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SOUTH CAROLINA

Do We Still Have a Viable Defense to Idiopathic Falls?

By: Candy G. Hindersman (Columbia)

Once viewed as "defenseless" claims, recent case law pertaining to idiopathic falls has provided hope to defense lawyers and insurance adjusters alike. However, it is important to understand the decisions in the three leading cases to understand how to handle these cases. The history surrounding idiopathic injuries, provided by *Crosby*, shows that an employee's burden cannot be met by pure conjecture or speculation. In defending an idiopathic fall, two important things to look for are 1) the absence of a work connection to the injury, and 2) evidence of a pre-existing injury. The leading case in the field from 2015, *Nicholson*, determined that an employee need only prove that their injury occurred at work and was not caused by a condition peculiar to them in order to meet their burden of proof and show a causal connection between the injury and their employment. Therefore, it was much more challenging for the defense to prevail with an idiopathic defense following *Nicholson*. *Turner*, decided in December of 2016, provides an important distinguishing factor from *Nicholson*: if the employee fails to show, or cannot remember, what they were doing at the time of the alleged accident, a viable defense remains due to a lack of causal connection between the injury and the employment. The unexplained death or injury presumption in favor of the Claimant was built on the principal of fairness; when an employee has no memory of the circumstances surrounding their alleged accident, the employer cannot possibly know more about the accident than the employee himself and there is no inherent unfairness. Therefore, when an employee has no memory surrounding their alleged accident, their burden of proof has not been satisfied and a workable defense strategy endures.

Tips

- Obtain a recorded statement as soon as possible asking probing questions about how the fall happened
- Speak to any witnesses that saw the fall or talked to the Claimant
- Obtain a detailed medical history regarding potential pre-existing issues

These two cases demonstrate how the outcomes can be unpredictable. *Nicholson* is still good law although slightly weakened. However, *Turner* is a helpful decision for the defense. *Turner* may still be appealed.

GEORGIA

Suspension of Income Benefits

By: William J. Naglich (Atlanta)

One of the most frequent questions to arise throughout handling a workers' compensation claim is, "can I suspend income benefits?" The only time income benefits can be unilaterally suspended once commenced is upon a normal duty work release from the authorized treating physician, an actual return to work, or failure by the claimant to comply with an offer of suitable employment made by the employer in compliance with O.C.G.A § 34-9-240.

In Georgia, the employer/insurer has 21 days from first notice of injury to decide whether to accept or deny a claim. If income benefits are voluntarily commenced within the 21-day period, the time for investigation is extended to 60 days during which the employer/insurer may deny the claim and suspend income benefits for any reason. Thereafter, if not controverted within 21 days of the employer's first knowledge of injury, a claim may be converted for any reason by filing a

Form WC-3 Notice of Controvert within 60 days of the due date of first payment of compensation. If payment of benefits is suspended within the 60-day time frame or thereafter based upon an unrestricted normal duty work release from the Authorized Treating Physician, in addition to a WC-3, a Form WC-2 must be filed providing the claimant 10 days notice prior to suspension benefits. Income benefits, once commenced, may be suspended without 10 days notice when there is an actual return to work, failure to comply with a WC-240 offer a suitable employment, or if the claimant reaches the statutory maximum number of weeks for indemnity benefits.

Regardless, starting, stopping, or modifying weekly income benefits requires filing of a Form WC-2 with the State Board and also copying directly to the claimant, as well as the claimant's attorney of record, if represented. The employer/insurer many seek suspension of benefits for other reasons such as: refusal to comply with authorized medical care, incarceration, failure to maintain an accurate address of record, intervening injury, or the like. However, suspension in those circumstances must be based upon a Board order following an interlocutory motion or administrative law hearing. Improper suspension of benefits and/or failure to comply with requisite board filing requirements can result in penalties as well as assessed attorney fees.

If there is any uncertainty as to whether circumstances of a proposed suspension of income benefits is proper, please contact us to discuss the circumstances of the specific situation before proceeding with filing a formal controvert and/or proceeding with an unilateral suspension of benefits.

NORTH CAROLINA

When Does It End?

By: Emily S. Goodman (Raleigh)

In December 2016, the North Carolina Court of Appeals rendered an important decision regarding statutes of limitation in workers' compensation claims. In *Lewis v. Transit Management of Charlotte*, Plaintiff sustained a compensable workplace accident in 2009. Though no official forms were initially filed, Defendants paid for all related medical and indemnity compensation. Plaintiff eventually achieved maximum medical improvement and returned to work. The last payment of indemnity compensation was made on December 2, 2009, and the last payment of medical compensation was made on April 24, 2010. In 2014, Plaintiff filed official written notice of injury and requested additional medical treatment in addition to back payment of indemnity benefits based on an alleged compensation rate miscalculation.

At the Deputy Commissioner level, Plaintiff won entitlement to ongoing benefits of both kinds. However, the Full Commission denied Plaintiff's entitlement to ongoing medical benefits pursuant to a "plain reading" of N.C.G.S. § 97-25.1. As it regards entitlement to ongoing indemnity benefits, the Full Commission found there had been no "final award" as required by § 97-47 and permitted Plaintiff's receipt of a corrective indemnity benefit payment. Both sides appealed, and Defendants tendered the ordered corrective indemnity payment on December 7, 2015.

The Court of Appeals first affirmed that pursuant to § 97-25.1, Plaintiff's entitlement to medical compensation clearly ended two years after the final payment of either medical or indemnity compensation was made, which was long before his 2014 request for ongoing treatment. The Court further affirmed that since Plaintiff's claim had not been resolved in such a way that constituted a "final award" under § 97-47, the indemnity statute of limitation had not been triggered. This meant Plaintiff was entitled to the corrective indemnity payment, even in the face of other equitable arguments of timeliness and reasonableness.

Since the corrective indemnity payment was not made until after the Full Commission ruled, the Court refused to comment on whether such payment could reopen the § 97-25.1 statute of limitation such that Plaintiff would be entitled to additional medical benefits. It admitted the possibility of increased litigation, but also noted the legislature's failure to distinguish between regular and corrective indemnity payments when it came to statutes of limitation.

The *Lewis* case suggests that corrective benefit payments could potentially prevent the tolling of statutes of limitation in workers' compensation cases, highlighting the importance of making correct compensation rate calculations from the outset of a claim. The case further suggests that it is in the best interest of carriers and employers to secure

resolution via compromise settlement agreement or Form 26A, a.k.a. a "final award," for the most permanent end to a claim.

SOUTH CAROLINA

How to Defend a Repetitive Trauma Claim

By: Franklin D. Guerrero (Greenville)

Repetitive trauma claims are becoming more and more prevalent. Defending a repetitive trauma claim is slightly different than defending a specific traumatic event. Quickly identifying and tailoring our investigation towards a repetitive trauma claim will assist in effectively defending the matter. Repetitive trauma claims are unique in that they do not have a specific mechanism of injury or a single date of onset. A repetitive trauma injury is defined as, "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." In determining compensability, the focus is usually on whether the job is repetitive and medical causation. However, the employee must also provide notice to the employer within 90 days of when the employee "discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." The 90 days starts running when the employee first goes to the doctor or misses a day of work. A tailored investigation will help you and your counsel successfully defend a repetitive trauma claim.

Tips

Request the employer provide a detailed job description and/or a job video. A job description or video will assist in determining whether the job is repetitive and we can provide the doctor the job video, rather than the doctor relying on the employee's description.

During the recorded statement, ask the employee:

- When did you first experience symptoms?
- When did you first receive medical treatment?
- When did you first miss a day of work because of your symptoms?
- When did you report an injury to your employer?
- Who is your primary care physician?

Determining the claimant's medical history is crucial. One of the primary defenses is that the claimant's symptoms are more likely related to the natural progression of a preexisting condition (i.e. arthritis), rather than a repetitive job.

As our work force ages, expect to see more repetitive trauma claims. An employee can assert that their preexisting degenerative joint disease was aggravated by repetitive trauma! It is common for employees to simultaneously claim a specific traumatic event and a repetitive trauma claim. This usually occurs when the employee has a questionable specific traumatic event so they will "piggyback" a repetitive trauma claim.

NORTH CAROLINA

Minor Settlement Procedures: A Brief Overview

By: Ashlee B. Poplin (Charlotte)

When a civil action is resolved with a minor it is important to keep in mind that there are special rules in place which directly relate to how the settlement process will proceed. These rules vary between states.

In North Carolina, all minor settlements must be court approved. *Ballard v. Hunter*, 12 N.C.App. 613, 618, 184 S.E.2d 423, 427, cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1971). No settlement with a minor will be valid if it is not approved by a judge, no matter how small.

Minor settlements are handled through the filing of a "friendly suit." Defense counsel often prepares all documents: Complaint, Answer, Petition for GAL, Order for GAL, Judgment, Satisfaction of Judgment and Release and Dismissal. These documents are signed by the appropriate parties, and the Complaint, Answer, Petition and Order are submitted to the court for filing. The filing fee is often covered by the insurer. Once filed, a hearing date can be agreed upon by the parties and set.

From experience handling these settlements in North Carolina, no two judges are the same on what information they require to approve the settlement, so it is best to either call the Clerk and confirm or abide by the more strict requests. Some judges hear the matter in chambers, while others require them to be heard on the record; some judges hear them at the first of the docket, while others hear them at the end of the docket; some require the minor and the Guardian ad Litem to be present and request a formal presentation of the facts,

medicals and settlement arrangement, while others are fine with just the attorney's appearing on behalf of their clients. Due to the varied style of hearing, it is important to know what the judge expects before arriving.

At the hearing, the Judgment (some attorneys use different forms) is reviewed by the judge and signed. Once the settlement payment has been made, the Satisfaction of Judgement is executed and filed along with a Dismissal of the suit. In North Carolina, the settlement funds that are not used for medical bills, liens, or attorney's fees and costs are made out to the Clerk of Court on behalf of the minor. The Clerk is then responsible for the funds until the child reaches the age of majority, at which time they can return to the Clerk's office and withdraw the funds any interest that has accrued. A parent/guardian may petition the Court to obtain the funds sooner for good cause shown, but the Court often does not release the funds unless there are exceptional circumstances.

Though the process may seem straightforward, several issues can arise with a minor settlement that can stand in the way of getting it approved by a judge, which is why we at Willson, Jones, Carter & Baxley are here to help you navigate that process and ultimately get claims resolved and files closed!

FIRM RETREAT

We recently held our Firm Retreat at Highland Lake Inn in Flat Rock, North Carolina. It was a wonderful opportunity for our attorneys from all six of our offices to meet, share ideas, and build a sense of community across the three states we serve. Here is a small peek at some of the fun:

We appreciate and THANK YOU for the opportunity to serve your interests in the Carolinas and Georgia. Please feel free to contact any of our attorneys if you have general insurance defense questions or would like a defense opinion on a specific matter.