WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE, 2000

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Standard for Commission reversal of Deputies' decisions

Toler v. Black and Decker, 134 N.C. App. 695, 518 S.E.2d 547 (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.

Fuller v. Motel 6, __ N.C. App. __, 526 S.E.2d 480 (2000).

Ms. Fuller worked as a housekeeper for the employer. After about 18 months of doing that, she developed carpal tunnel syndrome and a ganglion cyst. An orthopedist removed the cyst and performed a carpal tunnel release. About a month after surgery, Ms. Fuller fell at work, hurting both wrists and bruising a breast. She was diagnosed with sprains and contusions and sent back to work with instructions not to use her left arm. A few days later, she was released to work with no restrictions by the orthopedist, and was told she could expect to improve for another four to six months. Ten days after that, the doctor she had seen for the fall gave her restrictions of 10 pounds lifting and no repetitive use of the left arm. Shortly thereafter, the employee complained to her supervisor that she could not continue working, and she was sent home. She then saw a neurosurgeon, who diagnosed her with carpal tunnel syndrome, median neuropathy and spondylitis, all probably caused or exacerbated by her fall at work, based on the inaccurate assumption that she had not had related problems before. The orthopedist who performed the surgery on the ganglion cyst was unable to give an opinion as to the cause of the employee's problems.

The Full Commission waived oral arguments, accepted certain credibility decisions made by the Deputy Commissioner and decided the case against the employee. The Court of Appeals affirmed, holding that (1) the Adams v. AVX Corp. case did not preclude the Full Commission from accepting the Deputy's credibility determinations, (2) the Commission's decision that the employee sustained injury to her neck in the fall did

not raise a presumption of disability, so that she was required to prove disability, and (3) the Commission's decision that she had failed to prove that her ganglion cyst and carpal tunnel syndrome were occupational diseases was supported by the evidence.

Calloway v. Memorial Mission Hospital, __ N.C. App. __, __ S.E.2d __(2000).

The injured worker claimed injury while working as a material handler for the employer hospital. There was much confusing evidence, involving which part of her back was injured, aggravation of pre-existing psychiatric problems, and employer misconduct in handling the claim and terminating the employee. It appears that the Deputy Commissioner decided that the employee had not been disabled by her injury, because she had been fired for excessive absenteeism, among other things. The Full Commission reversed on credibility grounds. The Court of Appeals affirmed, citing Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998) for the proposition that the Full Commission is not required to defer to the hearing deputy on issues of credibility.

This case is somewhat different from the other cases following Adams, in that the Court of Appeals expresses clearly its disagreement with the Supreme Court's decision in that case. In dicta, the Court encouraged the Supreme Court or the General Assembly to impose a rule requiring the Full Commission to defer to deputies on issues of credibility. Practitioners might be wise to take special pains to persuade the appellate courts of the factual justice of the Full Commission's decision in cases involving this issue.

2. Effect of maximum medical improvement (maybe)

Brice v. Sheraton Inn, __ N.C. App. __, __ S.E.2d __ (2000).

This is a case that may or may not raise serious concerns. The employee suffered wrist injuries, and her claim was denied. In litigation, she prevailed, and the Commission decided that she suffered a compensable repetitive motion-type occupational disease. Her surgeon eventually released her to return to work with no restrictions, though two other doctors apparently testified that she did have restrictions past the release date. The Deputy Commissioner decided that the employee was entitled to on-going compensation for temporary total disability. The Full Commission decided that the employee was entitled to ttd only until the time she was released with no restrictions, plus some compensation for ratings of ppd. On appeal, the Court of Appeals remanded for an opinion giving proper deference to the Deputy Commissioner's credibility decisions, based on the Sanders v. Broyhill Furniture case. The Commission again found the same way, specifically stating that the testimony of the treating surgeon should be given greater weight on the issue of restrictions.

The Court of Appeals rejected the employee's contention that the holding in the Adams v. AVX Corp. case, in which the Supreme Court overruled the cases requiring deference to Deputies' credibility decisions, should not be applied "retroactively" to cases decided while the Sanders rule was the case law. The Court then held that the treating surgeon's opinion was plenty of evidence to support the Commission's decision that the period of temporary total disability ended on the specified date.

In the more significant portion of the opinion, the Court of Appeals rejected the employee's contention that the Commission had improperly shifted the burden of proving total disability to the employee. Instead of holding that the evidence of lack of restrictions was sufficient to rebut the presumption of on-going disability, the Court held that the employee had the burden of proving separately permanent and total disability after she was released to return to work with no restrictions, even if temporary total disability has already been established. It is not clear whether the employee created the posture of needing to prove permanent total disability by making a specific claim for it or if the Court meant to imply that it is necessary to prove permanent total disability after some point, without the employee's having claimed anything more than on-going temporary total disability.

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

Choate v. Sara Lee Products, 351 N.C. 46; 519 S.E.2d 523 (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.

On appeal to the Supreme Court, the case was affirmed per curiam.

Pittman v. International Paper Co. 351 N.C. 42; 519 S.E.2d 524 (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.

On appeal, the Supreme Court affirmed per curiam.

Roman v. Southland Transportation Co. 131 N.C. App. 571; 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. 350 N.C. 549; 515 S.E.2d 214 (1999).

Holshouser v. Shaner Hotel Group Properties One Limited Partnership, 134 N.C. App. 391; 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.

On appeal to the Supreme Court, the case was affirmed per curiam. Holshouser v. Shaner Hotel Group Properties One Limited Partnership, 351 N.C. 330; 524 S.E.2d 568.

Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378; 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.

Lane v. R.N. Rouse & Co., __ N.C. App. __, 521 S.E.2d 137 (1999).

The employee was killed when he backed into a hole in the second floor while finishing concrete. The employee's estate sued the general contractor under the "other prong" of the Woodson case, which allows negligence liability to cross barriers of independent contractor status, when the activity involved in the injury is inherently dangerous. The jury rendered a verdict for the estate, for both compensatory and punitive damages.

The Court of Appeals found no error, holding that evidence that the employee was required to walk backwards on a second floor while paying intense attention to his task could have been found by the jury to fit the definition of inherently dangerous activity, when there were holes in the roof that should have been covered, pursuant to applicable OSHA regulations. The Court also held that the trial judge did not err in admitting evidence of subsequent, OSHA-violative conditions at the work site, since the conditions were close in time to the conditions at the time of the accident, and were relevant thereto. Finally, subsequent remedial measures were properly admitted into evidence, because they were probative to rebut the defendant's contentions that it had no control over the workplace and that protective measures were not feasible.

5. Suspension or termination of compensation.

Lewis v. Sonoco Products Co., __ N.C. App. __, 526 S.E.2d 671 (2000).

Ms. Lewis suffered a compensable injury to her back. There were recommendations for two-level instrumented spinal fusion from Dr. Lestini and Dr. Elkins (a professional IME doctor). The defendants filed a Form 28T, contending that the employee had returned to work for another employer. In fact, the defendants had videotape of the employee riding around on a lawn mower, which she had done a few times to help out her husband in his small lawn cutting business. The evidence accepted by the Commission was that she had not been paid and that the activity was within the restrictions assigned by her doctor.

The Deputy Commissioner and Full Commission found in favor of the employee, that the Form 28T had been misused, that the employee was not working, and that the defendants would be sanctioned by payment of attorney's fees for bringing a hearing without reasonable ground. The Court of Appeals affirmed everything, finding evidence to support the Commission's decision. The Court emphasized that the Form 28T is for use only when the defendant is certain that the employee has actually returned to work.

Scurlock v. Durham County General Hospital, __ N.C. App. __, 523 S.E.2d 439 (1999).

Ms. Scurlock, an LPN, suffered an accepted injury and was found by Dr. Lincoln, the original treating physician, to be capable of only sedentary work. About a year later, the defendant filed a Form 24, claiming failure to cooperate with medical treatment and vocational rehabilitation. 19 months later, Deputy Commissioner Nance found that the employee had failed to cooperate, by resisting physical therapy, exaggerating her symptoms and refusing to apply for jobs, among other things. The Full Commission

ordered discontinuation of compensation retroactively to a week before the Form 24 was filed and gave credit for the 87 weeks of ttd that had been paid in the interim. The Full Commission also ordered provision and compliance with vocational rehabilitation and medical treatment recommended by "plaintiff's doctors." The employee stopped seeing Dr. Lincoln and started seeing Dr. Scott, who said that the employee was unable to work. The defendant asked Ms. Scurlock to see Dr. Lincoln. She refused, and Dr. Lincoln stated that he did not want to see her, due to her uncooperative demeanor. The defendant asked her to see Dr. Whitehurst, and she refused.

The employee requested a hearing alleging change of condition and that she was complying with treatment and voc. Deputy Commissioner Young denied the claim as being time-barred, because the Form 33 was filed more than two years after the last time the employee received compensation, and denied the request to have Dr. Scott named the authorized treating physician. The Full Commission reversed, finding that the claiom was not actually one for change of condition, so the two-year limitation in N.C.G.S. § 97-47 did not apply. The Full Commission then decided that the defendant was not in compliance with the previous order to provide medical treatment, so that it was estopped to claim the employee's lack of cooperation. Compensation was ordered restored, retroactive to the date of the prior Full Commission award, in which provision and compliance had been ordered.

The Court of Appeals agreed with the Full Commission that the case was not in the posture of a change of condition, since there had been no prior closure. The defendant's unilateral filing of a Form 28B did not have the effect of creating closure, when there was none under the law. However, the Court reversed and remanded, because the Commission had made no findings to support the conclusion that the employee had ceased her refusal to cooperate. Finding that the defendant had failed in its duty was insufficient. The Court also held that the Commission had made insufficient findings to support authorization of Dr. Scott, implying that the three-year delay between starting treatment with Dr. Scott and the first motion to the Commission for authorization might be too long. The Court warned that the cooperation issue must be determined by the employee's willingness to be treated by authorized physicians.

This case represents a potentially dangerous interplay between authorization, which should apply primarily to payment of medical bills, and compensation paid to injured workers. The Court may be implying that the Commission can only find cooperation or reasonableness of lack of cooperation based on treatment recommended by authorized physicians, which would significantly impair the ability of injured workers to obtain and present evidence on these issues. Such an approach would play into the hands of those defendants that try to limit medical opinion through the authorization process.

6. Loss of "important" organs.

Aderholt v. A.M. Castle Co., __ N.C. App. __, __ S.E. 2d __ (2000).

The injured worker suffered severe injuries when a chain from an on-coming log truck crashed through his car window. After a long period of treatment, he sought a decision from the Commission as to the value of numerous ratable permanencies under N.C.G.S. § 97-31, including damage to several organs. The purpose of the exercise appears to have been to give the worker a basis for choosing whether to receive compensation under § 97-31 or for permanent, total disability under § 97-29.

The posture placed the employee in the unusual situation of asking the Commission for a decision as to the time of maximum medical improvement, to determine when he would be eligible for the § 97-31 compensation. The Deputy Commissioner determined that MMI was reached on January 24, 1994, when he was evaluated and rated as to his orthopedic arm injuries. The Full Commission held that MMI was not reached until October 3, 1994, when he was evaluated and rated as to all of his permanent problems, and shortly after he had declined referral to a neurosurgeon, because he did not want any further surgery. The Court of Appeals affirmed, citing evidence that the employee's condition was likely to deteriorate, absent the surgery that was suggested in September of 1994.

The defendants also challenged the Commission's awards for organ loss. The Court of Appeals held that there was evidence to support the decision that the spleen is an "important" organ and the amounts assigned to damage to several other organs, despite the defendants' contentions that the organs were not important, that the organs were not lost or permanently damaged, or that the Commission failed to consider the actual value of each organ.

Judge Greene concurred separately, to clarify the test for determining whether an organ is "important" under § 97-31(24).

7. Proving cause and compensability of death

Horton v. Powell Plumbing & Heating of N.C., Inc., __ N.C. App. __, 519 S.E.2d 550 (1999).

The employee was found dead at his workplace of a gunshot wound to the chest. A gun was found, wrapped in a shirt, on top of shelf 12 to 13 feet above the floor behind the employee's body. A sheriff's detective opined that the employee had committed suicide, based on gunpowder residue on his hands and lack of any leads as to motives for anyone else to kill him. There was vague testimony of having heard loud argument between two men, in the general vicinity of the death. The Commission applied the Pickrell presumption of compensable death when an employee is found dead in circumstances indicating that he was in the course of employment at the time of death. The Commission then decided that the defendant's evidence, which required acceptance of a somewhat goofy explanation as to how the gun, wrapped in a cloth and a shirt, with none of the employee's fingerprints on it, could have ended up on a box on the shelf, was insufficient to rebut the presumption and awarded death benefits. The Court of Appeals affirmed, citing the Commission's power to make credibility decisions.

8. Disability, including presumption of on-going.

Flores v. Stacy Penny Masonry Co., 134 N.C. App. 452; 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., 134 N.C. App. 53; 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 earnings 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.

The Supreme Court granted the employee's petition for discretionary review, but there was no opinion in time for this manuscript. Lanning v.Fieldcrest-Cannon, Inc., 351 N.C. 106, 516 S.E.2d 894 (1999).

Coppley v. PPG Industries, Inc., 133 N.C. App. 631; 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.

Davis v. Embree-Reed, Inc., __ N.C. App. __, 519 S.E.2d 763 (1999).

Mr. Davis suffered a compensable injury to his foot, with a nagging wound that would not heal. A Form 21 Agreement was approved. The defendants filed a Form 24 that was rejected. The Court of Appeals affirmed, holding that a two-month stint as a substitute teacher and two weekends working the door at a bar were temporary jobs that the Commission correctly found to be insufficient to rebut the presumption of continuing disability. There was apparently a period of incarceration, during which the Commission allowed suspension of compensation, but that was not appealed.

The Commission also found that Mr. Davis had not reached maximum medical improvement. The Court of Appeals held that there was sufficient evidence to support that finding. The Court does not explain why it was necessary to discuss MMI, though mention of it raises concerns as to the significance that might be attached to medical stabilization in determining the duration of total disability or the right to medical treatment in an on-going case.

Rivera v. Trapp, et al., __ N.C. App. __, 519 S.E.2d 772 (1999).

The employee was an undocumented Honduran alien who was injured when he fell off a forklift while roofing. He worked for Schuck, who was hired by Trapp to repair damage from Hurricane Fran. No one had any insurance. The Commission found that Trapp was a general contractor, that Schuck was a subcontractor, and that both of them were liable for the employee's injury. The employee was found to be totally disabled, through the date of the hearing, because of his physical inability to lift heavy things, his limited ability to speak English and his exclusive background in construction work. In addition, Schuck was fined $50.00 per day for a couple of days, and Trapp was fined $10,000 for failing to require Schuck to be in compliance with coverage requirements.

Trapp appealed, claiming, among other things, that the employee had no earning capacity independently of his compensable injury, because he was undocumented and could not legally be employed. The flaw in that argument was that the employee had been earning $600 per week for some time prior to the injury. A horseplay argument failed, because the activity of riding a forklift to the third floor roof was performed for the purpose of moving materials to the roof.

9. Third party lien related issues

Progressive American Ins. Co. v. Vasquez, 350 N.C. 852, 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, 134 N.C. App. 21, 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.

Discretionary review was denied. Hieb v. Lowery, 351 N.C. 103, __ S.E.2d __ (1999).

10. Employment status, including subcontractor issues.

Barber v. Going, West Transportation, Inc., 134 N.C. App. 428, 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.

Rhoney v. Fele, 134 N.C. App. 614, 518 S.E.2d 536 (1999).

This is a third party case without a workers' compensation component that is included here, because it contains a potentially useful discussing of employment status in independent contractor-type settings. Defendant Nursefinders maintained a pool of nurses and would call them to fill orders from hospitals for supplemental nursing staff. Defendant Fele was a nurse who did work for defendant Nursefinders and was on his way to a job when he was involved in a fatal car wreck with decedent Rhoney. The trial court granted summary judgment to Nursefinders, on grounds that Fele was an independent contractor, so that his negligence would not be imputed to Nursefinders. The Court of Appeals affirmed, drawing a distinction between "extraneous" factors that indicated an employer-employee relationship and factors related to the actual performance of work that did not. For example, the facts that Nursefinders charged an hourly rate to cusomer hospitals, then paid Fele an hourly rate, including overtime, with taxes withheld, were considered less significant than the facts that Fele performed the same kind of work through other agencies and was free to accept or reject assignments. The Court of Appeals held that the facts were undisputed and that the trial court made the correct legal decision.

There are several citations in the opinion, some to workers' compensation cases and some to other types. There is also discussion of the plaintiffs' claim that Fele was engaged in a joint venture with Nursefinders, which was also rejected, because there was no evidence that Fele had "an equal, legal right to control the conduct of Nursefinders 'with respect to prosecution of the common purpose.'" (Citation omitted)

Williams v. ARL, Inc., 133 N.C. App. 625, 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.**

Anderson v. Demolition Dynamics, Inc., __ N.C. App. __, 525 S.E.2d 471 (2000).

The employee was killed when a conveyor on which he was working collapsed, allegedly due to the negligence of the defendant. The estate sued the defendant, and the summary judgment was granted on exclusive remedy grounds. The Court of Appeals reversed.

The employee had worked for D.H. Griffin Wrecking. The defendant was a company formed by D.H. Griffin, his son and a former coworker of the decedent's at D.H. Griffin Wrecking, to provide Griffin Wrecking with explosive demolition capabilities. The two companies often worked together on projects, and the decedent was often involved in the same projects. The defendant contended that the decedent was jointly employed by Griffin Wrecking and the defendant, so that his claim was barred by the exclusive remedy of workers' compensation. The Court, citing Larson and the 1974 Court of Appeals case of Collins v. Edwards, used a three-pronged test to evaluate the defendant's claim that it was a special employer. Assuming, arguendo, that the middle prong, that the work being done is essential to the alleged special employer, was met, the Court held that there were material issues of fact as to the other prongs. There was an issue as to whether the employee had made a contract of hire with the special employer, based on evidence that formalities of payroll and equipment, as well as the decedent's representations and appearance to others, all pointed to employment by Griffin Wrecking. The third prong is whether the alleged special employer had the right to control the details of the work. Evidence that the decedent was an expert who was allowed to perform tasks independently was enough to get past summary judgment.

Purser v. Heatherlin Properties, __ N.C. App. __, __ S.E.2d __(2000).

Heatherlin was a partnership between the McMahan's, a husband and wife. Mr. McMahan had a general contractor's license. The partnership built houses on land owned separately by the McMahan's. Heatherlin would demand a certificate of insurance from those hired to do the actual work. If the contractor was not insured, it Heatherlin would arrange for coverage through its carrier and withhold premiums from the payments to the contractor.

Purser was a partner in a masonry company, who was working on one of the houses when he fell and was severely injured. There had been representations that the masonry contractor was going to get insurance. It did not, and Heatherlin retained from the third check to the contractor enough to pay the first three weeks of premiums. The money was not sent to the carrier. Rather, Heatherlin kept it, to pay as necessary after the carrier's year-end audit.

At hearing, the employer claimed that the carrier should cover the injury and defend. The carrier filed a separate Form 33R, denying coverage. The Deputy Commissioner found the masonry contractor not to be a subcontractor, under N.C.G.S. § 97-19, so that there was no claim against Heatherlin. The Full Commission reversed, deciding that the masonry contractor was a subcontractor. The Court of Appeals remanded, making its own findings of fact on the jurisdictional issue of whether Purser was a statutory employee and holding that despite the apparent technical distinction between Heatherlin as the owner and Mr. McMahan as the general contractor, they were in fact the same, so there could be no general contract between them. The Court viewed Heatherlin and McMahan as the owner, so that the contract with the masonry contractor was a general contract, not a subcontract. Therefore, Purser was not an employee of a subcontractor, and N.C.G.S. § 97-19 did not apply. The Court went on to instruct the Commission on remand to make findings and conclusions concerning whether the

defendants were estopped to deny coverage, having told the masonry contractor that it would be covered.

11. Presence or lack of an accident.

Calderwood v. The Charlotte-Mecklenburg Hospital Authority, __ N.C. App. __, 519 S.E.2d 61 (1999).

Ms. Calderwood was a labor and delivery nurse. She injured her shoulder while assisting in a delivery. The patient was 263 pounds, and her epidural anesthetic had caused a total block. This required the employee to lift the patient's leg without help from the patient. The employee testified that she had never before, while working for the employer, had to lift a patient's leg during delivery without any help from the patient. The employee's supervisor testified that all of this was stuff that could happen during a delivery and the employee's activity at the time of her injury was part of her regular job.

The Commission denied the claim for lack of an accident, finding that the employee was performing her regular work in the regular way. The Court of Appeals reversed and remanded, holding that there was no evidence to support that finding. In essence, the Commission had erred by taking an approach to the question that was too superficial, addressing whether delivering babies in general, which could require the injurious activity, was part of the job. The Court of Appeals, on the other hand, focused on details and held that there was undisputed evidence that the employee had never been required to lift a patient's leg without the patient's assistance, especially when the patient weighed 263 pounds.

12. Change of condition.

Young v. Hickory Business Furniture, __ N.C. App. __, __ S.E.2d __(2000).

Ms. Young strained her back and was seen by a company familiar practice doctor, who referred her to an orthopedist. She went to a chiropractor on her own, who rendered a 5% rating after six months of treatment. It is not clear when, or even if, Ms. Young was paid compensation for her rating. After her rating, her condition continued to get worse. She resumed treatment with the chiropractor about a year after her prior rating. He testified that the employee's condition was the same as when he had previously rated her, but that it had worsened. A rheumatologist diagnosed her with reactive fibromyalgia, resulting from her compensable injury. She returned to the orthopedist to whom she had been referred by the company doctor. He opined that her diagnostic tests were normal and that her condition was much worse than previously, but that her current symptomswere not causally related to her compensable injury. Shortly after resuming chiropractic care, Ms. Young became physically unable to perform her job, and her supervisor terminated her.

The employee filed a claim for additional benefits based on change of condition. Deputy Commissioner Dollar decided that there had been a substantial change, pursuant to N.C.G.S. § 97-47, despite the chiropractor's testimony that he would assign the same rating after the second round of treatment. The Full Commission affirmed, with Commissioner Sellers dissenting. The Court of Appeals, apparently in an unpublished opinion, sent the case back to the Commission for more specific findings of fact. On rehearing at the Full Commission, the same result was reached, again with Commissioner Sellers dissenting. The Court of Appeals affirmed, holding that (1) the Commission was allowed to give no weight to the orthopedist's opinion that the current symptoms were unrelated, because he had no expertise in fibromyalgia, (2) that the finding that the fibromyalgia was caused by the compensable injury was not merely speculative, despite the rheumatologist's admissions as to the difficulties in studying it, and (3) lack of change in the rating did not preclude a finding that the condition had changed.

Judge Horton dissented, buying into the defendant's contention that the causes of fibromyalgia are too speculative to support the decision.

This case contains a potentially important discussionof a "Daubert-like" issue. The majority was comfortable accepting the rheumatologist's opinion, because he "was in a better position than the fact-finding body to draw a conclusion from the relevant circumstances," thereby accepting the conventional definition of an expert. Judge Horton was hung up on judicial assessments of "reasonable scientific certainty," indicating a willingness to substitute the Court's judgment of the certainty of an opinion for that of a qualified expert. It will be interesting to see what the Supreme Court does with this, if it is given the opportunity to address the issue.

13. Occupational disease

Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 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.

Hardin v. Motor Panels, Inc., __ N.C. App. __, 524 S.E.2d 368 (2000).

Ms. Hardin worked as a typist for the employer. For about three years, she received good reviews. Then, the quality of her work deteriorated, and she resigned, instead of being fired. She complained to physicians and was diagnosed with tendonitis,

the Dr. Naso thought was getting better, and she was released her to return to work with restrictions. She worked at several jobs thereafter, for short times, and testified that her hand symptoms were exacerbated at each one. About 16 months after leaving the employer, she was diagnosed with carpal tunnel syndrome, had bilateral release surgery several months later and was released to work with no restrictions.

The Commission decided that the employee had failed to prove that her carpal tunnel syndrome was an occupational disease for which the employer was liable. The Court of Appeals affirmed, citing equivocal doctors' testimony. The closest the employee got was testimony from the surgeon that Ms. Hardin's work with the employer was "a contributing factor, and the degree of contribution that her work made I'm not able to say." The Court drew a distinction between a contributing factor and a significant contributing factor, implying that the surgeon's testimony was insufficient. There was some indication that the tendonitis that the employee suffered around the time she left her employment was an occupational disease, but the Court viewed that as a separate disease that was not disabling.

14. Salaam issues

Jenkins v. Public Service Co. of N.C., 134 N.C. App. 405, 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.

The Supreme Court, in Jenkins v. Public Service Co. of N.C., 351 N.C. 341; 524 S.E.2d 805 (2000), reversed per curiam for the reasons stated by Judge Wynn in dissent.

15. Procedural issues, including burdens of proof.

De Portillo v. D.H. Griffin Wrecking Co., Inc., 134 N.C. App. 714; 518 S.E.2d 555 (1999).

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.

Discretionary review was denied. De Portillo v. D.H. Griffin Wrecking Co., Inc., 351 N.C. 188, __ S.E.2d __ (1999).

Lewis v. Craven Regional Medical Center, 134 N.C. App. 438; 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.

Ruggery v. N.C. Department of Corrections, __ N.C. App. __, 520 S.E.2d 77 (1999).

The employee corrections officer suffered a compensable injury to the arms and back, including stretched nerves and radiculopathy. He was paid full salary during a period of total disability, because he was a corrections officer. He was treated by a neurologist, Dr. Siegel. After about three months of treatment, Dr. Siegel released the employee to light duty work. About two weeks later, and without seeing the employee again, Dr. Siegel removed the restrictions, stating that the employee was not significantly impaired. He refused to see the employee again for treatment or to explain why he had removed the restrictions without seeing the employee. Thereafter, the employee received unauthorized treatment from other doctors, which resulted in a return to restricted work within a few months. In the meantime, the employee was charged with sick and vacation time for certain periods of missed work.

The Commission ordered that the subsequent doctors be authorized, that the sick and vacation time be restored, and that the defendant pay $500 in attorney's fees as a penalty for unfounded litigiousness and $1000 for appeal by the insurer, under N.C.G.S. § 97-88. The Court of Appeals affirmed on all issues. Of particular interest is the Commission's decision to award fees as a penalty, and the Court of Appeals' affirmance of that, despite evidence from Dr. Siegel to the effect that the employee was capable of unrestricted work when that doctor released him. The Court, considering that issue de novo, held that the employer "could not reasonably have based its decision to defend on Dr. Siegel's findings," when he "reversed his own prior medical decision that employer (sic) was not capable of full duty," without seeing the employee, and when two other doctors later determined that the employee was unable to work.

Moore v. City of Raleigh, __ N.C. App. __, 520 S.E.2d 133 (1999).

The employee, a police officer, suffered a compensable injury. He underwent arthroscopic knee surgery and attempted a return to full duty. Six months later, his knee was reconstructed, and he was returned to light duty work. Four months after that, he accepted a disability retirement, because he could not perform the full duties of a police officer. He was given ratings of 10% and 25 % by different doctors. The employee proceeded pro se, and Deputy Commissioner Hedrick decided that he was partially disabled, with the choice of compensation for a 15% rating or based on wage loss, pursuant to N.C.G.S. § 97-30. Thereafter, the employee hired a lawyer, who filed a motion for reconsideration three months after the Deputy Commissioner's opinion and award. The motion was denied. The employee appealed to the Full Commission, which reversed the Deputy's decision, deciding instead that the employee had attempted an unsuccessful trial return to work and was entitled to on-going compensation for total disability.

The Court of Appeals reversed and remanded, holding that the appeal had been filed too late, and that there was no evidence to support the Commission's decision to allow the late appeal for excusable neglect. The Court cited a 1944 case for the proposition that while a motion to reconsider can be entertained after the expiration of the

time to appeal, a motion so filed will not toll the running of the statutory time to appeal. Therefore, if the motion is denied, then the moving party may not appeal, and the denial of the motion itself cannot be appealed. If, on the other hand, the motion for reconsideration is filed before the expiration of the appeal period, it does toll running of the time to appeal, so that appeal can be taken of the original decision after denial of the motion. In this case, the motion was filed after the 15-day period for appealing to the Full Commission.

While the Commission has inherent power to grant relief on grounds of excusable neglect, ignorance of the law due to lack of an attorney does not constitute excusable neglect.

London v. Snak Time Catering, Inc., __ N.C. App. __, 525 S.E.2d 203 (2000).

Mr. London was injured in a car wreck while working for his own company. He suffered a severe brain injury, and his claim was accepted. A claim was brought for attendant care, and the Commission ordered the defendants to pay the employee's wife $6.00 per hour, eight hours per day, plus to pay for outside attendants, when the wife needed relief. The defendants appealed, on grounds that there was insufficient evidence of the need for care at the level ordered and that the wife's care was not of the sort that should be paid for by the defendants. The Court of Appeals affirmed in an unpublished opinion that was later published.

There was testimony from Barabara Armstrong, who is a certified life care planner, and one of the Commission's nurses. Both opined as to a need for monitoring every few hours but that it was not practically possible to hire a nurse for sporadic monitoring, so that is would be necessary to pay for at least four hours at a time. There was testimony that the wife had worked for the company as well, before the accident, which was important is showing that she was now doing more than her usual marital duties. Surveillance information was not inconsistent with the employee's claimed condition, since there was no contention that the employee could never be alone. This case is a good illustration of the structure of a well-litigated attendant care claim and some of the issues that arise.

Cole v. Triangle Brick, __ N.C. App. __, 524 S.E.2d 79 (2000).

Mr. Cole suffered a back injury that was denied. He eventually prevailed. During the pendency of the workers' compensation proceedings, he was paid disability benefits through an employer-funded plan. The Commission gave the defendants credit for the disability benefits paid, pursuant to N.C.G.S. § 97-42, but reduced the credit by 25%, which was paid to plaintiff's counsel as a fee. The defendants appealed, and the Court of Appeals affirmed.

The Court cited Church v. Baxter Travenol Laboratories, 104 N.C. App. 411, 409 S.E.2d 715 (1991), which allowed a nearly identical discretionary decision by the Commission. The defendants argued that the subsequent case of Evans v. AT&T Technologies, 332 N.C. 78, 418 S.E.2d 503 (1992) had implicitly overruled Church. The

Court of Appeals stated that the Evans case had been about the separate issue of whether credit was "week-for-week" or "dollar-for-dollar" and did not disturb the principle from Church, that the Commission may reduce the credit in its discretion, as long as it acknowledges the full extent of the credit first.

Allen v. K-Mart, __ N.C. App. __, __ S.E.2d __(2000).

Ms. Allen claimed fibromyalgia caused by a muscle injury to her side. Dr. Whitehurst found no organic basis for her continued complaints of pain and released her to return to work with no restrictions. Matters were complicated by dispute with the employer. A family physician diagnosed her with fibromyalgia, though the testimony from that doctor was a bit weak.

Deputy Commissioner Hedrick found that the employee's disability due to her compensable injury had ended relatively early and that she was not entitled to payment for treatment of or disability due to fibromyalgia. While the case was on review before the Full Commission, Ms. Allen moved the Commission for independent examinations by psychiatric and fibromyalgia specialists. The defendant objected at every step. After Ms. Allen had trouble finding a rheumatologist, Commissioner Scott ultimately ordered payment for examinations by a psychiatrist and a general practitioner familiar with fibromylagia. The reports from those doctors were entered into evidence without depositions, and the Commission found in favor of the employee. The dfendant's numerous objections were never addressed.

The Court of Appeals held that while the rules of evidence are not technically applicable to Commission proceedings, due process required that the defendants at least be allowed to cross-examine the physicians, when new evidence is allowed that provides the basis for the Commission's decision. The Commission was held to have abused its discretion, and the case was remanded.

16. Life care plans and medical benefits, including attendant care.

Timmons v. N.C. Dept. of Transportation, 351 N.C. 177, 522 S.E.2d 62 (1999). (Also 132 N.C. App. 377, 511 S.E.2d 659 (1999) and 130 N.C. App. 745, 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.

On discretionary review, the Supreme Court reversed, holding that there was evidence to support the Commission's decision that, at least in this case, a life care plan was a necessary medical expense. The Court cited evidence that there were gaps in treatment, implying that the life care plan might be useful in arranging needed care. The Court stated that preparation of a life care plan is not necessary in all cases, so the decision may be fact-specific. It is at least uncertain that payment for a life care plan by defendants would be supported, if the purpose of the plan was to persuade the defendants of the value of the case or to aid in proving the case to the Commission.

London v. Snak Time Catering, Inc., __ N.C. App. __, 525 S.E.2d 203 (2000).

Mr. London was injured in a car wreck while working for his own company. He suffered a severe brain injury, and his claim was accepted. A claim was brought for attendant care, and the Commission ordered the defendants to pay the employee's wife $6.00 per hour, eight hours per day, plus to pay for outside attendants, when the wife needed relief. The defendants appealed, on grounds that there was insufficient evidence of the need for care at the level ordered and that the wife's care was not of the sort that should be paid for by the defendants. The Court of Appeals affirmed in an unpublished opinion that was later published.

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17. Jurisdiction

Perkins v. Arkansas Trucking Services, Inc., 134 N.C. App. 490, 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, as provided by N.C.G.S. § 97-36. 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.

The Supreme Court granted the defendant's motion for discretionary review, the modified and affirmed. Perkins v. Arkansas Trucking Services, Inc., __ N.C. __; __ S.E.2d __ (1999). The Court of Appeals had applied the incorrect standard to its review, having used the usual test of whether there was evidence to support the Commission's decision, when jurisdictional issues are to be decided independently by the appellate courts. However, the Supreme Court then reached the same conclusions as the Commission, on essentially the same reasoning. There was some mention that other states did not have the same degree of "significant contacts" as North Carolina did, which might imply that the Court would apply a comparison test. But the mention did not appear to be crucial to the decision, and we can hope that the Court would allow the possibility of multiple available jurisdictions.

18. Aggravation of Pre-existing Condition

Smith v. Champion International, 134 N.C. App. 180; 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.