

# RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



**TEAGUE CAMPBELL  
DENNIS & GORHAM**  
EXPERIENCE | TRUST | RESULTS

- WORKERS' COMPENSATION
- COMMERCIAL AND CIVIL LITIGATION
- PRODUCTS LIABILITY
- PREMISES LIABILITY
- MEDICAL MALPRACTICE
- NURSING HOME LITIGATION
- REAL ESTATE LITIGATION
- PROFESSIONAL LIABILITY
- EMPLOYMENT LAW
- CONSTRUCTION LAW
- ENVIRONMENTAL LAW
- BUSINESS LITIGATION
- AUTOMOBILE LIABILITY
- GOVERNMENT & MUNICIPAL LAW
- INSURANCE LAW & COVERAGE

PLEASE CONTACT  
THE ATTORNEYS AT  
TEAGUE, CAMPBELL  
WITH QUESTIONS  
CONCERNING THE  
ARTICLES IN THIS  
NEWSLETTER

RALEIGH  
919-873-0166

ASHEVILLE  
828-254-4515

WWW.TCDG.COM

## RUMBLINGS AT THE INDUSTRIAL COMMISSION

*Commission Adopts New Procedures and Forms*

Effective August 1, the Industrial Commission has modified a number of its procedures and forms. Risk managers are advised to familiarize themselves with the changes that have been made, including substantial revisions to Forms 60 and 63 and creation of a new Form 26A, and make note of the new address to which completed forms should be sent, found in the lower right-hand corner of each form.

On October 14, as part of its Thirteenth Annual North Carolina Workers' Compensation Educational Conference, the Commission will conduct a 1 1/2 hour workshop on its new procedures and forms, which can be downloaded at [www.comp.state.nc.us/ncic/pages/forms.htm#word](http://www.comp.state.nc.us/ncic/pages/forms.htm#word).

### Form 26A

New Form 26A, entitled "Employer's Admission of Employee's Right to Permanent Partial Disability," is designed for use in lieu of a Form 21 or 26 whenever compensation is owed for permanent impairment, disfigurement, loss of teeth or a hearing loss. It allows for payment of separate ratings to three different body parts and includes a line on which the parties can state the amount being paid for disfigurement or loss of teeth. In addition, if the parties agree that the defendants made an overpayment and are entitled to a credit, that fact can be indicated on page 2, in which case a Form 28B documenting the amount of the overpayment should be attached. The fee for filing a Form 26A will be \$125, the same amount charged for Forms 21 and 26.

### Form 25R

The Commission has also revised the form for compensating permanent impairments, Form 25R, so as to require the physician completing it to indicate whether the injured worker has reached maximum medical improvement and/or was released with permanent work restrictions.

### Forms 60 and 63

The changes made to Forms 60 and 63 are of particular significance. Form 60, the "Employer's Admission of Employee's Right to Compensation," now contains a requirement that the defendants "describe with particularity the body part(s) or condition(s)" for which liability is being admitted. Because our appellate courts have held that the filing of a Form 60 creates a rebuttable presumption that the injured worker's post-accident medical difficulties are related to the injury for which liability was admitted, it behooves defendants to be very specific when describing the part of the body or condition for which liability is being admitted. If, for example, the location of injury is described as the "low back," rather than simply the "back," the injured worker should not be accorded a rebuttable presumption that subsequent complaints involving the thoracic or cervical spine were caused by the admittedly compensable injury.

The Commission has also removed the "medical only" option from Form 60 and substantially modified Form 63 so that it can be used in those cases in which only medical expenses are being paid. Retitled "Notice to Employee of Payment of Compensation Without Prejudice or Payment of Medical Benefits Only Without Prejudice," revised Form 63 calls for the defendants to specify the body part(s) involved and state whether they will be paying only medical benefits, or indemnity benefits as well, while they continue their investigation and reserve the right to ultimately deny the claim.

When Section 2, "Medical Benefits Only," is selected, revised Form 63 specifically states that payment of an employee's medical expenses is "NOT subject to [the] 90-day requirement" applicable to indemnity benefit payments made "without prejudice." It advises the injured worker that "Payment of medical compensation is expressly being made without prejudice to [defendants' right] to later deny the compensability of your claim. In the event you miss more than 7 days of work, you must notify your employer or carrier because you may be entitled to additional benefits. Completion of this section ... does not constitute an agreement to pay indemnity (money) benefits to you under G.S. § 97-18(d)."

Therefore, in future cases in which the newly revised version of Form 63 is used to pay an injured worker's medical bills and a claim is subsequently brought for indemnity benefits, the defendants' past payment of claimant's medical bills should not bar them from contesting compensability, even if it has been more than 90 days since the date of injury. At the same time, however, risk managers should be careful to enter on the last line of the Form 63 the date on which they first received actual or written notice of the injured worker's claim.

#### Forms 18, 19 and 26

The Commission has also modified Forms 18, 19 and 26 and given notice that it will no longer accept an "Accord Workers' Compensation - First Report of Injury or Illness" form in lieu of the new Form 19.

#### Sanctions

The Commission has given notice that, beginning August 1, it plans to assess a \$200 sanction against all employers and carriers that fail to file a Form 60, 61 or 63 within thirty days of the mailing of the Commission's form letter advising that a Form 18 has been filed. At the same time, it has indicated that if the defendants file one of those three forms within ten days of the sanction order, it will be lifted. This new policy is applicable to all claims in which a Form 18 was filed on or after April 1, 2008.

### CASE LAW UPDATE

#### *Election of Benefits Concept Applied to Death Claim*

Betty Jean Jeffreys, a medical secretary in the Anesthesia Department at Duke University Medical Center, worked for a very demanding doctor. Her internist, Dr. Scott Joy, felt that the stress she experienced at work aggravated her pre-existing diabetic condition to the point that it caused her overall health to deteriorate, including almost total loss of vision in both eyes. After Jeffreys was placed on disability retirement, she filed a workers' compensation claim alleging that the mental stress associated with the environment in which she worked qualified as either an injury by accident or occupational disease.

Duke contested Jeffreys' claim, but the Commission ultimately found it compensable under the theory that the stressful conditions in which she worked aggravated and accelerated her pre-existing diabetes, carpal tunnel syndrome, anxiety and depression. That led the Commission to conclude as a matter of law that she had contracted a compensable occupational disease and was entitled to an award of TTD, retroactive to the day she retired, April 1, 1999.

In 2003, Dr. Joy noticed that Jeffreys' glucose levels had begun to increase significantly. Later, in January 2004, Jeffreys reported to Dr. Joy's nurse

that she had been sick for three weeks with chest congestion and a cough. Dr. Joy diagnosed an upper respiratory infection and prescribed an antibiotic, but three days later Jeffreys died, leaving behind as her sole surviving relative a sister, Elsie Kelly. Kelly filed a claim for death benefits, which she supported with the opinions of Dr. Joy, who, without the benefit of an autopsy, indicated on Jeffreys' death certificate that the cause of death was "complications of diabetes."

Dr. Joy subsequently testified that the most likely cause of Jeffreys' death was a cardiovascular event secondary to complications of diabetes. That led the Commission to find the death claim compensable. It also determined that Jeffreys had a vested right in 240 weeks of compensation for industrial blindness pursuant to N.C.G.S. § 97-31(16). As a consequence, it awarded death benefits under N.C.G.S. § 97-38 and compensation for PPD under N.C.G.S. § 97-31.

Duke appealed to the Court of Appeals, contending that the Commission erred in three respects: (1) failing to find the claim barred by the statute of limitations; (2) making findings of fact regarding causation that were not supported by competent evidence; and (3) awarding death benefits and compensation for a permanent impairment under N.C.G.S. § 97-31.

On June 3, in *Kelly v. Duke University*, the Court of Appeals affirmed the Commission's resolution of the causation and statute of limitation issues. At the same time, however, it reversed the Commission's determination that claimant was entitled to PPD in addition to death benefits.

In its discussion of the statute of limitations issue, the Court noted that N.C.G.S. § 97-38 provides that "[i]f death results proximately from a compensable injury or occupational disease and within six years thereafter ...," the employer is obligated to pay death benefits. Duke's argument on appeal was that the six years Jeffreys had to file her claim began to run on what it characterized as her "date of injury," April 11, 1997, the date on which she began experiencing the symptoms that ultimately caused her to stop working two years later. In rejecting Duke's argument in that regard, the Court cited *Joyner v. J.P. Stevens*, a 1984 decision in which it had held that the time for filing a death claim in an occupational disease case begins to run on the date of "disability," which in Jeffreys' case did not occur until she took disability retirement in April 1999. As a consequence, her claim was filed in a timely manner and not barred by the statute of limitations.

When the Court turned next to the causation issue, it noted at the outset that "the mere possibility of causation as opposed to the probability of causation is insufficient to support a finding of compensability." However, it found Dr. Joy's testimony that it was more likely than not that his patient's death proximately

resulted from diabetes, which he in turn believed had been aggravated and accelerated by her stressful work environment, was competent evidence that supported the Commission's finding of a causal connection between her occupational disease and eventual death. That being so, the Commission did not err in finding that death benefits were owed to the dependents of the deceased employee.

But, on the election of remedies issue, the Court agreed with Duke that the Commission erred when it entered an award of benefits for loss of vision under N.C.G.S. § 97-31, as Jeffreys had already received compensation for total disability under N.C.G.S. § 97-29. After observing that benefits paid under N.C.G.S. § 97-31 "shall be in lieu of all other compensation," the Court quoted from *Gupton v. Builders Transport* ("as a general rule, 'stacking of benefits covering the same injury for the same time period is prohibited'") and *Collins v. Speedway Motor Sports Corp.* ("[w]here an employee can show both a disability pursuant to G.S. §§ 97-29 or 97-30 and a specific physical impairment pursuant to G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more favorable remedy") and held that Jeffreys' receipt of TTD under N.C.G.S. § 97-29 from April 1999 until she died precluded her estate from recovering compensation for loss of vision under N.C.G.S. § 97-31.

**Risk Handling Hint:** In the course of resolving the legal issues raised in *Kelly*, the Court of Appeals rejected the argument made by claimant's attorney that the deceased employee had never made an actual election to receive benefits under N.C.G.S. § 97-29. In essence, the Court found that her acceptance of ongoing TTD benefits after reaching maximum medical improvement, rather than executing a form agreement paying for her loss of vision, constituted a *de facto* election of remedies. By the same token, however, the Court held that "if decedent had died prior to receiving a full 240 weeks of ... [PPD benefits for loss of vision], plaintiff would then be entitled to recover the more generous vested benefits available pursuant to § 97-31, less the amount she had already received [in TTD payments since the date of MMI]." Risk managers are reminded that, when determining their liability for permanent impairment under N.C.G.S. § 97-31, they are entitled to a credit for all temporary total or temporary partial disability benefits paid after date of MMI. And, information regarding dates of payment and calculation of that credit can now be entered directly on new Form 26A.

**PLEASE CONTACT THE ATTORNEYS  
AT TEAGUE CAMPBELL WITH  
QUESTIONS CONCERNING THE  
ARTICLES IN THIS NEWSLETTER**

**RALEIGH 919-873-0166  
ASHEVILLE 828-254-4515**

**WWW.TCDG.COM**