# WORKERS' COMPENSATION
# CASE LAW UPDATE: OCTOBER, 1999

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## CONTENTS

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## 1. Standard for Commission reversal of Deputies' decisions

Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998).

The employee made a claim based on exposure to chemicals at work. The Deputy Commissioner denied the claim. The Full Commission reversed, with a dissent. The Court of Appeals reversed, on grounds that the Full Commission had failed to give proper deference to the Deputy's credibility findings. The Supreme Court overruled the Court of Appeals case of Sanders v. Broyhill Furniture, holding instead that the statutory authority for finding facts lies with the Commission, not with a Deputy, so the Full Commission is under no obligation to explain its decisions on credibility that differ from those of Deputies. In this case, the evidence supported the Commission's decision, so the Supreme Court reversed and remanded.

Sanders v. Broyhill Furniture Industries, __ N.C. App. __, 507 S.E.2d 568 (1998).

This case returned to the Court of Appeals after it was remanded to the Full Commission, for the Commission's failure to give proper deference to the credibility decisions made by the Deputy Commissioner. The Full Commission decided, on remand, the same way it had before, but with additional findings and conclusions. The Court of Appeals affirmed, holding that the Commission, on remand, had complied with the requirements necessary to disagree with the Deputy's credibility findings. The Court went on to find that there was evidence to support the Commission's decisions that the employer knew about the injury shortly after it happened and was not prejudiced by delay in filing the Form 18 until about nine months later, that medical treatment could be compensable, even if not at the referral of specialists, and that the employee was disabled.

Toler v. Black and Decker, __ N.C. App. S.E.2d __ (1999).

The Full Commission overturned a Deputy Commissioner's credibility decision in favor of the defendants. The defendants appealed, claiming that the Commission failed to give proper deference to the Deputy's credibility evaluation. The Court of Appeals cited Adams v. AVX Corp., 349 N.C. 679, 509 S.E.2d 411 (1998) for the proposition that the Full Commission did not have to show such deference and affirmed. The tone of the opinion indicates that the Court did not approve of the Commission's decision.

The Court also addressed the nature of the necessary contribution of the compensable injury to aggravation of pre-existing conditions, holding that there is no

need for magic words that the aggravation is "a natural and unavoidable consequence" of the compensable injury.

Hollingsworth v. Cardinal Container Service, ___ N.C. App. ___, 507 S.E.2d 571 (1998).

The employee claimed an injury to her ankle. The Deputy Commissioner denied the claim, on credibility grounds, in light of a lot of testimony that made it look like the employee was lying. The Full Commission reversed, with Commissioner Sellers dissenting, stating that it had considered the Deputy Commissioner's findings on credibility, but deciding to reject them. The Court of Appeals reversed, citing Sanders v. Broyhill Furniture for the proposition that the Full Commission is required to show proper deference to credibility decisions made by Deputies. **Great care should be exercised in using this case, since the Supreme Court has overruled Sanders on this point, in Adams v. AVX Corp.**

Deese v. Champion International Corp., ___ N.C. App. ___, 506 S.E.2d 734 (1998).

The employee suffered an accepted back injury and underwent four surgeries. A private investigator collected information tending to show that the employee might be working at a car dealership that he owned. The Deputy Commissioner considered the evidence from the private investigator, including videotape, as indicative of the employee's credibility and affirmed approval of a Form 24 Application. The Full Commission reversed, addressing the Deputy's credibility decision. The Court of Appeals, citing the Sanders v. Broyhill case, reversed on grounds that the Commission had failed to give proper deference to the Deputy's credibility decisions. The Court also noted that on remand, the Commission should address wage-earning capacity, instead of actual earnings (which may imply that a reason for the Full Commission's decision might have been a lack of evidence that the employee was paid anything for what he was doing at the car dealership). **Great care should be exercised in using this case, since the Supreme Court has overruled Sanders on this point, in Adams v. AVX Corp.**

The case was remanded by the Supreme Court, pursuant to its decision in Adams and was heard again at the Court of Appeals. On that remand, the Court of Appeals held that there was insufficient evidence to support the Commission's decision that the employee's testimony was credible, and to reject the Deputy Commissioner's decision to the contrary. The Court also held that the defendant, through the evidence that the Commission had decided not to accord weight to, had presented evidence to rebut the presumption of on-going disability, so that the burden shifted to the employee to prove continued total disability.

## 2. Effect of maximum medical improvement

Neal v. Carolina Management, 130 N.C. App. 228, 502 S.E.2d 424 (1998), reversed, ___ N.C. ___, 510 S.E.2d 375 (1999).

The employee sought a hearing before the Commission for purposes of establishing permanent, total disability and ending vocational rehabilitation. The Commission decided that the employee remained temporarily and totally disabled and that she should continue to cooperate with reasonable vocational rehabilitation. The employee appealed to the Court of Appeals, which affirmed the Commission's decision, holding that even though the Commission had found that the employee had reached a condition of maximum medical improvement, that is not the same as the end of the healing period, so temporary disability benefits could be ordered to continue.

Judge Timmons-Goodson dissented, opining that the maximum medical improvement is the same as the end of the healing period, so that temporary disability benefits are not available. She further agreed with the employee that the Commission erred in requiring continued cooperation with vocational rehabilitation, since there was no finding that it would help the employee. She favored remand of the case to the Commission for determination of the "amount to which plaintiff is entitled for the permanent disability to her back and the aggravation of her existing venous stasis leg ulcer."

The Supreme Court reversed the Court of Appeals per curiam, ordering remand to the Commission for a decision consistent with the dissenting opinion.

## 3. "Arising out of and in the course of" issues

Choate v. Sara Lee Products, ___ N.C. App. ___ S.E.2d ____ (April 20, 1999).

The employee was working on the day of an ice storm. Her nephew's wife, who worked at the same place, came by the employee's workstation and told her that the nephew had been in a car wreck. The employee left her workstation and accompanied the nephew's wife into the parking lot, possibly to leave with her. Once in the parking lot, the employee slipped on ice and injured her shoulder and upper back. She then decided not to accompany the nephew's wife and returned to her workstation. While she was not supposed to go into the parking lot at the time in question, her supervisor testified that she would have permitted the excursion, if the employee had asked.

The Commission denied the claim, on grounds that the accident did not arise out of the employment. The Court of Appeals reversed, holding that the employee's actions were not a large enough departure from the work to be considered not to arise from the employment and that there was some connection to the employer's benefit, in that the employee was attending to a co-worker. The Court also pointed out that the purported violation of the rule against leaving the plant was of no effect, in light of the employee's uncontradicted testimony that the rule was routinely violated and the testimony of supervisors that she would have been allowed to go out if she asked and there would not be serious disciplinary sanctions for the violation.

Judge Greene dissented, accepting the defendant's narrow view of when an injury arises out of the employment. He also stated that the cases cited by the majority in support of their decision-contained evidence of definite benefit to the employer, which distinguished those cases from this one.

Floyd v. First Citizens Bank, ___ N.C. App. ___, 512 S.E.2d 454 (1999).

The employee slipped and fell while buying bagels for an office Christmas party. The employee's testimony that her supervisor had asked her to arrange the party was sufficient to support the Commission's finding of fact to that effect, and such a request was sufficient to create a benefit to the employer, such that the injury arose out of and in the course of employment.

Pittman v. International Paer Co., ___ N.C. App. ___, 510 S.E.2d 705 (1999).

The employee made a claim for an alleged injury in March of 1993. He lost before the Commission. In August of 1993, his treating physician released him to return to work without specific restrictions. The employer required the employee to undergo a functional capacities evaluation before returning to work. The employee alleged injury caused by the FCE and filed a separate workers' compensation claim for that injury. In his deposition testimony, the treating physician opined that the FCE did not contribute significantly to the employee's back problems. However, thereafter, and IO days after the expiration of the time to take depositions, the doctor wrote a letter to plaintiffs counsel, stating that he had changed his mind, after talking to the employee. The employee's motion for additional time to redepose the doctor was denied by the Deputy Commissioner. Plaintiff s counsel then questioned the doctor under oath, before a court reporter, for purposes of making an offer of proof, to preserve the issue of denial of the motion for appeal. The defendants were not notified of the "deposition." The Full Commission allowed the employee to redepose the doctor, with one dissent, then made a decision in favor of the employee, again with one dissent.

The Court of Appeals held that the injury arose out of and in the course of the employment, because there was evidence to support the Commission's finding that the FCE was ordered by the employer. The Court also held that the ex parte communication between the employee-patient and his doctor was not prohibited by the rule announced in Salaam, and the communication by the employee's lawyer was further removed from Salaam concerns, because it was conducted to support the motion to take additional evidence. The record supported that the Commission had considered the first deposition of the doctor in question, despite lack of a specific finding that the first testimony was rejected. Judge Greene emphasized this last point in his concurring opinion.

Judge Lewis dissented, expressing concern over the manner in which the recorded statement was taken and the deposition deadline was disregarded by the Commission. His feelings on this were strong enough that he favored disregarding the defendants' abandonment of the issue by failure to brief it, so that the Court could find an abuse of discretion.

Roman v. Southland Transportation Co., __ N.C. App. __, 508 S.E.2d 543 (1998).

The employee truck driver was en route back to Rocky Mount when he stopped at a truck stop in Gary, Indiana. While there, he witnessed an attempted theft from the cash register. He and another customer ran after the fleeing thief and grabbed the steering wheel of his car as he tried to escape. A security guard shot the employee to death. The Commission awarded death benefits, on grounds that the employee's work placed him in a particularly dangerous position and the activity of chasing the thief was for the benefit of his employer, as well as the third party truck stop. The Court of Appeals, Judge Greene writing for the majority, reversed, addressing the failure of the evidence to satisfy 'fie tests for the "arising out of' requirement.

Judge Timmons-Goodson dissented, opining that the Commission's findings that the attempt to stop the thief benefited the employer "by increasing goodwill as well as reciprocating assistance for that anticipated from the truck stop employees" were supported by the evidence. She specifically mentioned the employer's handbook, which encouraged drivers to help members of the public, for goodwill purposes. She also considered the job-related requirement that the employee stop for fuel as placing him in the position to be injured.

On appeal to the Supreme Court, the case was affirmed, without precedential value, by a three to three vote. Roman v. Southland Transportation Co., __ N.C. __, 515 S.E.2d 214 (1999).

Holshouser v. Shaner Hotel Group Properties One Limited Partnership, N.C. App. ___, 518 S.E.2d 17 (1999).

The employee was taken from the parking lot of the hotel where she worked and raped. She sued the hotel's security company and the employer. Summary judgment was granted against the employee on all claims. In the portion pertinent to workers' compensation issues, the Court of Appeals held, with a dissent, that the injury did not arise out of the employment, so that the civil suit could go forward.

Hauser v. Advanced Plastifonn, Inc., __ N.C. App. __, 514 S.E.2d 545 (1999).

The employee was kidnapped and murdered by a laid-off co-employee, during a lunch meeting with the co-employee off the employer's premises. The Deputy Commissioner denied the claim, but the Full Commission awarded compensation. The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision, and the Full Commission was not bound by the Deputy Commissioner's credibility decisions. The Court noted evidence that the employee, who was apparently a supervisor or benefits person, was going to talk with the co-employee about filing for unemployment benefits. The Court of Appeals also affirmed the Commission's award of attorneys' fees as a penalty. The Commission found that the defendant had deliberately and dishonestly denied in discovery the existence of a memorandum concerning unemployment benefits, which the murdered employee had taken to the lunch meeting,

and which was critical to the decision that the death arose out of and in the course of employment.

## 4. Actions in the General Courts of Justice concerning workers' compensation related issues, including Woodson

Seigel v. Patel, __N.C. App.__, __S.E.2d __ (April 6, 1999).

The employer was illegally uninsured, but allegedly promised to pay the injured employee's medical bills. The employee sued the employer in Superior Court on that promise, alleging fraud and unfair trade practices. The case was dismissed and the Court of Appeals affirmed. In so doing the Court noted that the record on appeal had not been properly settled, though it appeared that the defense lawyer had "sandbagged" the plaintiff s lawyer, and the Court made clear that it considered that conduct a breach of common courtesy. The Johnson v. First Union case (discussed elsewhere in this manuscript, was cited as a rejection of similar claims, and the period provided by the relevant statute of limitations had expired. However, the Court held that the claim could have been pursued as one for workers' compensation benefits in Superior Court, because the employer had failed to comply with the requirement of being insured.

Wiggins v. Pelikan, Inc., __ N.C. App. __, __ S.E.2d __ (April 6,1999).

The employee lost this Woodson case, in which she alleged that a cart fell on her due to bad design and failure of the employer to repair. In affirming a directed verdict, the Court of Appeals listed six factors that it drew from the case law, to be considered in determining whether conduct rose to the Woodson standard: "(1) Whether the risk that caused the harm existed for a long period of time without causing injury ... (2) Whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue ... (3)Whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm ... (4) Whether the employer's conduct which created the risk violated state or federal work safety regulations ... (5) Whether the defendant-employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation ... (6) Whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm."

Poe v. Atlas-Soundelier/American Trading & Production Corp., __ N.C. App., 512 S.E.2d 760 (1999).

The employee was injured while using a die press. At the time, he was working for a temporary agency, at Atlas/Soundeller. He sued several parties for negligence. He sued Atlas/Soundelier both for negligence and for intentional misconduct under the Woodson standard. Summary judgment was granted as to all defendants, on grounds that the employee was unable to forecast evidence that would prove negligence, because he was unable to explain how his accident happened. With respect to workers'

compensation related issues, the Court of Appeals made holdings regarding the claims against Atlas/Soundelier. The plaintiff conceded that that employer was a joint employer with the temporary service, but claimed abrogation of the exclusive remedy on grounds that it did not provide workers' compensation coverage on the employee as required by law. The Court held that Atlas/Soundelier satisfied its statutory obligation by contracting with the temporary service to provide coverage. The Woodson standard could not be met, since the employee was unable even to show negligence.

Johnson v. First Union Corp., ___ N.C. App. ___, 504 S.E.2d 808 (1998).

Two employees sued their employer, the workers' compensation carrier, the rehabilitation company assigned to their cases, and individuals within those organizations, for fraud, unfair and deceptive trade practices, intentional infliction of emotional distress, bad faith refusal to pay or settle valid claims, and civil conspiracy. The acts alleged were provision ex parte of allegedly misleading videotape of the employees' jobs to their treating physicians, which resulted in denial of their claims for occupational disease caused by repetitive motion at work. The trial court dismissed the actions. The Court of Appeals initially reversed as to certain of the claims. On rehearing, the Court reversed itself completely, holding that the Workers' Compensation Act provided the exclusive remedy for the claims.

As of the time of hearing, this case had been heard before the Supreme Court on petition for discretionary review, and the author is unaware of any decision.

Bigger v. Vista Sales and Marketing, Inc., __ N.C. App. __, 505 S.E.2d 891 (1998).

The employee won her case before the Commission, but the employer was illegally uninsured. The employee and her husband then filed a lawsuit against the employer, a couple of insurance companies, and a couple of individuals. This appeal involves dismissal of the claims against an agent and the carrier he represented. The Court of Appeals affirmed dismissal, on grounds that the agent had no duty to advise the employer of its obligation to carry workers' compensation coverage, when the employer never asked him about it. Further, the employee lacked standing to sue the agent. The employee's husband's claim of negligent infliction of emotional distress was too remote.

Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998).

The employer began payments of compensation to the employee under N.C.G.S. § 97-18(b), acknowledging the employee's entitlement by a Form 60. The employee returned to work, then went out again. The employer prepared and filed a Form 60, but did not start paying. The employee filed a complaint in Superior Court, alleging entitlement to compensation to the compensation stated on the Form 60, plus a 10% penalty for late payment. The Superior Court heard the defendant's motion to dismiss, denied it, and signed an order essentially granting summary judgment to the employee.

The Court of Appeals agreed that the Form 60 constituted an award of compensation by the Commission that could be converted to a judgment for purposes of execution, because payments made pursuant to N.C.G.S. § 97- 1 8(b) constitute an award of the Commission. The procedure followed by the employee was sufficient, though the Clerk of Court should have simply accepted the certified copy of the Form 60 for filing. The judgment was reversed and remanded, because the employer was not given sufficient notice that the hearing was for summary judgment.

## 5. Suspension or termination of compensation

Matthews v. Charlotte-Mecklenburg Hospital Authority, __ N.C. App. __, 510 S.E.2d 388 (1999).

The employee apparently won a contested case, with much psychological overlay to her condition. Ultimately, the defendant filed a Form 24 Application to Stop Payment, based on failure to attend appointments with the doctor that the employer had succeeded in having designated as primary treating physician a couple of months before. The Special Deputy ordered suspension of benefits. The employee appealed for a formal hearing. She was, by that time, living in Tennessee. She failed to appear for her first scheduled hearing. The Deputy Commissioner rescheduled it. The employee then failed to attend that hearing, but presented an affidavit through her attorney, explaining that she could not attend, and that she recognized that her absence would hurt her chances of winning, but electing to proceed, anyway. The Deputy Commissioner dismissed her appeal, with prejudice, for failure to appear. The Full Commission reversed the Deputy's decision, reinstating compensation and ordering that the employer pay for the employee's transportation to subsequent formal hearings.

The Court of Appeals affirmed the Commission's vacating of the dismissal of the appeal from the Special Deputy's decision, because the Deputy Commissioner did not make any findings as to any violations that might have supported dismissal under Commission Rule 802. The Court also held that even if there were grounds to satisfy Rule 802, the remedy of dismissal was not available under the statute, in the presence of other sanctions.

The Court reversed the Commission's order that compensation be reinstated, accepting the defendant's argument that it was never given an opportunity to present evidence, In the process, the Court explained that the Commission had erred in deciding, as a matter of law, that the change of treating physician had been improvidently granted by the Executive Secretary. The Court stated that the Commission does have power to grant such a change. The Form 24 was properly approved, because the employee had failed to comply with the order designating the new doctor as the treating physician. The Court noted that the employee could have resisted suspension of compensation by choosing her own doctor, subject to Commission approval. Finally, the Commission exceeded its statutory authority by requiring the employer to pay the expenses necessary for the employee to attend future hearings.

Deskins v. Ithaca Industries, Inc., __ N.C. App. __, 509 S.E.2d 232 (1998).

The parties entered into a Form 21 Agreement for compensation for the employee's carpal tunnel syndrome. She received surgery from Dr. Marks, then was seen by other doctors, and the defendants voluntarily changed her treating physician to Dr. Mutton. Dr. Mutton performed further surgery, ordered home physical therapy, then returned the employee to part-time work. The employee complained of pain and requested that Dr. Marks be redesignated as her treating physician. Pending the Commission's decision on that issue, she went to Dr. Marks, who performed additional surgery, then opined that she could return to part-time work. The Deputy Commissioner ordered the defendants to pay for the treatment by Dr. Marks, but suspended compensation for failure to cooperate with a rehabilitation nurse. Further, the Deputy decided that the defendants would not be required to pay for further treatment by Dr. Marks, and the employee was required to accept treatment from Dr. Mutton or any other physician designated by the defendants. The Full Commission adopted the Deputy's decision, The Court of Appeals affirmed the denial of further treatment from Dr. Marks, but held that the suspension of compensation was erroneous, since the receipt of treatment from Dr. Marks, while seeking Commission approval for it, was not a refusal to accept treatment, and the employee's lawyer's letter requesting that the rehabilitation nurse not contact his client directly did not constitute a refusal to accept a rehabilitation procedure.

Stamey v. N.C. Self-Insurance Guaraty Assoc., __N.C. App. __, 507 S.E.2d 596 (1998).

The employee prevailed in a denied claim for the occupational disease of an impingement syndrome in her shoulder. She was out of work for about three weeks, returned to light duty, then returned to her regular work as a spinner. After several months, she was taken out of work by her physician, who opined that it was for the same problem. She received group disability benefits for 13 weeks. She was then offered a modified, one-handed job. She did not return to it and was terminated. On hearing requested by the employee, the Commission decided that the modified job was a real one and suspended compensation until such time as the employee ceased her unjustified refusal to return to it. The Court of Appeals reversed, holding that there was no evidence to rebut the presumption of continuing disability. The Commission had cited the Court of Appeals decision in Saums v. Raleigh Community Hospital, placing the burden on the employee to prove that the offered employment did not qualify under the standard in Peoples v. Cone Mills. The Court of Appeals noted that that decision was reversed by the Supreme Court. There was no evidence to support the Commission's finding that the offered job was a real one.

Williams v. Pee Dee Electric Membership Corp., 130 N.C. App. 298, 502 S.E.2d 645 (1998).

The employee suffered a compensable injury and was paid full wages, pursuant to the employer's policy, for about three months. He then returned to light duty work.

About two months later, he was convicted of indecent exposure. He was fired two days later, ostensibly because of the conviction. Ultimately, he appealed the conviction to Superior Court and the district attorney dismissed the case. The employee filed for a hearing, claiming compensation for total disability after the firing. The Deputy Commissioner awarded compensation for permanent partial disability, but not for temporary total, on grounds of constructive refusal to accept suitable employment. The Full Commission reversed, awarding compensation for temporary total disability. The Court of Appeals reversed and remanded for more specific findings by the Commission on the issue of whether the employer established that the employee was fired for misconduct for which other employees would normally be fired. The Court explained that the Commission had been laboring under misconceptions as to whether the misconduct had to be work related or a crime. The defense of constructive refusal need not be specially pled, because it is a way of proving lack of disability, not a separate affirmative defense.

Bryant v. Weyerhauser Co., 130 N.C. App. 135, 502 S.E.2d 59 (1999).

The employee suffered injuries to his right leg and left foot. The Deputy Commissioner determined that he remained totally disabled, but that he was required to cooperate with vocational rehabilitation efforts, fl the employer re-initiated them. After the employer did so, the employee failed to attend scheduled rehabilitation meetings. A Form 24 Application was approved, after an informal hearing. The employee requested a hearing, and a Deputy Commissioner decided that compensation should be reinstated, because the employee was incapable of completing the vocational rehabilitation programs at the times he missed. The Full Commission decided the same way as the Deputy. The Court of Appeals affirmed, holding that the previous Deputy's decision was not res judicata on the issue of whether the employee was able to engage in vocational rehabilitation, only whether the employee was required to cooperate with "reasonable" vocational rehabilitation. Vocational rehabilitation with which the employee is incapable of complying is not reasonable. The Commission was held to have made sufficient findings of fact, and was not required to make "negative" findings with respect to evidence that might have indicated that the employee was not depressed.

## 6. Attempts to avoid binding effect of acceptance of case

Higgins v. Michael Powell Builders, ___ N.C. App. ___ S.E.2d (April 6, 1999).

The employee was a carpenter who was injured when he fell out a window. The Form 19 prepared by the insured employer indicated in separate places that the employee was an employee and a subcontractor. The servicing agent for the insured employer began payment without prejudice and filed a Form 63. More than 90 days after the accident, the servicing agent decided that the injured employee was a subcontractor and stopped compensation. The Commission decided that the defendant had failed to contest the claim within the time provided by N.C.G.S. § 97-18(d) and awarded compensation.

The Court of Appeals affirmed, holding that the evidence supported the Commission's decision, since the employer obviously had knowledge of the employee's employment status, and the information in question was readily available. Specifically, the servicing agent failed to investigate. Also, no relief was available under N.C.G.S. § 97-82(b) and because the evidence was not new, the neglect in investigating was not "excusable." The payment of compensation could not be set aside for fraud, misrepresentation or mutual mistake, under N.C.G.S. § 97-17, because payment was not based on an agreement. Even if § 97-17 had applied, the evidence supported the Commission's *decision* that the mistake was not mutual.

Lowery v. Locklear Construction, __ N.C. App. __, 512 S.E.2d 477 (1999).

The employee was injured in a wreck. He filed his Form I 8 about three months later. The carrier contacted the employer listed on the Form 18, Carl Locklear, and was told that he employed the injured employee. At hearing, the defendants stipulated that the employer-employee relationship existed. After the Deputy Commissioner's decision in favor of the employee, the defendants filed their notice of appeal to the Full Commission, about 19 months after the accident. About six months after that, the defendants filed a motion to submit additional evidence to the Full Commission, claiming that they had recently discovered that the insured was actually a company owned by Keith Locklear, and that Carl Locklear was not insured. The Commission denied the motion, stating that the defendants could not present evidence contrary to their stipulation.

The Court of Appeals reversed, holding that the motion should be treated as one to set aside the stipulation, which the Commission was required to hear, with evidence. The decision would be discretionary, based on whether the motion was filed seasonably" and whether there was justification for setting aside the stipulation.

Foster v. Carolina Marble and Tile Co., Inc., __ N.C. App. __, 513 S,E.2d 75 (I 999).

The employee tinnitus and hearing loss in one ear, after using a jackhammer for several days. He also experienced vertigo. He was placed on medications that made it difficult for him to drive, sleep, concentrate and perform other tasks. He ended up in psychiatric treatment for depression and anxiety associated with the tinnitus. The treating physician testified that the employee was unable to work, while other doctors testified to the opposite, though all agreed that he had hearing problems. The defendants accepted the claim on a Form 21 Agreement. They later filed for a hearing, seeking to terminate compensation. The Deputy Commissioner decided that they could, but the Full Commission reversed. The Court of Appeals affirmed the award of continuing compensation for temporary total disability, because the alleged error in accepting the case in the first place was a mistake of law, and thus not grounds for setting aside the Form 21, and the treating physician's testimony was sufficient to support the finding of continuing disability, despite testimony by other doctors to the contrary.

## 7. Proving cause and compensability of death

Westbrooks v. Bowes, __ N.C. App. __, 503 S.E.2d 409 (1998).

The employee was working under a house, installing an icemaker, when he suddenly stopped talking to his partner. He was pulled out from under the house and was dead. His cause of death was cardiac arrhythmia. There was contradictory evidence as to whether there had been a damaged wire that presented an electrical shock hazard and as to whether the death was the result of coronary artery disease or a shock. The Commission decided that the death resulted from an electrical shock and awarded benefits. The Court of Appeals affirmed as to that decision, citing evidence sufficient to support the Commission's findings. The testimony of an electrician who inspected the wire some time after the accident was held admissible, because there were no indicia that the condition of the wire was subject to change between the time of the accident and the time of his inspection. The fact that he found damage that a prior inspector did not went to the weight of the evidence, not its admissibility.

However, the case was remanded to the Commission to address whether the defendants were prejudiced by the beneficiary's failure to give written notice within the time required by N.C.G.S. § 97-22, despite the Commission's finding that the employer was aware of the accident immediately. The Court considered the employer's knowledge to be a "reasonable excuse" for failure to make the written notice, but still required specific findings.

Beaver v. City of Salisbury, __ N.C. App. __, 502 S.E.2d 885 (1998).

The Deputy Commissioner denied compensation to a firefighter's widow, for death caused by non-Hodgkin's lymphoma. The Full Commission reversed, with a dissent. The Court of Appeals reversed. The employee had presented testimony from a toxicologist, with a Ph.D. in Zoology, that the employee's employment increased his risk of getting cancer and that the employment contributed to the cause thereof. The defendant presented testimony from an oncologist from Michigan, who typically testifies for defendants, to the effect that there is no evidence of a link. The Court of Appeals rejected the Commission's acceptance of the toxicologist's testimony, opining that the medical literature was insufficient to support her opinion and that her testimony was not sufficiently specific as to the type of cancer involved and noting that her testimony had been rejected in cases in other states.

Shaw v. Smith & Jennings, Inc., __ N.C. App. __, 503 S.E.2d 113 (1998).

The employee died in an unwitnessed, one-car wreck while going to get coffee for a co-worker during his break. The Commission awarded compensation, and the Court of Appeals affirmed. The Court of Appeals held that the accident arose out of and in the course of employment when it occurred during a paid break of short duration, while the employee was about an errand that was for the purpose of rest and refreshment, when there were no facilities from which to obtain refreshments on the work premises. The

Court approved of the Commission's application of the "Pickrell presumption" that an unexplained death is compensable, when it occurs within the course of employment, and of the Commission's rejection of the testimony of the defendant's expert to the effect that the employee had died of malignant dysrhythmia caused by coronary disease related to diabetes.

## 8. Disability

Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998).

The employee received an electric shock to her arm that caused potential nerve injury. She underwent surgery the same night. Thereafter, she developed psychological problems. The employer denied compensation and required the employee to come in and perform light duty tasks that the employee found demeaning. The Commission found that the employee suffered on-going disability, caused by the compensable accident and exacerbated by the employer's poor treatment of the employee. The Court of Appeals affirmed the award of compensation and medical expense, citing plenty of evidence to support the Commission's findings. The Court specifically rejected the defendant's contention that the medical evidence was insufficient, because it was not couched as being opinion "to a reasonable degree of medical certainty." The Court reversed the Commission's award of attorney's fees under N.C.G.S. § 97-88.1, because the Commission could have found disability after a certain point not to be caused by the compensable injury.

Judge Timmons-Goodson dissented in part, opining that the Commission's award of attorney's fees should have been allowed to stand. She was offended by the treatment of the employee by the employer.

Flores v. Stacy Penny Masonry Co., __ N.C. App. __, 518 S.E.2d 200 (1999).

The parties entered into a Form 21 Agreement for an injury to the employee's knee. After a few years of surgical treatment and unsuccessful attempts to return to work, the employee ended up out of work for an indefinite period. The Court of Appeals affirmed the award to the employee, holding that one job that might have been suitable to the employee's eventual physical condition, but that was attempted and left before the employee reached that condition, was insufficient to rebut the presumption of continuing disability. The employee's termination from the employer of injury did not impair the right to compensation, because evidence supported the Commission's finding that the termination was due to excessive time missed from work for the compensable injury. The case was remanded to the Commission for the amount of expenses due under N.C.G.S, § 97-88.

Lanning v.Fieldcrest-Cannon, Inc., __ N.C. App. __, 516 S.E.2d 894 (1999).

The employee made a claim for change of condition. The Commission granted the claim and ordered compensation for total disability. In the process, the Commission concluded that the $300 to $600 per month that the employee earned in commissions in a multi-level marketing distributing business was not evidence of wage earning capacity, because the earning were not related to his ability to work. The Commission further concluded that the defendants might be entitled to some credit for that income. The Court of Appeals affirmed the decision that there had been a change of condition, but reversed as to the impact of the earnings, holding that the earnings were dependent upon the employee's management skills. The employee was precluded from receiving compensation for partial disability based on wage loss, pursuant to N.C.G.S. § 97-30, because the 300-week period therein had expired.

Coppley v. PPG Industries, Inc., __ N.C. App. __, 516 S.E.2d 184 (1999).

The employee was injured at work, and the Commission awarded compensation. The Court of Appeals reversed, holding that the Commission had erroneously placed the initial burden on the defendant to prove disability, based on the Commission's findings. This may have been an oversight, as there is a finding that the employee was released to return to work with restrictions at some point after the injury, which implies that she had been taken out of work by her doctor.

## 9. Third party lien related issues

Bartell v. Sawyer, __ N.C. App. __, 512 S.E.2d 93 (1999).

The employee obtained judgment in a jury trial against a third party tortfeasor. On application to the Commission for an order of disbursement, with respect to the lien created by N.C.G.S. § 97-10.2, the Executive Secretary awarded the defendants a pro rata share of the pre-judgment interest. A Deputy Commissioner affirmed. The Full Commission reversed, and the Court of Appeals affirmed the Full Commission's decision. The Commission correctly decided that it was without authority to award the interest, since § 97-10.2 is explicit as to how third party proceeds are to be distributed and does not state that interest is to be given to the employer and workers' compensation carrier.

Progressive American Ins. Co. v. Vasquez, 129 N.C. App. 742, 502 S.E.2d 10 (1998).

Several people were killed or injured in a wreck. A declaratory judgment action was brought to determine liabilities under certain insurance policies. The Court of Appeals held that an "umbrella" policy was required to provide UIM coverage and that while it could provide for reduction of coverage for workers' compensation benefits paid, the absence of a provision in the policy allowing reduction would result in no reduction.

The Court reversed the trial court in holding that the umbrella policy provided a single limit of UIM coverage in the full amount of its $20,000,000.00 policy limit. Finally, the Court held that the $1,000,000.00 limit of UIM coverage under the business auto policy was "per accident" and that the carrier of that coverage was entitled to reduce coverage by the amount of liability coverage paid, as well as by the aggregate amount of workers' compensation paid.

Progressive American Ins. Co. v. Vasquez, __ N.C. __, 515 S.E.2d 8 (1999).

This complicated case involves whether there is provision of UIM coverage under excess liability policies, among other things. For workers' compensation purposes, the important holding is that a single limit UIM coverage can be reduced by the aggregate of all workers' compensation payments. That is, the single limit of $ 1,000,000 per accident is reduced by the combined total of workers' compensation paid to several employees injured in a wreck, despite the fact that the law does not require the employer's carrier to provide coverage of $1,000,000 for each employee.

Hieb v. Lowery, __ N.C. App. __, 516 S.E.2d 621 (1999).

This case went to the Supreme Court over the workers' compensation carrier's entitlement to a lien against third party proceeds, pursuant to N.C.G.S. § 97-10.2. Ultimately, the carrier was held to have a lien for the full amount paid or to be paid. This is the appeal of an order by the Superior Court that the plaintiff's lawyer was responsible for the entire lien, when he disbursed the third party funds in his possession. The Court of Appeals affirmed that order, apparently approving punishment of the lawyer for having distributed proceeds in dispute, having told one judge that he would be responsible for the proceeds. Further, the Court affirmed elimination of the attorney's fee the lawyer disbursed under one of the prior orders, holding that the Commission had exclusive jurisdiction over fees in this case.

## 10. Employment status

Fulcher v. Willard's Cab Co., __ N.C. App. __, 511 S.E.2d 9 (1999).

The plaintiff s decedent (employee) was shot to death while working as a cab driver. The employee paid a $55 "per-shift" rental fee and was supposedly free of any restrictions. After the presentation of lay evidence at hearing, the Deputy Commissioner accepted into evidence an affidavit of another driver, including two memos to drivers from the cab company, concerning check-in times and vacation. The Commission awarded death benefits. The Court of Appeals reversed, holding that the affidavit and accompanying memos were inadmissible, because they related to a time after the employee" death. Absent the information contained therein, the evidence did not support a finding of employee status, despite the prohibitions issued by the cab company against carrying handguns in the cab and allowing others to drive it.

Judge Greene concurred, but not on the issue of employment status. He stated that the prohibitions against handguns and allowing others to drive were restrictions imposed by the cab company, that were sufficient to make it an employer. He also agreed with the Commission that the killing was an accident, despite the defendant's contention that it was part of the normal job, since cab driving is dangerous. (Perhaps the defendant would agree that the killing was an occupational disease?) However, he opined that the plaintiff had failed to prove that the killing arose out of and in the course of employment, since the only evidence was that the employee had been dispatched somewhere at 1:00 a.m. and was killed at 1:35.

Barber v. Going, West Transportation, Inc., N. C. App. __, 517 S.E.2d 914 (1999).

The employee truck driver was injured in a wreck. The Court affirmed the Commission's finding that the driver was an employee, citing, among other things, a driver handbook that required the drivers to call in at specific times, use approved routes, follow certain maintenance procedures on the company-owned trucks, and submit to random drug testing. The Court noted that it was required to evaluate the evidence fully, since the employment status is a jurisdictional fact, so that sufficient evidence to support the Commission's decision is not enough.

With respect to whether the employee had proved disability, the Court reviewed a list of evidentiary points, which it found sufficient to support the Commission's decision of total disability. Interestingly, the Court did not focus on specific medical opinions as to disability, allowing the Commission's decision to be supported by descriptions of pain and impairment by the doctors and the employee.

The Court reversed, with respect to the Commission's calculation of average weekly wage. The Commission had apparently divided the wages earned in the 52 weeks prior to injury by the weeks actually worked. However, the employee drove for the employer only for less than half the year, fitting in roughly with the produce seasons. The Court held that it was unfair to the employer not to consider the slack times of year, and even suggested that the Commission might divide the wages earned by 52 weeks, which resulted in an average weekly wage of only $179.48, instead of the $548.94 calculated by the Commission. At least the Court invited the Commission to take additional evidence and arguments on the issue.

Williams v. ARL, Inc., __ N.C. App. __, 516 S.E.2d 187 (1999).

Employee truck driver was injured while driving for B.J. Transportation, which was under contract to ARL. The Commission awarded compensation. The Court of Appeals reversed, holding that there was no evidence that ARL had three or more employees, so there was no jurisdiction under the Workers' Compensation Act. The case was also found not to fit the alternative route for finding jurisdiction in subcontractor situations, under N.C.G.S. § 97-19. In this, the Court appeared to get tangled up, drawing a distinction between "subcontractors" and "independent contractors." The Court then

applied the test for employment relationships from Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944), and held that B.J. was not a subcontractor, because ALR did not have the right to control the details of its work. **Unless ALR did not have a general contractor relationship with another, that is unless it was not a common carrier, this case is probably wrongly decided on the subcontractor issue.**

## 11. Average weekly wage

Hendricks v. Hill Realty Group, Inc., __ N.C. App. __, 509 S.E.2d 801 (1998).

The employee died as a result of a compensable accident. The defendant began paying death benefits, based on an average weekly wage calculated by dividing the employee's wages over the 52 weeks prior to her death by 52. The employee's beneficiaries filed for a hearing to increase the average weekly wage. The Commission nearly doubled the average weekly wage. The Court of Appeals affirmed. The evidence supported the Commission's decision that "exceptional reasons" existed to calculate average weekly wage by using the earnings for the 15 weeks prior to death, under the fifth method in N.C.G.S. § 97-2(5), because the employee had dramatically increased her production as a realtor, by obtaining a home computer and doing much more work by phone from home, beginning just a few months before her death.

Tucker v. Workable Co., Inc., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

The employee fell off a roof and was injured. The defendant paid compensation based on the employee's representation on a Form 18 of an average weekly wage of $262.50. The employee requested a hearing because the defendant refused to file a Form 21 Agreement. The defendant later stopped paying, based on its belief that the employee had reached maximum medical improvement. At hearing, the Deputy Commissioner decided that the employee continued to be totally disabled, awarded compensation, and awarded costs, penalties and attorney's fees against the defendant. The average weekly wage was stipulated to be $659.70 per week. The employer applied for review before the Full Commission on grounds, among others, that the Deputy's order violated a Tennessee Federal District Court stay of litigation against the purported self-insured fund. The employer also filed an affidavit challenging the stipulated average weekly wage. The Full Commission removed the sanctions imposed by the Deputy against the fund only, but otherwise adopted her decision.

The Court of Appeals held that the Commission's award did not violate the stay, because it was against the employer, not the fund, since the fund was not qualified to insure in North Carolina, leaving the employer uninsured, and because the employer is primarily liable in any event. The Court of Appeals reversed and remanded the Commission's decision on the average weekly wage, because the affidavit filed by the employer indicated that the stipulation was incorrect, even though there was no evidence presented before the close of the record on that issue and the affidavit was too late to preserve the issue for appeal on the Form 44. The sanctions imposed against the

employer were affirmed, again on grounds that the employer was primarily liable for the payment of benefits. The Court reversed the Commission's refusal to give credit for the benefits that were paid, noting that there are other ways to penalize intransigent employers.

## 12. Change of condition

Bailey v. Sears Roebuck & Co., __ N.C. App. __, 508 S.E.2d 831 (1998).

The employee had suffered from cerebral Palsy as a child and had had surgery to lengthen her heel cords. She had not been treated for CP since age 10. She injured her foot and was paid compensation for temporary total and permanent partial disability, pursuant to form agreements. About 15 months after her last payment of compensation, she returned to her treating physician and underwent surgery similar to that she had undergone as a child. The Commission denied benefits for change of condition, and the Court of Appeals affirmed, holding that the Commission had properly considered all of the evidence and that the medical evidence supported the decision that the additional foot problems were not related to her compensable injury.

Cummings v. Burroughs Wellcome Co., 130 N.C. App. 88, 502 S.E.2d 26 (1998).

The employee prevailed in a denied claim, after defense of the claim through the Court of Appeals. She was awarded compensation for a short period of total disability and 3% permanent partial disability of her back. She filed a claim for change of condition, which was denied by the Deputy Commissioner but granted by the Full Commission. The Court of Appeals reversed, on grounds that there was no evidence to relate the later condition to the original compensable injury or to show that the employee's condition had actually worsened.

## 13. Occupational disease

Locklear v. Stedman Corp./Sara Lee Knit Products, __ N.C. App. __, 508 S.E.2d 795 (1998).

The employee claimed asthma as an occupational disease and won before the Commission, which ordered the second employer to pay benefits. The Court of Appeals affirmed, citing somewhat equivocal testimony from doctors that the employee's work placed her at an enhanced risk of developing the disease and contributed to the disease. The second employer was held liable, because there was testimony that the employee's exposure working there, even if for a very short time, augmented the damage to her lungs, at least slightly. There was also support for the Commission's decision that the employee filed her claim on time, when one doctor testified that while her noted in his discharge summary that the employee's problems might be related to her work

environment, he did not diagnose her with an occupational disease or tell her to stop working.

Garren v. P. H. Glatfelter Co., __ N.C. App. __, 504 S.E.2d 810 (1998).

The employee claimed a rotator cuff injury caused by repetitive motion and won at hearing. The Court of Appeals held that there was evidence to support the Commission's decision, in the form of medical testimony, and that the Commission did not err in how it considered a videotape of the purported 'ob, when the videotape did not include some of the injurious activities in which the employee engaged.

Jarvis v. Food Lion, Inc., __ N.C. App. __, 517 S.E.2d 388 (1999).

The employee made a claim for carpal tunnel syndrome. Her treating physician testified that the problem was caused by her work, and Dr. Naso testified that it was not. The Commission gave "no weight" to the treating physician's opinion, because it was based on an inaccurate description of the employee's job duties. Therefore, the Commission found that there was insufficient evidence that the condition was characteristic of and peculiar to the employment. (That may have been an unnecessary finding, since the carpal tunnel syndrome might have been couched as tenosynovitis, an enumerated disease under N.C.G.S. § 97-53(21)) The Court of Appeals affirmed, holding that the Commission had properly exercised its power to weigh evidence.

## 14. Salaam issues

Porter v. Fieldcrest Cannon, Inc., __ N.C. App. S.E.2d __ (April 20, 1999).

The employee's attorney was allowed to withdraw before hearing, and she lost her claim for neck injury. The Court of Appeals held that the Commission did not err in allowing her to go forward 12ro se absent a showing of abuse of discretion in allowing the withdrawal, did not err in admitting certain medical records into evidence in the absence of objection, did not err in placing the burden of proving her case on the employee, and did not err in refusing to reopen the record for the taking of additional evidence despite having found good grounds to reconsider the evidence. However, the Commission's decision was reversed and remanded, because defense counsel had engaged in improper ex 12arte communication with a testifying, treating physician. The Court did not buy the defendant's argument that the Commission's decision was correct, because it was filed before the Court of Appeals decision in Salaam v. N.C. Dept. of Transportation.

One significant aspect of the case is the Court's instruction to the Commission that it exclude only those portions of the affected deposition testimony that were tainted by the improper communication. The Court apparently was rejecting a defense contention that tainting, if any, required exclusion of all evidence form the affected witness. It seems that the defendant was attempting to place the employee "between a rock and a hard place" by forcing her to choose between accepting the consequences of

the improper communication and pushing to exclude evidence that was necessary to prove her case. It is very important that the Court of Appeals has explicitly directed the Commission to fashion a remedy that protects employees from that cynical trap.

Jenkins v. Public Service Co. of N.C., __ N.C. App. __, 518 S.E.2d 6 (1999).

The employee underwent surgery shortly after his injury, which was performed by Dr. Rodger. He was later referred to Dr. Hicks, who became the authorized treating physician. He attempted a trial return to work, which failed after a week. When he took a Form 28U to Dr. Hicks, who conferred privately with the rehab nurse before refusing to sign the form. The employee testified to his impression that Dr. Hicks had appeared ready to sign before the private conversation with the nurse. At hearing, Dr. Hicks testified that he had no recollection of the conversation with the nurse. The employee then took the Form 28U to Dr. Rodger, who signed it and testified that, based on the employee's report to him, the employee was unable to do the assigned job. The Commission awarded additional compensation, giving "no weight" to Dr. Hicks' testimony, finding that he "left at least the appearance of undue influence by the rehabilitation nurse by stepping outside the presence of plaintiff and into the presence of the rehabilitation nurse before saying whether or not he would sign the Form 28U." The Court held that Dr. Rodger's testimony was not "mere speculation" 'just because it was based primarily on the employee's subjective complaints. The Court also held that Dr. Rodger was not the appropriate person to sign the Form 28U under the relevant rule, because he was not the authorized treating physician. However, that was not grounds for reversal, because the Commission ultimately decided that the trail return to work had failed, and the Form 28U is only a "short cut" to such a conclusion, pending potential Commission determination at hearing.

The case was reversed due to the majority's perception that the Commission had improperly excluded Dr. Hicks' testimony on the Salaam grounds of improper ex parte communication. The Court held that such exclusion is only proper if there is evidence to support a finding that the rehabilitation nurse is acting as the agent of the employer. The nurse cannot be presumed to be an agent, because rehabilitation professionals are supposed to be independent, and such agency would be unethical and in violation of Commission rules. The Court interpreted the Commission's Rehabilitation Rules as showing strong preference toward the presence of the employee in conversations between rehab nurses and doctors, but not prohibiting ex parte communication.

Judge Wynn, in dissent, opined that there was evidence to support the Commission's decision to accord weight to Dr. Rodger's testimony and not to Dr. Hicks', and apparently did not perceive that the testimony of Dr. Hicks had been excluded under the Salaam rule.

## 15. Procedural issues

Davis v. Weyerhauser Co., _ N.C. App. __S.E.2d __(April 6, 1999).

This case turned out to be largely procedural. The employee's claim for compensation beyond 104 for total disability due to asbestosis was denied by the Deputy Commissioner. The Full Commission adopted the Deputy's findings of fact, but wrote its own conclusions of law. The assignments of error were directed to the Full Commission decision, but the brief addressed primarily errors in the Deputy Commissioner's decision. The Court of Appeals held that there were no issues properly before it, both because the employee had abandoned his assignments of error and because the Court of Appeals reviews only the final decision of the Industrial Commission, so that the Deputy's decision is not properly appealed. The Court went on to review the case, anyway, affirming the Commission's decision. The Court specifically rejected the employee's contention that the prior award of 104 weeks of compensation established disablement.

Perhaps most importantly, the Court suggested that the Commission be more explicit in stating how it reaches its factual decisions. The Court noted a tendency to "find facts" regarding matters upon which expert testimony is given by simply reciting the expert's testimony. The Court stated that the Commission should go on to make specific findings of the facts that are proved by the testimony.

Riggins v. Elkgy Southern Corp., __ N.C. App. __, 510 S.E.2d 674 (1999).

The employee prevailed in a denied case. However, the Deputy Commissioner and the Full Commission both decided that they needed additional evidence to decide the period of temporary total, temporary partial and, possibly, permanent partial disability resulting from the injury. The defendants appealed, and the Court of Appeals declined to hear the appeal, holding that it was interlocutory, since the Commission's final decision was pending introduction of additional evidence.

De Portillo v. D.H. Griffin Wrecking Co., Inc., __ N.C. App. S.E.2d (I 999).

The employee died as a result of a compensable accident, leaving three illegitimate children. A settlement was reached for payment of compensation, but without specific designation as to the adult to receive the compensation. The Commission erred in ordering payment to a general guardian, but was correct as to "some other person appointed by a court of competent jurisdiction. The Court pointed out that payment to a guardian ad litem is improper, but implied that a guardian ad litem can separately be a properly appointed person.

Lewis v. Craven Regional Medical Center, __ N.C. App. __, 518 S.E.2d 1 (1999).

The employee lost his claim for change of condition, and the Commission's decision was affirmed by the Court of Appeals. The employee then requested a hearing to challenge the appropriateness of the Form 26 Agreement. The Commission decided that the Form 26 had been improvidently approved and awarded additional compensation. The Court of Appeals reversed, holding that the previous finding that the employee had earning capacity, affirmed by the Court of Appeals, caused the Commission to be collaterally estopped from finding that the employee was totally disabled at the subsequent hearing. The required determination by the Commission as to whether the Form 26 was fair and just was properly found not to have been performed, but the result was the same, because the remedy given through the Form 26 was the best available to the employee. Judge Wynn dissented.

## 16. Timely filing and notice

Wall v. MacField/Unifi, __ N.C. App. __, 509 S.E.2d 798 (1998).

The employee claimed a back injury and received group disability benefits. About four years after the date of the alleged accident, the group disability benefits were terminated, on grounds that the employee was able to work. Thereafter, the employee filed her form 18. The Deputy Commissioner awarded compensation, apparently based on a decision that the defendants had waived their defenses pursuant to N.C.G.S. § 9718(d). The Full Commission reversed. The Court of Appeals affirmed, holding that the Form 18 was filed too late and that there was no estoppel. The record contained evidence that the employee had been told that the employer would deny and claim she might make, which was not the same as lulling the employee into a belief that her claim had been filed. Since there was no jurisdiction over the claim, the Court did not reach the issue of whether the defenses had been waived.

## 17. Life care plans and medical benefits

Timmons v. N.C. Dept. of Transportation, __ N.C. App. __, 511 S.E.2d 659 (1999). Timmons v. N.C. Dept. of Transportation, __ N.C. App. __, 504 S.E.2d 567 (1998).

The Full Commission ordered the employer to pay for the preparation of a life care plan for a paraplegic employee and for implementation of the substance of it. The Court of Appeals, in the earlier of the decisions cited above, remanded for clarification as to which costs the Commission was ordering with respect to the expert who prepared the life care plan and for modification of the award, so as to limit the medical benefits ordered to those available under the law. The latter decision cited above was the Court of Appeals' decision on order to reconsider from the Supreme Court, in light of the Adams v. AVX Corp. decision (addressed elsewhere herein), in which the Supreme Court held

that the Full Commission is not required to defer to credibility decisions of Deputy Commissioners. On that reconsideration, the Court of Appeals affirmed its previous decision, because it was or could have been based on issues of law, instead of issues of fact. In so doing, the Court stated that there was no evidence to support a finding that the preparation of the life care plan was a medical service or treatment and that the Commission's award of all of the substance of the recommendations in that life care plan was properly reversed, because there were portions thereof that were not authorized by statute.

Peeler v. Piedmont Elastic, Inc., __ N.C. App. __, ___ S.E.2d __ (April 6, 1999).

The employee suffered a compensable back injury and underwent two surgeries. After one of them, she caught pneumonia, and the defendant refused to pay for the treatment therefor. On motion, the Commission ordered payment. The same result followed reconsideration. A hearing was then held, and the Deputy Commissioner ordered payment for all pulmonary treatment after the onset of the pneumonia, plus attorney's fees. The Full Commission held the same way. On appeal to the Court of Appeals, the defendant's contention that there was no evidence to show a causal connection to the pneumonia was rejected. However, the Court reversed the decision as to pulmonary treatment after the pneumonia resolved, and the award of attorney's fees, because the strongest evidence of causation in the record was testimony from one doctor that there was a "possible" connection between the surgery and the problems the employee experienced after the pneumonia.

## 18. Inability to recover compensation both for total disability and scheduled benefit

Dishmond v. International Paper, Co., __ N.C. App. __, 512 S.E.2d 771 (1999).

The employee suffered a skull fracture, which left him with brain damage, loss of hearing in one ear, and loss of vision in one eye. The Commission and the Court of Appeals held that the employee could recover compensation for permanent, total disability, but could not separately recover compensation for scheduled injury.

## 19. Penalty for late payment

Felmet v. Duke Power Co., __ N.C. App. __, 504 S.E.2d 815 (1998).

The employee moved the Commission to order a 10% penalty for late payment of the proceeds of a clincher agreement. The Commission refused, and the Court of Appeals affirmed. The Court held that the employer had a right to appeal the approval of the clincher to the Full Commission and, therefore, interpreted N.C.G.S. § 97-18 as giving the employer 39 days to pay.

## 20. Assignability of benefits

Orange County, ex rel. Byrd v. Byrd, 129 N.C. App. 818, 501 S.E.2d 109 (1998).

The defendant husband in this domestic matter had a child support arrearage, suffered a compensable injury, and went to jail for some crime, during which time he was unable to make bail. The District Court adjusted his child support, struck the arrearage, and ordered that his workers' compensation settlement of $18,000 be apportioned among his workers' compensation attorney, his criminal defense lawyer, his child support lien, and him. The Court of Appeals reversed, holding that the lien was to be satisfied, without apportionment, subject only to the fee ordered by the Commission for the workers' compensation lawyer.

Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998).

The defendant, an employee of Sara Lee, arranged for computer parts and services to be provided to Sara Lee through companies in which he had interests, in violation of his fiduciary duty to his employer. He was found to have committed fraud, among other things. The significant part of the case for workers' compensation purposes was the Court of Appeals' decision to vacate the trial court's imposition of a constructive trust on workers' compensation benefits that might be awarded in the employee's claim against Sara Lee, which was unresolved at the time of the judgment in this matter. The Court cited N.C.G.S. § 97-21, which exempts workers' compensation benefits from "all claims."

## 21. Jurisdiction

Murray v. Ahlstrom Industrial Holdings, Inc., __ N.C. App. __, 506 S.E.2d 724 (1998).

The employee lived in Canton. He had previously done work for the employer in Tennessee, after which he was laid off. The employer then called the employee at home offered work in Mississippi. The employee initially rejected the offer, because it did not pay enough. The employer then called him back with a better offer, and the employee accepted it. While working in Mississippi, he was injured. The sole issue at hearing was jurisdiction. The Deputy Commissioner found none. The employee appealed to the Full Commission, which decided the other way. The Court of Appeals affirmed, holding that the decision in favor of the employee was supported by evidence that the last act necessary to form the employment contract occurred in North Carolina, when the employee accepted the offer of employment. The paperwork filled out at the job site was required before work could start, but the employer's witness admitted that it was essentially administrative. Other requirements, such as physical examinations, were not required, because the employee was a rehire, instead of a new hire. The Commission's decision to excuse filing of the appeal to the Full Commission four days after the

deadline had run, on grounds of excusable neglect, was supported by evidence that the plaintiff's lawyer was on vacation when the Deputy Commissioner's Opinion and Award arrived in his office, and the office staff mishandled it.

Perkins v. Arkansas Trucking Services, Inc., __ N.C. App. ___, 518 S.E.2d 36 (1999).

Truck driver for Arkansas employer was assigned out of a hub in Georgia, lived in North Carolina and was injured in South Carolina. The Court affirmed the Commission's conclusion of North Carolina jurisdiction, on grounds that the employee's principal place of business was in North Carolina. The Court held that while there was evidence to the contrary, the facts that the employer's truck was kept at the employee's home and that the employer arranged the employee's first pick-ups and last drop-offs of most trips to be in North Carolina close to the employee's home supported the conclusion. The Court specifically rejected the employer's attempt to limit jurisdiction to Arkansas, citing N.C.G.S. § 97-6.

## 22. Legality of assigned risk pool procedures

N.C. Steel, Inc. v. National Council on Compensation Insurance, et al., 347 N.C. 627, 496 S.E.2d 369 (1998).

Certain employers challenged the process by which premiums were set those employers in the assigned risk pool. In short, the Supreme Court held that the employers' claims were barred by the "filed rate doctrine."

## 23. Aggravation of Pre-existing Condition

Smith v. Champion International, __ N.C. App. __, 517 S.E.2d 164 (1999).

The employee aggravated a pre-existing, severe back condition by a relatively minor specific traumatic incident. The defendants apparently were unhappy about the perceived imbalance in severity between the pre-existing condition and the specific traumatic incident, but there was evidence to support the Commission's decision, and it was affirmed.