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Workers' Compensation

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WORKERS' COMPENSATION

THE PROPER PROCEDURE FOR SUSPENDING AND TERMINATING TEMPORARY TOTAL DISABILITY BENEFITS

In *Grayson v. Carter Rhoad Furniture*[1] the South Carolina Supreme Court held that when an employer seeks to suspend temporary total disability (TTD) benefits pursuant to Regulation 67-504,[2] the employer must provide clear proof of the employee's ability to return to work "without restriction."[3] The court found that Carter Rhoad could not have properly terminated Grayson's TTD benefits because it failed to meet the preliminary requirements for suspension of benefits under Regulation 67-504(C). Although the court focused on Regulation 67-504, the *Grayson* decision raises questions about the necessary degree of proof that employers and carriers must provide pursuant to other regulations as well.

Grayson worked as a furniture mover for Carter Rhoad Furniture and injured his back while moving a sofa on August 23, 1990.[4] Grayson continued working until October 9, 1990 when he was forced to stop because of increased pain.[5] On December 11, 1990, Dr. Joel Graziano, an orthopaedic surgeon, reported that Grayson was "doing fine"[6] and told Grayson that he

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1. ___ S.C. ___, 454 S.E.2d 320 (1995).

2. *See* 25A S.C. CODE ANN. REGS. 67-504 (Law. Co-op. 1990). The practitioner is advised to be aware of recent statutory revisions. Specifically, S.C. CODE ANN. § 42-9-260(B)(1) to (6) (1996) (effective June 18, 1996) is worth noting:

> The revised statute allows an employer to initiate payment of temporary benefits once an employee has missed eight consecutive days due to a reported work-related injury, without admitting the claim. Now, an employer may stop or suspend payment of temporary benefits for up to 150 days after the injury is reported, without a hearing, based on any one of the [six reasons set forth in § 42-9-260(B)(1) to (6)] . . . .
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> . . . .
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> After the initial 150 days, the new legislation calls for the Commission to implement a regulation, rather than the existing rule, to provide the method and procedure for employers to stop payment. The new regulation is likely to mirror the present rule, as a the new legislation left unchanged the requirment for an evidentiary hearing and Commission approval prior to terminating benefits.
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> . . . [H]owever, . . . an employer [can] stop payment, without a hearing, after the 150 days expires, if the basis for the stop payment is either § 42-9-260(B)(1) or (2).

Alton L. Martin, *Understanding the New Workers' Compensation Legislation*, S.C. LAW., Sept./Oct. 1996, at 15, 16-17.

3. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 322.

4. *Id.* at ___, 454 S.E.2d at 321.

5. *Id.* at ___, 454 S.E.2d at 321.

6. Record at 52.

could return to work the following Monday. Dr. Graziano added, however, that Grayson "should be somewhat careful with lifting, etc."[7] Carter Rhoad paid Grayson TTD benefits while he was out of work until December 16, 1990.[8] Grayson returned to work on December 17, 1990 and "worked in pain for three weeks."[9] On January 7, 1991 Carter Rhoad fired Grayson, alleging Grayson's lack of a driver's license as the grounds for termination.[10] Grayson then initiated an action to resume TTD payments.[11]

The Single Commissioner held that Grayson failed to prove he was entitled to further TTD benefits, and the Full Commission affirmed this decision.[12] The circuit court reversed, stating that Dr. Graziano's report was insufficient to constitute the substantial evidence[13] necessary to support the termination of TTD benefits.[14] The court of appeals affirmed, and the supreme court granted certiorari.[15]

The supreme court strictly interpreted Regulation 67-504 and found that Carter Rhoad failed to provide any proof "that Grayson's period of temporary total disability ever ended."[16] The court refused to find Dr. Graziano's conditional release of Grayson sufficient to constitute evidence that Grayson could return to work "without restriction."[17] Additionally, the court found that Grayson himself had not agreed that he was able to return to work without restriction despite his having returned to work for three weeks and having signed a Form 17, Receipt for Compensation.[18] The court, therefore, found

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7. *Id.*; *Grayson*, ___ S.C. at ___, 454 S.E.2d at 321.

8. *See* Brief of Appellant to court of appeals at 2.

9. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 321.

10. *Id.* at ___ n.1, 454 S.E.2d at 321 n.1.

11. *Id.* at ___, 454 S.E.2d at 321.

12. *Id.* at ___, 454 S.E.2d at 321.

13. In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), the court declared that the South Carolina Industrial Commission, now the Workers' Compensation Commission, is an agency governed by the Administrative Procedures Act; therefore, the court replaced the "any evidence" test with the "substantial evidence test," stating that a reviewing court must uphold the Commission's findings as to questions of fact, unless those findings prejudice the appellant and are clearly erroneous when considering the "reliable, probative, and substantial evidence on the whole record." *Id.* at 133, 276 S.E.2d at 305 (quoting S.C. CODE ANN. § 1-23-380(g) (Law Co-op. 1976)).

14. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 321.

15. *Id.* at ___, 454 S.E.2d at 321. Although the supreme court affirmed the court of appeals decision, it also modified the opinion, finding there was "*no* evidence that Grayson's period of temporary total disability ever ended," rather than upholding the court of appeals determination that "the commission's findings were based upon a 'mistaken' or 'clearly erroneous' view of the evidence." *Id.* at ___, 454 S.E.2d at 322.

16. *Id.* at ___, 454 S.E.2d at 322.

17. *Id.* at ___, 454 S.E.2d at 322.

18. *Id.* at ___ n.2, 454 S.E.2d at 322 n.2.

that Carter Rhoad had improperly terminated TTD payments in violation of Regulation 67-504.[19]

Pursuant to section 42-9-10 of the South Carolina Code, "[w]hen the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid . . . to the injured employee during the total disability a weekly compensation."[20] The purpose of TTD payments is to compensate the injured employee for his period of "disability," meaning his "incapacity because of injury to earn the wages which the employee was receiving at the time of [the] injury in the same or any other employment."[21] Generally, the employee's disability is statutorily "presumed to continue until the employee is able to return to work without restriction for fifteen calendar days or fifteen calendar days from the date the claimant agrees he or she was able to return to work."[22] Under Regulation 67-504, in a voluntary suspension of benefits action, an employer's insurance carrier cannot *suspend* payments of TTD unless the "claimant reaches maximum medical improvement[23] *and* the authorized health care provider reports the claimant is able to return to work without restriction to the same job or other suitable job, and such job is provided by the employer, *or* the claimant agrees he or she is able to return to work without restriction."[24] In contrast, under Regulation 67-507 in an

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19. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 322.

20. S.C. CODE ANN. § 42-9-10 (Law. Co-op. Supp. 1995).

21. S.C. CODE ANN. § 42-1-120 (Law. Co-op. 1976). Compare the above rationale for TTD with that in *Watson v. Winston-Salem Transit Authority*, 374 S.E.2d 483, 486 (N.C. Ct. App. 1988), in which the court of appeals focused on Professor Larson's two-pronged definition of disability in interpreting the meaning of the North Carolina disability statute, N.C. GEN. STAT. § 97-2(9) (1988), which mirrors South Carolina Code section 42-1-120:

> [T]he disability concept is a blend of two ingredients . . . : [t]he first . . . is disability in the medical or physical sense . . . ; the second . . . is *de facto* inability to earn wages . . . . A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability.

Arguably, the court in *Grayson* could have been emphasizing Grayson's own testimony in order to prevent an over-reliance on his Form 17 and the wage earning component of disability; however, the court failed to make any such indication.

22. 25A S.C. CODE ANN. REGS. 67-504(B) (Law. Co-op. 1990).

23. *See* O'Banner v. Westinghouse Elec. Corp., ___ S.C. ___, ___, 459 S.E.2d 324, 327 (Ct. App. 1995) (defining maximum medical improvement (MMI) as "a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment.") However, a finding of MMI does not necessarily mean that the claimant's disability is completely dissipated. *See* Swinton v. South Carolina Dep't of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994).

24. 25A S.C. CODE ANN. REGS. 67-504(C) (Law. Co-op. 1990) (emphasis added). Note that the carrier must also comply with the subsequent subsection (D) of the regulation. *Id.* Moreover,

involuntary termination of benefits action in which a claimant refuses to sign a Form 17, an insurance carrier may petition the Workers' Compensation Commission for permission to *terminate* TTD benefits by one of four methods.[25] Significantly, Regulation 67-507 does not necessarily require proof of the claimant's ability to return to work.

In *Grayson*, the court held that in order for a carrier to properly suspend TTD benefits, the employer must provide clear proof not only that the claimant has reached MMI, but also that the claimant "is able to return to work *without restriction*."[26] The regulation gives an employer two options in showing that an employee is capable of returning to work without restriction: (1) the employer can provide medical certification that the employee is able to return to work without restriction; or (2) the employee may agree that he or she is able to return to work without restriction.[27]

In evaluating whether the employer met the requirements for the first option in Regulation 67-504, the court held that the proof offered by Carter Rhoad was insufficient because the doctor's "release" contained words of

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when the claimant signs a Form 17, indicating his or her ability to return to work without restriction, the insurance carrier may *terminate* benefits by filing the Form 17 with the Workers' Compensation Commission's Claims Department. *See* 25A S.C. CODE ANN. REGS. 67-504(D) (Law. Co-op. 1990) (emphasis added).

25. 25A S.C. CODE ANN. REGS. 67-507(C)(3) (Law. Co-op. 1990) states that a carrier can request a hearing for permission to terminate TTD benefits by attaching one of the following to a Form 21:

> (a) A medical certificate of the authorized health care provider stating the claimant has reached maximum medical improvement; or
> (b) A medical certificate of the authorized health care provider stating the claimant is able to return to the same or other suitable job, an impairment rating, if any, and an affidavit of the employer that the same or other suitable job has been provided to the claimant; or
> (c) A medical certificate of the authorized health care provider stating the claimant is unable to return to the same or other suitable job and an impairment rating; or
> (d) A medical certificate of the authorized health care provider stating the claimant refuses medical treatment.

See also Brown v. Owen Steel Co., 316 S.C. 278, 450 S.E.2d 57 (Ct. App. 1994) (finding that an employer properly terminated TTD benefits by submitting a physician's report that concluded the claimant had reached MMI).

26. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 322.

27. 25A S.C. CODE ANN. REGS. 67-504(C) (Law. Co-op. 1990). Regulation 67-502(A)(4) defines the phrase "return to work without restriction" as:

> A statement of the authorized health care provider about the capacity of the claimant to meet the demands of a job and the conditions of employment. The determination must be made when the claimant's physical condition is static or is stabilized with or without medical treatment. The determination is appropriate when there are no physical limitations on the claimant's ability to perform the same or other suitable job as the claimant performed before the injury.

limitation.[28] The court seemed to give great weight to the doctor's warning that Grayson be "somewhat careful with lifting." In fact, the court ultimately found that such a limitation on a furniture mover negated any argument that Grayson had returned to work "without restriction."[29] The question arises as to whether Dr. Graziano intended his imprecise words to be construed as a true restriction or as merely providing cautionary advice to his patient.[30] Moreover, the court seemed to disregard other language in Dr. Graziano's report indicating that Grayson was "doing fine . . . , ha[d] full [range of motion] and only ha[d] some discomfort with extension."[31] Through its narrow linguistic interpretation, the court imposed a new, higher standard of proof, indicating that in order to properly suspend benefits, employers and carriers must provide specific proof that a claimant has reached MMI and, in light of the exact verbiage in a doctor's release, is clearly able to return to his or her particular line of work.

In reviewing the second option under Regulation 67-504, the court found Grayson's signing of the Form 17 virtually irrelevant and focused instead on Grayson's testimony.[32] Generally, if an employee has signed a Form 17, it is an acknowledgement that he or she was able to return to work without restriction.[33] Such signature should, therefore, satisfy the proof requirements for proper TTD suspension under the second option of Regulation 67-504(C). Moreover, after a claimant has signed a Form 17 the insurance carrier can file for a voluntary termination of benefits with the Commission.[34] Yet, in *Grayson*, the court rejected the signed Form 17 as sufficient proof to end benefits. The court found that Grayson never agreed that he was able to return to work without restriction because his testimony indicated that he was in pain and could not perform his job as well as he could before the accident.[35] In doing so, the court indirectly suggested that pain and decreased work levels are sufficient to prevent the termination of TTD benefits. Such a suggestion conflicts with the purpose of TTD benefits in South Carolina, which is to compensate for the claimant's loss of earning capacity. Grayson demonstrated his capacity to earn wages by returning to work for three weeks, and he was subsequently terminated for reasons unrelated to his injury.

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28. *Grayson*, ___ S.C. at ___, 454 S.E.2d at 322.

29. *Id.* at ___, 454 S.E.2d at 322.

30. *Cf.* Ancrum v. Low Country Steaks, ___ S.C. ___, 452 S.E.2d 609, 610-11 (Ct. App. 1994). The doctor in *Ancrum* concluded that his own objective medical findings did not support claimant's subjective complaints, determining that claimant had reached MMI but giving claimant an impairment rating and telling her not to "lift more than 25 to 30 pounds." *Id.*

31. Record at 52.

32. *Grayson*, ___ S.C. at ___ n.2, 454 S.E.2d at 322 n.2.

33. *See* S.C. WCC Form #17.

34. 25A S.C. CODE ANN. REGS. 67-504(D) (Law. Co-op. 1990).

35. *Grayson*, ___ S.C. at ___ n.2, 454 S.E.2d at 322 n.2.

Thus, the court apparently found that in a voluntary suspension of benefits action in which a claimant has signed a Form 17, the employer must provide either clear proof that the doctor released the claimant without restriction or that the claimant unquestionably agreed that he or she was able to return to work without restriction before the employer is entitled to suspend benefits. Because Carter Rhoad never provided clear evidence that Grayson was without restriction, the court found that Carter Rhoad could not have properly *terminated* Grayson's TTD benefits because it failed to even meet the preliminary requirements for *suspension* of benefits under Regulation 67-504(C).

However restrictive the employer requirements set forth in *Grayson* appear, these standards may only apply to voluntary suspension of benefits cases where the employee signs a Form 17 pursuant to Regulation 67-504, as opposed to an involuntary action to terminate benefits brought by an employer under Regulation 67-507, where the employee refuses to sign a Form 17.[36] For example, in *O'Banner v. Westinghouse Electric Corp.*[37] the court of appeals clearly rejected the argument that an employer must provide proof of an employee's ability to return to work before terminating TTD benefits under Regulation 67-507. In *O'Banner*, Westinghouse provided a written medical report stating that the claimant had reached MMI and suffered a 15% permanent partial disability to his back, thereby satisfying the requirements of Regulation 67-507(C)(3)(b).[38] The Workers' Compensation Commission granted Westinghouse's stop-payment application and terminated O'Banner's TTD benefits. The *O'Banner* court, emphasizing a clear break from the past, flatly rejected the claimant's argument that, in addition to proving that the claimant had reached MMI, Westinghouse was required to provide evidence of their employee's "ability to return to work" in a medical report.[39] The court of appeals agreed that a stop payment was in order and strongly indicated its unwillingness to impose any additional barrier on employers and carriers, stating:

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36. 25A S.C. CODE ANN. REGS. 67-507 (Law. Co-op. 1990); *see supra* note 25.

37. ___ S.C. ___, ___, 459 S.E.2d 324, 326 (Ct. App. 1995).

38. *Id.* at ___, 459 S.E.2d at 325. Westinghouse did offer a videotape of O'Banner hitting softballs; however, in determining whether Westinghouse met the requirements of Regulation 67-507(C)(3)(b), the court of appeals looked only at the medical report which stated the claimant had reached MMI. *Id.* at ___, 459 S.E.2d at 326.

39. *Id.* at ___, 459 S.E.2d at 326. The *O'Banner* court distinguished the current requirements from the former regulation which had been applied in *Adams v. Rice Servers*, 313 S.C. 488, 443 S.E.2d 391 (1994) (holding that under Regulation 67-10, the predecessor to Regulation 67-507, in a stop payment action, an employer must prove that the claimant has the ability to return to work).

> The current [R]egulation [67-507] unambiguously allows the employer to attach only a medical certificate stating the claimant has reached MMI to support its stop payment application. We refuse to read into the presumption [of disability] . . . a requirement that the employer provide separate proof of claimant's ability to return to work, in addition to the requirements of subsection (C).[40]

Thus, the court of appeals held that Westinghouse properly complied with the procedural requirments to terminate TTD payments, as set forth in Regulation 67-507, by merely providing a doctor's report stating that the claimant had reached MMI.[41] The fact that the claimant continued to receive prescriptions did not prevent the court from finding that he had reached such a plateau of medical improvement that no further medical treatment would lessen the degree of O'Banner's impairment.[42]

In light of both *Grayson* and *O'Banner*, it is clear that employers and carriers must comply with different procedures depending on whether they act under Regulation 67-504 or Regulation 67-507 in seeking to stop TTD payments. Undoubtedly, *Grayson* indicates that in a voluntary proceeding to suspend TTD benefits under Regulation 67-504, an employer must either provide clear evidence that the claimant has both reached MMI and is able to return to work or that the claimant agrees that he or she is able to return to work before the employer can properly suspend benefits. Moreover, if the employer meets these requirements and further seeks to terminate TTD benefits pursuant to a signed Form 17 under Regulation 67-504, it appears that an employer can no longer rely on a claimant's signed Form 17 as conclusive proof that the claimant agreed he or she was able to return to work. The court's holding in *Grayson*, however, does not appear to affect the degree of medical proof required in an involuntary termination of TTD benefits action initiated by an employer under Regulation 67-507(C)(3). For an involuntary termination of TTD benefits, an employer need only provide medical certification that the claimant reached MMI, without any additional proof that the claimant is able to return to work. Even so, it may be wise for employers and carriers to request clear statements from medical providers indicating that the claimant is able to return to work without restriction before suspending or terminating TTD benefits under either regulation.

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40. *Id.* at ___, 459 S.E.2d at 326 (citations omitted).

41. *Id.* at ___, 459 S.E.2d at 325-26.

42. *Id.* at ___, 459 S.E.2d at 327; *see also supra* note 23 (stating South Carolina's definition of MMI).

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