



## News & Updates

### DOES PRE-MMI BURDEN OF PROVING DISABILITY APPLY TO CURRENT EMPLOYEES?

The North Carolina Court of Appeals has ruled, in an unpublished opinion, that an employee may meet the burden of proving disability simply by staying “employed” with the employer of injury.

In *Snyder v. Goodyear*, the plaintiff alleged to have a lower back injury, and was sent home by the defendant after no work could be found within the plaintiff’s light-duty work restrictions. Several months later, the plaintiff attempted to return to full-duty, but had difficulties due to pain and was written out of work completely for two weeks. The plaintiff never returned to work, but was also never formally terminated.

At hearing, the Commission awarded the plaintiff ongoing benefits. On appeal the Commission found that the plaintiff had met his burden of proving disability because his “efforts [to return to work] constituted a reasonable, but unsuccessful, effort to obtain suitable employment” as required by *Russell v. Lowes Product Distribution*. The defendant appealed to the Court of Appeals, arguing that the ruling was unsupported by the evidence. Affirming the Commission’s ruling, the Court of Appeals held that the finding was supported by evidence because the plaintiff had made himself available to work and, since he was still technically an employee, had “a reasonable expectation of being able to return to his employment... at the end of his healing period.”

In its opinion, the court noted that, by itself, an employer’s failure to provide light-duty work does not allow an injured employee to meet his burden of proving disability. However, because the defendant had failed to challenge the factual basis for the finding in its appeal, the court held that the unchallenged evidence justified the determination that reasonable return to work efforts were made.

If it becomes clear that an employee will not be able to return to work with or without a reasonable accommodation, the employer should determine what applicable leave provisions apply, and make a determination as to whether continued employment is appropriate. If after engaging the employee, continued employment is deemed inappropriate, the employer should move to administratively terminate the employee in accordance with its policies.

From *Snyder* it is apparent that the courts and the Commission may be reluctant to hold an injured employee to his or her burden of proof with respect to disability while “employed” — even if it is apparent that the employee will never be medically allowed to return to their pre-injury position or an alternate position in the company for which he or she is qualified.

For more information on the impact of this case on your policies and procedures, please contact:

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