and return to work is in the file. Sometimes, the Commission will refer Form 26A cases to an evidentiary

hearing on the issue of whether employee will need future medical treatment. Once a Form 26A is approved and paid, a Form 28B should be filed with the Commission.

Prior to the creation of the Form 26A on August 1, 2008, a Form 21 was used to pay ratings. Clients were always cautioned that Form 21 agreements should be entered into carefully because, once approved by the Commission, they may entitle the employee to a “presumption” of disability. Whether the same is true for Form 26A Agreements remains to be seen but the creation of a presumption of disability should be considered particularly when an employee is not back to work.

2. Clincher/Compromise Settlement Agreement

A clincher or compromise settlement agreement can completely resolve a claim. Sometimes parties will use clinchers to settle portions of the claim but usually it is used to entirely close out a claim. The clincher details the history of the claim, the medical treatment and the agreement the parties have reached as to settlement. It also has to be submitted to the I.C. for approval. If the claim has not been assigned to a hearing docket, the clincher is submitted to the Executive Secretary’s office. If the case is on a hearing docket, the clincher should go to the Deputy assigned to the case. If the case is at the Full Commission, there is usually a Commissioner designated to receive the clinchers.

Like the Form 26A Agreements, the I.C. will scrutinize any settlement agreement involving an employee not represented by counsel. If the employee has received a rating, the payment made to settle the case must be at least 10% more than what the employee would receive under N.C.G.S. § 97-31 for that rating.

Once a clincher has been approved, payment of the settlement proceeds must be made in 24 days from receipt of the Order of Approval or will be subject to a 10% penalty unless the delay was beyond the carrier’s control. A Form 28C must be filed with the Commission once a clincher has been approved and paid.

Medicare set asides

In certain situations, Medicare’s interests may need to be considered when negotiating a final settlement or clincher of a claim. Sometimes, there may need to be an amount of money set aside to pay for an employee’s future medical treatment –

this is what's known as a Medicare Set Aside or MSA. A full discussion of MSAs and when they are necessary is best saved for a full paper but your carrier/TPA and counsel should be well versed in these requirements and able to provide you with guidance.

H. MISCELLANEOUS

1. Third Party Claims

If an employee is injured in the course of his employment due to the negligence of a third party, then the employee has two claims: a workers' compensation claim and a claim against a third party. An example of this is when an employee is hurt in an automobile accident, caused by another person, while working. In that case, you would be entitled to a lien against any money the employee obtains from that third party as a reimbursement for the money you and your carrier paid to the employee in the workers' compensation claim. In practical terms, however, the employer rarely recovers its full lien in such cases, because that law that allows you to recover also allows a civil judge to eliminate the lien if s/he believes that the recovery obtained by the employee against the third party is not sufficient to compensate the employee. The employer and insurer also have the right to pursue a claim against that third party, even if the employee does not do so but they can only exercise that right beginning one year after the accident occurred up until 60 days prior to the running of the statute of limitations on the third party claim. It is a good idea to try and reach some type of agreement on how the lien issue is going to be handled at the time a claim is clinched.

2. Use of Private Investigators/Surveillance

Private investigators often provide wonderful evidence which is very valuable at a mediated settlement conference or hearing to prove defenses. Employers tend to use private investigators mainly for purposes of surveillance, to determine 1) whether the employee is working or 2) whether the employee is truly as physically disabled as s/he claims to be. Photos or video of an employee either working for money or performing yard work, washing a car, or shopping can be helpful and even can win a

case in certain situations. However, private investigators are capable of performing a wide array of helpful functions. For example, many investigators can perform criminal and civil background checks; run motor vehicle histories to determine where the employee has owned vehicles; perform background checks in those other states; interview neighbors and friends to determine an employee's history of making false claims or medical history; and determine an employee's education and work history.

One important fact to tell all investigators before hiring them is that they are not permitted to speak to the employee under any circumstances if the employee is represented by an attorney. For purposes of the North Carolina Revised Rules of Professional Conduct, the investigator is considered to be an agent of the employer. Therefore, just as the employer is not permitted to talk to the employee about the workers' compensation claim if the employee is represented by counsel, neither is the investigator. The I.C. often excludes otherwise valuable evidence if it is found that the evidence was obtained improperly, by communicating directly with a represented employee. Don't waste good time and money by sending out an investigator without those specific instructions.

3. Contact With Physicians

Frequently the issue arises regarding how much contact an employer examiner can have with the treating physician. Recognizing the need to facilitate the exchange of information, the legislature enacted N.C.G.S. § 97-25.6 on September 29, 2005. The statute, applicable in *admitted* workers' compensation cases, addresses the physician-patient privilege, and works to define the methods through which an employee's medical information can be obtained. The statute outlines four ways by which an employer may communicate with a treating physician:

Notwithstanding the provisions of N.C.G.S. § 8-53, any law related to the privacy of medical records or information, and the prohibition against *ex parte* communications at common law, an employer or insurer paying medical compensation to providers or rendering treatment under this Article may obtain records of the treatment without the express authorization of the employee. In addition, with written notice to the employee, the employer or insurer may obtain directly from a medical provider medical records of evaluation or treatment restricted to a current injury or a current condition for which

an employee is claiming compensation from that employer under this Article.

Any medical records or reports restricted to conditions related to the injury or illness for which the employee is seeking compensation, in the possession of the employee shall be furnished by the employee to the employer when requested in writing by the employer.

An employer or insurer paying compensation for an admitted claim or paying without prejudice pursuant to N.C.G.S. 97-18(d) may communicate with an employee's medical provider in writing, limited to specific questions promulgated by the Commission, to determine, among other information, the diagnosis for the employee's condition, the reasonable and necessary treatment, the anticipated time that the employee will be out of work, the relationship, if any, of the employee's condition to the employment, the restrictions from the condition, the kind of work for which the employee may be eligible, the anticipated time the employee will be restricted, and the permanent impairment, if any, as a result of the condition. When these questions are used, a copy of the written communication shall be provided to the employee at the same time and by the same means as the communication is provided to the provider.

Other forms of communication with a medical provider may be authorized by (i) a valid written authorization voluntarily given and signed by the employee (ii) by agreement of the parties, or (iii) by order of the Commission issued upon a showing that the information sought is necessary for the administration of the employee's claim and is not otherwise reasonably obtainable under this section or through other provisions for discovery authorized by the Commission's rules. In adopting rules or authorizing employer communications with medical providers, the Commission shall protect the employee's right to a confidential physician-patient relationship while facilitating the release of information necessary to the administration of the employee's claim.

Upon motion by an employee or provider from whom medical records or reports are sought or upon its own motion, for good cause shown, the Commission may make any order which justice requires to protect an employee or other person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

As noted in the statute, the Commission has developed a set of questions, which can be found on the Commission's website, www.comp.state.nc.us/ncichome.htm that employers can use to communicate with an employee's treating physician. There

is no restriction on the use of this form; however, the scope of information obtainable is limited to the specific questions.

The next statutorily prescribed option is to obtain a valid written authorization from the employee. It should be noted that the written authorization can be revoked by the employee at any point.

Next, the parties have the option of communicating with a treating physician by agreement of the parties. Generally, under this method, the parties agree to a pre-trial deposition to assess the employee's medical condition. If the employee or the employee's attorney will not agree to the deposition, then employers have the right to make a motion to the Commission to allow communication with the treating physician. This type of motion generally places employees and their counsel in a difficult position as there are not many circumstances when the employee is justified in refusing to consent to a deposition.

If there is direct contact with the treating physician, the Commission can exclude testimony from the physician and has done so in the past.

4. Death Claims

If the employee dies as a result of an accident, within six years of the accident or occupational disease, or within 2 years of a final determination of disability, death benefits and funeral expenses (up to \$3,500) are payable. Death benefits are paid for 400 weeks unless the employee's spouse is disabled or there are children under the age of the age of 18 years. If there are children under the age of 18, they receive benefits until they reach 18 or for the 400 weeks, whichever is greater. If an employee does not have a spouse or children, then benefits are paid to the next of kin, with parents being the first in line. Benefits to next of kin are paid in a lump sum after being reduced to present value. N.C.G.S. § 97-40.

When an employee dies, the employer/carrier must make certain that all people who are entitled to receive benefits are identified. While death benefits can be paid on a Form 90, in order to fully protect their interests, an employer/carrier may want to have a dependency hearing and obtain an Opinion and Award from the I.C. that identifies the beneficiaries. In all death cases, the I.C. will want to see the

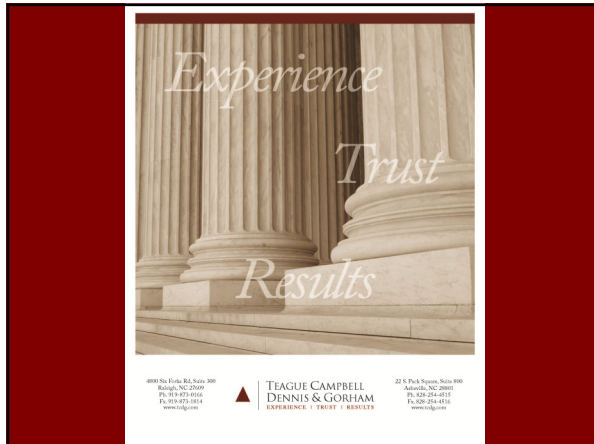
employee's birth certificate and the employee's death certificate. Other documents that may be submitted are: a marriage license, birth certificates of any of the employee's children and tax returns. Even with a request for a dependency hearing, evidence can be submitted by Affidavit and Stipulation.

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**Workers' Compensation
Essentials for
North Carolina Employers**

Teague Campbell Dennis & Gorham, LLP
Melissa R. Cleary
Julia S. Hooten

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Western North Carolina Safety and Health Conference

A New Claim

- **Initial Investigation**
 - **Accident Form**
 - **Witness interviews**

**Remember to not only interview the claimant, but talk to the witnesses and dig deep....claims are not always as they initially appear

A New Claim

- Completing a Form 19
 - Ask who, what, where, when, why and how
 - Be specific
- **Remember to provide the employee with a copy of the Form 18 for completion.

A New Claim

1. Know the Rules
 - 30 days from filing Form 18 to accept for deny
2. When in doubt...file the 63!
 - allows payment without prejudice
 - provides 90 days to make decision
 - but be aware of consequences

A New Claim

Accept or Deny?

1. Was there an "injury by accident?"
 - Note the special caveat for back and hernia claims → SPECIFIC TRAUMATIC INCIDENT
 - Occupational disease claims
 - 1) exposure to an increased risk AND
 - 2) employment conditions were significant contributing factors

A New Claim

2. Did it “arise out of scope and in the course of employment?”

1) Going and Coming Rule



A New Claim

Exceptions to the Going and Coming Rule:

1. Special Errand
2. Traveling Salesman
3. Contractual Duty
4. Personal Vehicle
5. Premises

A New Claim

Did it “arise out of scope and in the course of employment?” (cont.)

- 2) Break time injuries
- 3) Assaults
 - Co-worker fights
 - Attacks by third parties
- 4) Horseplay
- 5) Athletic/Social Events



A New Claim

Forms that are used to accept a claim

- Form 63 → Medical only and payment without prejudice

- Form 60 → Specificity required

A Form 61 is used to deny a claim.

Payment of Compensation: Indemnity

Total Disability (N.C.G.S. 97-29)

- 7 day waiting period

Partial Disability/Wage Loss (N.C.G.S. 97-30)

- 300 weeks from date of accident

Permanent Partial Disability (N.C.G.S. 97-31)

- MMI and ratings

Bodily Disfigurement

Damage to Organs

Payment of Compensation: Indemnity

Calculation of Average Weekly Wage

- Form 22

- Short term employees

- 5 ways to calculate AWW

Travel Reimbursements

- Form 25T

Cessation of Weekly Benefits

1. Return to Work
 - w/restrictions → Form 28T
 - w/o restrictions → Form 28
2. Getting the Employee Back to Work
 - job description/approval
 - “make work”
 - Form 24

The Hearing Process

Mediation



The Hearing Process



The Hearing Process

- Pre-Trial Agreement
- Lay witnesses
- Medical depositions
- Contentions

Settlement Agreements

Form 26A

- employee remains with the insured
- 2 years for change of condition
- payment of PPD rating only

Clincher Agreement

- at least 10% over PPD rating
- requires Industrial Commission approval

Settlement Agreements

Medicare Set Asides



Triggers

MUST include if...

1. Claimant already on Medicare OR
2. Settlement agreement over \$250,000 AND "Reasonable expectation" of enrollment within 30 months of settlement

Miscellaneous

Third Party Claims



Lien rights under N.C.G.S. 97-10.2

Note that many liens ultimately get reduced to 25% or eliminated completely

Miscellaneous

Contact with Physicians (N.C.G.S. 97-25.6)

1. Medical Status Questionnaire
2. Signed authorization from employee
3. Agreement of the parties
4. Order of the Commission

Miscellaneous

Death Claims

- w/in 6 years of accident or occupational disease
- w/in 2 years of final determination of disability
- 400 weeks unless...
 - 1) wife is disabled OR
 - 2) children under 18

QUESTIONS
&
COMMENTS
