WORKERS' COMPENSATION
CASE LAW UPDATE: OCTOBER, 2000

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Standard for Commission reversal of Deputies' decisions

Deese v. Champion International Corp., __ N.C. __, __ S.E.2d __ (2000).

Mr. Deese was observed and videotaped doing things at his brother's car dealership. A Form 24 Application to Stop Payment was approved, when the employee did not respond to it. The Employee filed for a hearing, and the Deputy Commissioner denied further compensation, finding that the videotape proved the employee not to be credible and that the employee had regained his earning capacity. The Full Commission reversed, finding no evidence that Mr. Deese was earning wages and making specific findings as to why the credibility decision was reversed.

The Court of Appeals reversed, citing Sanders v. Broyhill Furniture. On discretionary review, the Supreme Court reversed and remanded, citing Adams v. AVX Corp., in which the Supreme Court had explicitly overruled Sanders and those cases following it, and instructing the Court of Appeals to review only as to whether the evidence supported the findings of fact and whether there were legal errors. On remand, the Court of Appeals reached the same conclusion as it had the first time, holding that the Full Commission's findings explaining its reversal of the Deputy's credibility decision indicated that certain facts had been inaccurately perceived and that the Commission had applied an inaccurate legal standard to the question of whether the videotape proved that the employee was not disabled.

On the second petition for discretionary review, the Supreme Court again reversed the Court of Appeals, emphasizing again the role of the Full Commission as the ultimate authority on factual determinations. The Supreme Court held that the Court of Appeals had incorrectly focused on the rationale expressed by the Full Commission for its credibility decision, noting that the Commission was not required to give an explanation and had done so only because the Sanders case was still in effect at the time the opinion and award was drafted. The Supreme Court stated that there was evidence to support the findings. As to the legal standard applied to disability, the Supreme Court rejected the argument that the Commission had equated lack of evidence of wages at pre-injury level with total disability. The Court noted that another finding of fact stated total inability to earn wages.

As with other Supreme Court cases, the Commission's order of resumed compensation for temporary total disability on an indefinite basis was not subjected to any restrictions based on maximum medical improvement.

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)

Demery v. Converse, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Demery suffered injury after a couple of specific traumatic incidents. After two lumbar disc surgeries, Dr. Rice found that he had reached maximum medical improvement, rated him with 20% permanent partial impairment to his back, and placed him on permanent restrictions requiring frequent changes of position, limited bending and stooping, and no lifting over 25 pounds. The employee did not return to work. The claim was denied, apparently on grounds that the employee's problems were caused by his pre-existing condition and that the specific traumatic incidents caused only temporary, non-disabling exacerbations.

The deputy commissioner found compensability, awarded compensation for temporary total disability only through a time shortly before the date of MMI, and then awarded compensation for permanent partial disability based on the rating, for an additional 60 weeks of compensation. The Full Commission modified the award by granting compensation for temporary total disability indefinitely.

The Court of Appeals, in an unpublished opinion, reversed and remanded, for failure of the Commission to make findings as to causation, while acknowledging that there was evidence to support such a finding, and for the Commission to correct its error of awarding compensation for temporary total disability after MMI. The Full Commission generated another Opinion and Award, making the necessary findings as to causation and deciding that Mr. Demery was permanently and totally disabled.

On this, the second appeal, the Court of Appeals affirmed the Commission's decision as to causation, noting evidence sufficient to support such a finding, despite some potentially equivocal testimony by the doctor. However, the Court of Appeals again reversed and remanded on the issue of the duration of total disability, holding that temporary total disability can only continue until the time of MMI, which the Court equated with the end of the healing period, that any disability after MMI must be permanent, and that the plaintiff must present evidence of permanent total disability. This requires showing that the employee is totally unable to earn wages. The Court stated that the medical evidence showed restrictions, but there was no medical testimony that the employee could not work at all and the plaintiff did not present other evidence. The Court did not address whether physicians are qualified to testify as to vocational factors other than medical condition, or even whether those factors matter in determining disability after MMI. Further, the holding in the prior, unpublished, Court of Appeals opinion that the employee was not entitled to compensation for temporary total disability after MMI was the law of the case, because an appellate court had spoken on the question. Therefore, the Commission was not permitted to find permanent total disability on remand and the Academy of Trial Lawyers' position, stated in its amicus brief, that temporary total disability compensation could be awarded after MMI, was explicitly not addressed. This is a bit confusing, since it appears that the Court had already held that TTD could not be awarded after MMI earlier in its opinion. With the additional discussion of the law of the case, it is not clear whether that was an independent holding, or simply following the prior unpublished opinion, which cannot be given precedential

weight. The Court also mentioned that the plaintiff was not entitled to a presumption of on-going total disability, because there was no Form 21 Agreement, which might have been meant to imply that a presumption of total disability extending past MMI might have been given effect, if there had been a Form 21. The emphasis on the Form 21 is hard to square with prior cases in which a presumption of on-going total disability has arisen, when the injured worker proved an initial total disability at hearing, as Mr. Demery undoubtedly did. The effect of this case is unclear.

Royce v. Rushco Food Stores, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Royce suffered three compensable injuries to her ankle, which resulted in ulcers. All occurred while working for the same employer, but the first one occurred while one carrier was on the risk, and the other two while another was on the risk. Subsequently, her ankle ulcerated again, without a new injury. The doctor testified that all three injuries contributed to the new ulceration and that apportionment was impossible. An opinion rendered by the second carrier's chosen doctor, on a review of the records, that only the first injury was related, was given less weight by the Commission and rejected.

The deputy commissioner concluded that the carriers were jointly and severally liable and that Ms. Royce was entitled to compensation for a few months, until the time a doctor's note indicated that she had reached maximum medical improvement. Both parties appealed. The Full Commission essentially affirmed. On the most important issue, the Commission followed the extremely recent Court of Appeals decisions in Brice v. Sheraton Inn and Demery v. Converse, Inc. in concluding that even when an injured worker has established total disability before MMI, the presumption of continuing disability lasts only until MMI, after which the worker must prove permanent disability. The Commission found that while the employee was restricted to a seated job in which she could keep her leg elevated most of the time and the employer had not offered her suitable employment, Ms. Royce had made no effort to find employment after MMI, and she had not proved that seeking employment would be futile. Thus, she had failed to prove disability after MMI. The Court of Appeals affirmed, adding that there was no medical or vocational evidence presented to show futility. The Court of Appeals also held that the presumption of disability arising from the Form 21 Agreements ended when Ms. Royce returned to work at her pre-injury wage, prior to the onset of her additional problems.

On another issue, after the deputy commissioner's decision, the first carrier had settled for $3500. The second carrier claimed a credit for that amount. The Commission denied the credit, and the Court of Appeals affirmed, noting that even if it assumed that the payment had been made by the employer, an idea which the Court viewed skeptically, it was due and payable when made under N.C.G.S. § 97-42, since there had already been an order of the deputy commissioner, and there was no other authority for a credit.

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. Disability, including presumption of on-going.

Dancy v. Abbott Laboratories, __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Dancy suffered bilateral carpal tunnel syndrome, which was accepted as compensable. There is some medical complication that is not important to the holding in the case. A Form 21 was initially filed, which called for compensation to be paid indefinitely. In the process of attempting to return to work, the parties entered into a Form 26 that provided for compensation for temporary partial disability for two week. The Commission awarded benefits for total disability for fibromyalgia, psychological problems and reflex sympathetic dystrophy, after the time of the Form 26. In the process, it placed the burden on the defendants to rebut the presumption of continuing total disability established by the Form 21.

The court of Appeals reversed and remanded, holding that the Form 26 Agreement had superceded the Form 21, so as to create a presumption of partial disability, which the injured worker was required to rebut in order to obtain compensation for total disability. Judge Greene dissented, noting that the Form 26, because it was for a defined duration of two weeks, created a presumption for only that time, after which the presumption of total disability created by the Form 21, which was for an indefinite duration, resumed.

Saunders v. Edenton Ob/Gyn Center, __ N.C. __, __ S.E.2d __ (2000).

Ms. Saunders suffered a compensable back injury. A Form 21 was executed for a defined period of four weeks of temporary total disability. Thereafter, the parties entered into a Form 26 Agreement for compensation for temporary partial disability, for necessary weeks at varying rates. By a couple of months later, Ms. Saunders was apparently working full time. In the months that followed, she was found by her doctor to have reached maximum medical improvement, was rated at 3% of the back, then resigned from her job due to pain. She tried a couple of other jobs, which only lasted a short time each and did not pay her very much. She then filed a Form 33, seeking compensation for total disability since her departure from the employer.

The deputy commissioner found that there was a presumption of disability that the defendants had rebutted, by showing that offered employment was suitable and Ms. Saunders had quit for reasons not related to her injury. Further, the subsequent jobs demonstrated wage earning capacity. The deputy commissioner awarded nine weeks of compensation for permanent partial disability. The Full Commission decided the other way, that the Form 21 established a presumption of continuing total disability and that the defendants had presented no evidence to rebut the presumption. Ms. Saunders was awarded compensation for temporary total disability until she returns to work, with adjustments for the times she worked at the subsequent jobs. The Court of Appeals affirmed, with a dissent.

The Supreme Court reversed, holding that the Form 26 had created a new presumption, of partial disability, that both parties would have to rebut in order to establish something else. The Court stated that it was unnecessary to decide whether the time limitation in the Form 21 had any effect or not, because the Form 26 explicitly superceded it. The case was remanded. It is worth noting that while the Supreme Court mentioned that the injured worker had reached maximum medical improvement, that concept was not mentioned at all in the holding, which may imply that MMI has no effect on on-going temporary total disability. The Commission was left free to decide again that Ms. Saunders was entitled to indefinite compensation for total disability.

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 reversed and remanded to the Commission. The Court noted that the defendant had not petitioned for discretionary review as to the issues of whether the Commission had properly found a change of condition and that the machinist jobs Mr. Lanning tried before the change of condition were not available in the open job market, so affirmance on those issues by the Court of Appeals was not disturbed. However, on the issue of the nature of the disability after starting the multi-level marketing activity, the Supreme Court found that the Commission had failed to generate findings of fact as to whether the income from the self-employment constituted wages. In so doing, the test was announced that self-employed workers have earning capacity when (1) they are "actively involved in the day-to-day operation of the business" and (2) they "utilize skills which would enable them to be employable in the competitive market, notwithstanding the employee's physical limitations, age, education and experience." The Court implied that the key question in Mr. Lanning's case would be whether he would be hired in the competitive market place to do what he was doing in his self-employment. Reversal of the Court of Appeals decision was required, because that Court had decided that the employee's management skills would be marketable in the labor market, which is a finding of fact reserved for the Commission. The Supreme Court also held that the Commission had erred in trying to craft a "hybrid" compensation scheme of total disability (which is not affected by the 300 week limit in N.C.G.S. § 97-30) reduced by amounts earned in the self-employment. The Commission must either determine that the injured worker is totally disabled or partially disabled and cannot blend the two. An

interesting implication is that an employee could be found to be totally disabled, despite making more money in self-employment than he had earned while working for the employer, as long as what he was doing was not marketable.

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.

Olivares-Juarez v. Showell Farms, __ N.C. App. __, __ S.E.2d __ (2000).

The injured worker was an undocumented alien who got his job by using fraudulent papers that actually belonged to his brother. After he suffered a clearly compensable injury to his arm, the employer started paying without prejudice, filing a Form 63 notice to the brother. A Form 18 was filed under the brother's name, and the parties attempted to file a Form 21 Agreement, again using the brother's name. The Commission refused to approve it, because the name of the employee on the Agreement was admittedly "fictitious."

After surgery, the employee was released to return to one-handed work proposed by the employer. The employer then withdrew the offer, ostensibly due to the injured worker's immigration status. Shortly thereafter, but more than 90 days after the injury and beginning payments (a point not mentioned in the opinion), Liberty Mutual stopped compensation payments. The Court did not mention whether a Form 24 was filed. About a month later, the employee was released to light duty work and was apparently expected to return to full duty in about three months.

The Deputy Commissioner decided that the employee's disability after the release to one-handed work was caused by his illegal immigration status and limited additional compensation to that for permanent partial disability. The Full Commission reversed, concluding that the offered employment did not prove ability to return to work at pre-injury wages. The Court of Appeals reversed, holding that the Commission's conclusion that the employee was unable to earn his pre-injury wage was not supported by findings of fact. The Court noted that there was no presumption of disability, because the Form 21 was not approved, and the Commission did not make a finding that the employee had carried his initial burden of proving disability. This may be a merely technical decision, as the Court did not say that there was no evidence to prove disability, only that there was no finding of fact. Thus, the Commission could simply make the finding and reach the same conclusion. There were some interesting unspoken points, though. For example, the Court did not discuss whether payment without prejudice for 90 days established the presumption, or whether the payment without prejudice was rendered ineffective by the employee's fraud, or whether there was a lack of jurisdiction due to failure of the employment relationship for fraud, or whether the Deputy Commissioner was correct that illegal immigration status is a superceding cause of disability.

4. "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.

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.

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

Bruno v. Concept Fabrics, Inc., __ N.C. App. __, __ S.E.2d __ (2000),

The injured worker was being treated for anxiety and depression associated with marital problems. She arrived at work after having taken medication that came with warnings against using machinery. She asked her supervisor to allow her to do alternative work sweeping. He refused, telling her that she had to either operate the picker machine or go home. The employer's drug policy prohibited employee's from working while using the drugs Ms. Bruno had used. Ms. Bruno felt that she had to work, so she went to the picker. Shortly thereafter, she lost her arm.

Ms. Bruno sued the employer under Woodson and the supervisor under Pleasants. The trial court granted summary judgment against the plaintiff on both claims. The Court of Appeals affirmed, citing a bunch of now familiar cases. The Woodson claim was rejected, because there had been no injuries in 11 years of operation of the picker, OSHA inspections had been passed and there was no evidence of failure to take necessary steps or follow industry standards to prevent injury. While the violation of the substance abuse

policy was mentioned prior to the holding language, there is no reference to the drug use factor in the reasons given for holding that the Woodson standard was not met. Lack of prior injury to employees who were not drugged and passage of OSHA inspections have nothing to do with the important point in the case, which is that the employee was sent to operate a potentially dangerous machine while under the influence of drugs that rendered operation dangerous in that specific instance. The Court adhered to restrictive language from prior cases that did not allow for addressing the important issue ion the case. The case is consistent with the continuing trend toward severe limitation of Woodson claims.

The Pleasants claim was rejected by comparing the behavior of the supervisor to that of defendants in other cases. There was also reference to the concept of "contributory conduct." The Court noted that the plaintiff was aware of her condition and had the option going home, instead of working. Thus, if the supervisor was "negligent" in allowing the plaintiff to operate the picker, then she was equally "negligent" in doing so. The Court held that Ms. Bruno's claim was "barred because of her contributory negligence as a matter of law." There was no recognition of the fact that the claim was not one of negligence, or that the result required a decision that Ms. Bruno was exhibiting the same willful disregard for her own safety that the supervisor was exhibiting. That would be hard to do, when the evidence shows that the plaintiff asked not to be forced to operate the picker, and the supervisor made her do it, anyway. Again, this case indicates a negative view in the appellate courts regarding claims for workplace injury, beyond the exclusive remedy of workers' compensation.

Plaintiff's counsel plans on filing a petition for discretionary review.

Groves v. The Travelers Insurance Company, et al., __ N.C> App. __, __ S.E.2d __ (2000).

This is a case in the General Courts of Justice, based on alleged fraud and other misconduct in the litigation and claims handling process. Mr. Groves suffered rotator cuff damage. Dr. Sypher, the treating physician, initially opined that the injury was likely related to employment. The claim for compensation was denied. The defendants then submitted a videotape to Dr. Sypher that purported to show Mr. Groves' job. The videotape allegedly omitted the parts of the job that caused the injury. Based on the tape, Dr. Sypher reversed his opinion on causation. After hearing, but before decision, the parties settled.

Mr. Groves sued the carrier, the adjuster, the employer, and the employer's manager, who supervised production of the tape. The facts and alleged causes of action were essentially identical to those in Johnson v. First Union Corp.. The trial court dismissed. The Court of Appeals followed Johnson in affirming dismissal of claims for fraud, bad faith, unfair and deceptive trade practices, and civil conspiracy. However, the majority of the Court reversed as to the claim for intentional infliction of emotional distress, holding that Mr. Groves had made sufficient pleadings as to that cause of action, but noting that the standard of proof was high. Judge McGee dissented, opining that the intentional infliction claim should have been dismissed, as well.

This case has been appealed to the Supreme Court. The author has information about the facts of the case that are not mentioned in the opinion, because this was the author's case. Interestingly, no mention was made in the opinion that provision of the videotape to Dr. Sypher was *ex parte* or that he testified that he felt that he had been tricked by the adjuster. Settlement of the workers' compensation case was for essentially full value.

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.

Reece v. Forga, __ N.C. App. __, __ S.E.2d __ (2000).

The employee sued his employer for negligence in Superior Court, alleging an injury arising out of and in the course of employment. The trial Court dismissed, pursuant to Rule 12(b)(6), for failure to state a claim, on grounds of lack of subject matter jurisdiction, due to the exclusive remedy of workers' compensation. The Court of Appeals affirmed, holding that the dismissal was proper, even though the defendants failed to raise the exclusive remedy issue and the judge acted *sua sponte*, because the exclusive remedy is jurisdictional and cannot be waived. The Court also noted that while there are some things that can prevent the application of the exclusive remedy bar, including failure to secure workers' compensation insurance, there were no allegations in the complaint of any such fact.

6. 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.

7. 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).

8. 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.

9. Third party lien related issues

Levasseur v. Lowery, __ N.C. App. __, __ S.E.2d __ (2000).

This is the "double whammy" lien case that some of us had been waiting for. Mr. Levasseur was severely injured in a car wreck. The negligent third party had minimum limits of $25,000 in liability coverage, and there was $1,000,000 in UIM coverage. The workers' compensation lien was about $190,000, and there was apparently more compensation coming. An arbitrator awarded $625,000 for the third party claim, while under a stipulation that the arbitrator was not to consider the lien issue. After the arbitration award, the UIM carrier refused to pay, claiming that no proceeds were payable until the workers' compensation claim was "closed." The plaintiff moved for judgment on the arbitration award and to extinguish the workers' compensation lien. Prior to hearing on that motion, the plaintiff and UIM carrier settled for a net payment to plaintiff of $450,000, apparently agreeing that the lien was about $6000 less than the amount stated on the Form 28B. The trial judge extinguished the lien, stating that the lien did not attach to the proceeds of the settlement and, in the alternative, that the lien was reduced to zero in the discretion of the judge, if there was later determined to be a lien.

The Court of Appeals reversed in part and remanded, holding that there is a lien in such circumstances against the remaining UIM benefits after credit has been taken. While the trial judge had discretion to reduce or extinguish the lien under N.C.G.S. § 97-10.2(j), he had failed to document sufficient findings of fact and conclusions of law. The

Court noted that the UIM carrier had not reduced its liability by operation of its policy provisions or the law. Instead, the plaintiff and the UIM carrier had reduced the UIM proceeds by settlement, and the plaintiff was not allowed to contend that the lien was extinguished by that settlement. On the other hand, the Court held that the award of one-third as a contingency fee was not an abuse of discretion and that disbursement of the tortfeasor's liability coverage by the Industrial Commission, apparently pursuant to an agreement, did not prevent the later use of § 97-10.2(j) to allow a judge to make the decision as to the rest of the settlement proceeds.

Judge Greene dissented in part, opining that prior case law did not require that a lien be given effect after reduction of UIM proceeds and that such a result would deny the injured worker full recovery. There are several footnotes to the dissent, which point out, among other things, (1) that the majority's result would require an injured worker to forego his workers' compensation benefits in order to avoid having his overall recovery for an injury severely reduced, (2) that the finding that UIM carrier had already received credit was sufficient by itself to justify the elimination of the lien under § 97-10.2(j), and (3) that the plaintiff did not waive his right to argue that the UIM recovery had been reduced by the lien, when the settlement with the UIM carrier reflected the unequivocal law at the time, which allowed the UIM carrier full credit. Judge Greene also mentioned the recent statutory changes that eliminated the potential for a "double whammy."

In re: Biddix and Wal-Mart, Inc., --N.C. App. __, __ S.E.2d __ (2000).

Ms. Biddix was injured in a car wreck, for which the other driver was liable in negligence. She suffered a broken femur (which required surgical insertion of a metal rod), a broken wrist, and emotional trauma. The employer paid $16,844.03 in medical bills and $1874.40 in TTD compensation. There were additional benefits outstanding. The third party claim was settled for policy limits of $25,000. The Superior Court made findings and conclusions concerning the insufficiency of funds to pay the third party claim and extinguished the employer's lien.

The employer appealed, claiming constitutional problems and abuse of discretion. The Court of Appeals rejected both arguments, pointing out that sufficient findings and conclusions were made to support the discretionary decision.

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

Norris v. Drexel Heritage Furnishings, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Norris suffered from fibromyalgia that several doctors testified was caused or exacerbated by her work. The Commission denied the claim, and the Court of Appeals affirmed, due to lack of evidence that her employment placed her at an increased risk of developing that disorder, as compared to the general public not so employed. This case serves to emphasize the importance of asking the "increased risk" question, though the opinion implies that the doctors may have been asked the question and just did not give the answer Ms. Norris needed to prove her case.

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.

Peagler v. Tyson Foods, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

The injured worker had pre-existing disc disease in his neck when he whacked a lock on a truck door and felt pain in his arm, then his shoulder and chest. Mr. Peagler was illiterate and had dropped out of school after third grade. He initially thought that he might have had a heart attack and did not report his injury as having happened at work. The Commission found for the plaintiff on all issues, including causation of the injury, notice, credit for disability payments made during the pendency of the claim, and attorney's fees. The Court of Appeals affirmed as to all issues, except the credit, as to which it found all evidence to indicate that the employer had funded the disability benefits and was entitled to a credit.

The case contains a good discussion of the standard for medical causation testimony and notice. The treating orthopedist had been a bit squishy, particularly on cross examination, on the causation issue, stating that while the reported episode could have caused Mr. Peagler's problems, he could not be sure, to a reasonable degree of medical certainty, that it caused the ruptured disc. The Court was willing to allow the Commission to consider law evidence, such as the reported temporal relationship between the episode and the onset of pain, in deciding the causation issue. On the notice issue, the

Court held that the Commission correctly decided that Mr. Peagler had an excuse for not giving notice, in that he was poorly educated, did not understand the cause of his problems and relied on his wife to give notice, and that there had been no prejudice to the employer.

As an aside, the Court affirmed the Commission's finding of total disability, despite a release to sedentary work, based on consideration of the employee's other vocational factors, in addition to his injury.

Friday v. Carolina Steel Corp., __ N.C. App. __, __ S.E.2d __(2000).

Mr. Friday was killed in an admittedly compensable accident. At the time of death, he left a 17-year old daughter and a widow who was disabled by blindness. There was no dispute as to the widow's entitlement to compensation beyond the 400-week limit, pursuant to N.C.G.S. § 97-38. Several years after settlement of the claim, which provided for payments of half of each weekly payment to each of the widow and the daughter, the widow filed for a hearing with the Commission, contending that the daughter should have been rendered ineligible for benefits upon her 18th birthday, so that the benefit should be re-apportioned, so that the full weekly benefit would be paid to the widow. She also claimed that the insurance adjuster had told her that she did not need a lawyer, so that the settlement had been entered into as a result of fraud, misrepresentation or mutual mistake.

The Commission rejected Ms. Friday's contention. The Court of Appeals affirmed, holding that entitlement to compensation is fixed at the time of death. Language from the case of Deese v. Southern Lawn and Tree Expert Co. about re-apportioning in the event of a decrease in the beneficiary pool was found inapplicable, as there was no decrease in the pool in this case. The daughter remained eligible until the full 400 weeks had been paid.

Hunter v. Perquimans County Board of Education, __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Hunter suffered an admittedly compensable back injury and was paid compensation. After payment for a rating, she experienced a change of condition and received compensation for an additional 10% of the back. The payment was made in a lump sum on March 3, 1994. The lump sum application was approved by the Commission on April 20, 1994. No Form 28B was filed or sent to the plaintiff. Ms. Hunter's condition continued to deteriorate, and she received a medical opinion of resumed total disability on March 21, 1996. She filed her claim for additional benefits for change of condition on April 3, 1996.

Deputy Commissioner Cramer found that Ms. Hunter was totally disabled, that she had not earned any significant wages since 1994, and that the claim was timely filed. It is not clear from the opinion as to whether the timely filing was found due to beginning of the two-year window on the date of approval of the lump sum application or due to estoppel for failure to file the Form 28B. The Full Commission reversed, concluding that failure by the defendant to file the Form 28B within 16 days as required by statute did not

estop the defendant from asserting the defense of late filing and that the time ran from the payment, not approval of the lump sum application.

The Court of Appeals affirmed, holding that the statutory language requiring filing of the claim within two years of payment did not allow for variation based on approval of the lump sum application or failure of the defendant to file a Form28B. The Court acknowledged the statutory requirement of filing the Form 28B, but held that the only impact of failure was the $25 fine levied by the Full Commission. The Court also acknowledged the holding in Sides v. Electric Co., 12 N.C. App. 312, 183 S.E.2d 309 (1971) that failure to file the Form 28B estops the defendant, but stated that the basis of that decision in the Supreme Court case of White v. Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964) had been overruled by the subsequent decision of Willis V, Davis Industries, 280 N.C> 709, 186 S.E.2d 913 (1972).

The Court dismissed the filing as nothing more than a reminder that payment had been made, not a legally significant notification, and cited the relatively low amount of the fine as an indication that the failure to file should not be accorded significance. Practitioners may wish to note that the $25 penalty is for failure to file the Form 28B within 16 days of payment and does not address failure to file one at all. It may be worthwhile to challenge this decision, should it be necessary to do so (though timely filing is certainly safer). It is also possible that a more substantive act subsequent to payment, such as a Commission decision as to whether payment during a particular period of time was for total or partial disability, may have a greater effect on the beginning date of the two-year window than the mere approval of a lump sum application.

Pearson v. C.P. Buckner Steel Erection, __ N.C. App. __, __ S.E.2d __ (2000).

This case involves attorney's fees connected to a previously reported case. A medical provider accepted Medicaid payments during the pendency of a claim. The plaintiff ultimately won. The workers' compensation carrier took the position that is was liable for medical bills only to the extent of reimbursing Medicaid. The medical provider made a claim as an intervenor for the difference between the Medicaid payments and the amounts payable under the Commission fee schedule. The intervenor was represented by a prominent plaintiff's worker's compensation lawyer (Jim Lore).

The intervenor ultimately prevailed, after a trip to the Supreme Court. That Court ordered $500 in attorney's fees. The procedural posture then gets confusing. The intervenor filed a petition for additional fees, and Commissioner Bolch ordered $10,000. By the time the smoke cleared, it was determined that that order had been properly appealed to the Full Commission, which reversed the order of attorney's fees. The order reversing was signed by only two Commissioners, because Commissioner Scott, who had sat on the panel that heard the matter, had become ill. The Court of Appeals held that all the procedural matters were handled correctly, then affirmed the decision of the Full Commissioner, noting that fees paid under N.C.G.S. § 97-88 can only be made on behalf of an injured employee, so that no award could be made on behalf of an intervenor medical provider.

Lewis v. N.C. Dept. of Corrections, __ N.C. App. __, __ S.E.2d __ (2000).

The injured worker suffered post traumatic stress disorder that was found to be compensable, after a hearing. The defendant filed an appeal to the Full Commission, then withdrew it. Later, the defendant refused to pay for treatment of exacerbated diabetes. After hearing and submission of the employee to an updated medical examination, the deputy commissioner in the second proceeding decided that the issue of the compensability of the diabetes treatment had been decided by the previous deputy and was, therefore, *res judicata*, since the defendant had offered no evidence of a change of condition for the better. The Full Commission affirmed, also citing *res judicata*.

The Court of Appeals reversed, holding that the concept of *res judicata* did not apply and that the Commission did not have the option of not reviewing the evidence to determine if the diabetes was related to the compensable injury. The Commission was ordered to conduct a hearing and make a full decision on the issue. The opinion is not clear as to whether the first deputy had actually made a decision as to the exacerbation of the diabetes in question. If he or she did, then it is not clear whether the Court meant to imply that any unappealed decision of a deputy commissioner could be collaterally attacked later through a hearing before another deputy. It could be that the Court would have accepted the Commission's decision if it had perceived that the Commission had reviewed the evidence before deciding that the issue had already been decided.

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.

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.

17. Average weekly wage.

Bond v. Foster Masonry, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Bond injured his shoulder while working for the employer as a brick mason. His claim was denied. Several months after his injury, with significant permanent restrictions, Mr. Bond returned to work for another employer, driving cars around. His wages there were significantly less than his pre-injury wage.

The Commission found compensability, calculated the average weekly wage by using the second method from N.C.G.S.§ 97-2(5), and ordered payment of compensation for temporary total disability, followed by compensation for partial disability based on wage loss for the remaining portion of the 300 weeks dictated by N.C.G.S. § 97-30. The employee had worked for the employer for moiré than a year, but there were mathematically significant periods of missed work, due to the effects of demand and weather. The Commission divided the amount earned during the year prior to injury by the number of days left after deduction of periods of missed work in excess of seven days to yield an average daily wage, then multiplied by seven to get a weekly wage. The Court of Appeals affirmed the decision to use the second method, rejecting the defendant's contention that the employment was seasonal or sporadic, so that fairness would dictate dividing the wages by 52 weeks to reflect "both peak and slack periods." However, the Court remanded for recalculation, holding that the law makes no provision for a daily rate to be multiplied by seven, and that the Commission should instead have calculated a number of weeks by which to divide the wages. (It is not clear whether that would make any difference mathematically) The Court also rejected the defendant's contention that the compensation for partial disability should be reduced on account of the alleged ability of the employee to earn more in substitute employment. Mr. Bond had produced evidence of substitute employment to satisfy the fourth prong of the test from Russell v. Lowes Product Distribution, and the defendant had produced nothing. Interestingly, both the deputy commissioner and the Full Commission calculated a specific average weekly post-injury wage, instead of allowing for future variation in the compensation due.

18. Coverage.

Harrison v. Tobacco Transport, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Harrison suffered severe injuries in a clearly compensable accident. His employer was based in Kentucky, and the insurance carrier denied coverage. The relevant policy provided that if the employer started working in a state not noted in the list of other states in the policy after the effective date of the policy, coverage would be extended. However, if the employer was working in a state on the effective date and did not list it, coverage would not apply to injuries in that state. The Commission and the Court of Appeals gave full effect to that provision, so that coverage was held not to apply. The Court of Appeals also affirmed the penalty assessed by the Commission for failure to be insured and the award of attorney's fees for unreasonable defense. While litigation of the coverage issue was considered legitimate, the Commission decided that the employer

should be punished for refusal to pay compensation for six years while that issue was being addressed, since it was clear that compensation was due from some source.

19. Intervention by health insurance carriers.

Hansen v. Crystal Ford-Mercury, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Hansen suffered a knee injury that was denied on grounds of lack of accident. Blue Cross/Blue Shield (BC/BS) paid medical expenses, then filed a Form 33, seeking reimbursement of its costs. Deputy Commissioner Hoag ordered the defendants to answer requests for admissions. Shortly after the deadline for those, the injured worker and the defendants settled the case for $15,000, but with a provision that the defendants would pay no medical expenses, as an exception to Commission rules. The deputy commissioner refused to approve the clincher, stating that she could not, "in good conscience," approve a settlement that did not include reimbursement of BC/BS. The Full Commission reversed that order, approving the clincher as written and stating that it had no jurisdiction to hear BC/BS's attempted intervention.

The Court of Appeals reversed, noting that the question was one of first impression in North Carolina and cobbling together a rationale from various treatises and cases from other jurisdictions. The opinion is complicated and confusing, with the bottom line that the group health insurance carrier was a real party in interest over which the Commission had jurisdiction, so that the approval of the clincher was void, because BC/BS did not sign the clincher. Along the way, the Court said some interesting things, spending several paragraphs on an implication that settlements should not be particularly favored, because they tend to either over- or undercompensate injured workers. Therefore, the fact that intervention by group health insurance carriers might disrupt settlements between employees and employers in difficult case is not a major concern, as the results of hearings provide better justice than settlements do. The Court also expressed concern that BC/BS would be unable to recover what it paid in Superior Court. However, no mention was made of the North Carolina Department of Insurance regulation prohibiting recovery by health insurance carriers in certain cases or of the effect of ERISA in allowing such reimbursement in direct violation of the state regulation. The Court of Appeals did not direct the Commission as to what decision it should make with its exercise of jurisdiction, though if the clincher is void without BC/BS's signature, the Commission may be prohibited from approving it. Another interesting twist is that former Commissioner Randy Ward mentioned in the Lawyers' Weekly article following the decision that BC/BS may not have an ERISA-protected right of reimbursement, or even a contractual right of reimbursement in its policy.

20. 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.

21. 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.