WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2001

By Jay A. Gervasi, Jr.
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CONTENTS

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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.

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.

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.

Sims v. Charmes/Arby's Roast Beef, __ N.C. App. __, __ S.E.2d __ (2001).

Mr. Sims hurt hid back lifting on October 25, 1994. The employer paid compensation for temporary total disability and filed a Form 60, admitting liability. He was rated at 10% of the back on June 15, 1995. A Form 24 was approved on July 25, 1995, terminating compensation effective March 20, 1995, on grounds that Mr. Sims was working in self-employment. Mr. Sims had operated several businesses before and after his injury, and the evidence showed some increase in income from those after the injury. He entered a manger-trainee program with K-Mart on July 29, 1996. At hearing, the Deputy Commissioner decided that Mr. Sims was entitled to about a month of total disability compensation for a reinjury in November of 1995, plus 30 weeks of compensation for permanent partial disability of the back, but that no compensation was owed, because the defendant was entitled to credit for all of the compensation that had been paid between October 25, 1995 and July 25, 1995. The Full Commission, concluding that there was no presumption of total disability established by the payments made pursuant to the Form 60 and that Mr. Sims had failed to meet his burden of proving that total disability. Mr. Sims' motion to reconsider was denied. Mr. Sims then moved the Commission to rehear the case *en banc*. That motion was granted, and the case was heard by all members of the Full Commission. However, the Commission then declined to rule *en banc*, ordering that the time to appeal to the Court of Appeals was to run from the date of the order.

Both parties appealed, with the defendant contending that the Commission had no authority to hear cases *en banc*. The Court of Appeals agreed and held that the order of the Commission, including the *de facto* extension of time to appeal, was vacated. Thus, appeal was found not to be timely, and the merits were reached only because the Court elected to treat the appeal as a petition for writ of certiorari. The rest of the Commission's decision was affirmed. The Court held that payments with a Form 60, as with a Form 63 after the deadline to contest, did not establish a presumption of on-going total disability. The Court also held that the Commission did not err in finding that Mr. Sims had failed to meet his burden of proving total disability, in light of his earnings from other employment. The Court did not address directly the question of the impact of static wages from previous employment, holding that the increase in earnings from Mr. Sims' other enterprises was sufficient to allow the Commission to find and conclude that he had failed to prove disability. Finally, the Court held that the Commission did not err in using Mr. Sims' wages to determine his average weekly wage. At the time of his injury, Mr. Sims had apparently not worked for the employer very long and was in a management

trainee position. He was earning only $240 per week during his probationary period. The Court noted evidence that not all trainees were ultimately promoted to management positions, so the Commission properly decided that using wages from an employee who had been in his job for a year would require inappropriate speculation that Mr. Sims would have had similar wages. This is a bit confusing, since in every case in which an employee's wages are too erratic or limited to reveal an accurate average weekly wage, the Commission must assume that the wages would have become less erratic or limited when deciding to substitute the wages of another employee, as required by the Act.

Oliver v. Lane Company, Inc., __ N.C. App. __, __ S.E.2d – (2001).

Ms. Oliver worked as a jitterbug sander, which required continuous use of a vibrating hand sander. She developed bilateral carpal tunnel syndrome, had surgery, and was released to light duty shortly thereafter. The light duty job required a lot of use of the hands, and Ms. Oliver refused to take it. She then applied for at least 100 jobs and sought help from the Employment Security Commission and the Division of Vocational Rehabilitation, and made a failed attempt to return to work a few years later. The Deputy Commissioner originally denied the claim in its entirety. On appeal to the Full Commission, the case was found compensable and sent back to the Deputy for "determination of the date of maximum medical improvement and the permanent partial disability." The Deputy found maximum medical improvement about three months after the release to light duty and permanent partial disability f 10% to her right hand and 15% to her left. On appeal, the Full Commission decided that Ms. Oliver was entitled to on-going compensation for total disability.

The Court of Appeals affirmed, finding evidence to support the findings that the light duty job was not suitable and that Ms. Oliver had attempted to find work. The Commission had concluded that the defendants had failed to produce credible evidence that Ms. Oliver was capable of obtaining suitable employment, as well as that she had made a reasonable attempt to return to work. The defendant contended that the Commission had erred in placing the burden on it to prove the end of her disability. Interestingly, the Court did not address the purported significance of maximum medical improvement, instead citing Franklin v. Broyhill, 123 N.C. App. 200, 472 S.E.2d 382 (1996) for the proposition that the defendant has a burden of proving the end of disability, which can be met by showing that 1) suitable work exists, 2) the injured worker can get it, and 3) the job would pay some wages. In the absence of such a showing, disability continues until she returns to working for at least the pre-injury wage. Along the way, there was mention of the plaintiff's meeting her initial burden of proving disability through approval of a Form 21 Agreement, when it appears from the opinion that there was no Form 21.

Demery v. Perdue Farms, Inc., __ N.C. App. __, __ S.E.2d __ (2001).

Ms. Demery developed carpal tunnel syndrome that was admittedly compensable. She remained at work, with company doctors saying that her condition stabilized and improved with conservative treatment and modified work. They opined that she could

continue to work, though at least one expressed that he would expect her to have pain. Eventually, she went to her family doctor, who prescribed medication and gave her notes to stay out of her previous job. She stopped working, claiming that it hurt too much, and was threatened with termination. She went back, but was sent home for refusing to leave her medication at the front desk while she was working. The Commission awarded compensation for permanent, total disability, finding that Ms. Demery had reached maximum medical improvement about a year before she stopped working and that her pain from the carpal tunnel syndrome superimposed on fibromyalgia rendered her unable to earn wages, and noting that the company doctor had testified that he could not see how the employer could make her job any lighter and that if work caused so much pain, she could quit and pursue Social Security Disability.

The Court of Appeals reversed, holding that while the Commission found that Ms. Demery was unable to do her job, it did not specifically find that she was unable to do any job and that, in any event, there was no evidence to support such a finding. The Court stated with particular clarity the framework, in which the plaintiff has the initial burden of proving disability and can meet her initial burden of production by satisfying one of the prongs of the test from Russell v. Lowes Product Distribution, 108 N.C. App. 762, 425 S.E.2d 454 (1993), after which the defendant has the burden of producing evidence that suitable jobs exist which the employee can actually get, taking into account both physical and vocational factors. The burden of proof remains on the employee. It is important for the practitioner to note that Judge Greene, in a footnote, points out that the evidence was insufficient to satisfy the first prong of the Russell test, which permits proof by direct testimony that the employee cannot do any work, but that she might have been able to meet her burden of production, if she had presented evidence material to one of the other prongs. The implication is that while Judge Greene took a very restrictive approach to the evidence under the first prong, he may have been satisfied if presented with evidence that Ms. Demery had attempted, and failed, to find other work.

Judge Hudson dissented, opining that the majority had overstepped the Court's role in reviewing whether there was evidence to support the Commission's decision. She pointed out evidence that the employer had repeatedly reduced the requirements of Ms. Demery's job, despite the company doctor's opinions that her condition was improving, until the job had descended to a level that the Commission found to be "make-work." She considered evidence that Ms. Demery was incapable of doing even that, along with the other evidence of her physical limitations and pain, to constitute evidence of total disability. Judge Hudson then opined that the defendant had failed to meet its burden, pursuant to Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E.2d 746 (1997), of proving that the modified work it offered was real employment, available in the competitive job market, so that there was an absence of evidence to meet the defendant's burden of production as to the availability of suitable work.

Webb v. Power Circuit, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Webb claimed that he hurt his back lifting an extension cord at work. The claim was denied. He obtained medical treatment through the Division of Vocational

Rehabilitation. He was initially diagnosed with lumbar strain, but was later found to have a herniated disc at L4-5 and a protruding disc at L5-S1, which would not be helped by surgery. Mr. Webb complained of a lot of pain, which his doctor opined was consistent with his back condition. He had pre-existing depression that was well managed before the injury, but he said that the chronic pain from the injury had made it worse, which made the pain more difficult to manage. As of the time of hearing, he had not reached maximum medical improvement. The Deputy awarded compensation and attorney's fees. The Full Commission affirmed.

The Court of Appeals affirmed, holding that evaluation of disability requires evaluation of the plaintiff's pain, in addition to his physical limitations, that Mr. Webb had satisfied his initial burden of proving total disability with testimony from his doctor that he was unable to perform his previous physical activity, that the burden then shifted to the defendants to produce evidence that there were suitable jobs available that Mr. Webb was able to get, and that the defendants had failed to produce any such evidence.

The Court also held that there was no need for expert testimony to prove that Mr. Webb's depression had gotten worse so that he had increased difficulty managing his pain, and that his testimony to that effect would suffice, because the cases requiring expert testimony involve issues of cause. Finally, the Court held that the Commission had properly used a 40-hour week to calculate the average weekly wage, despite a Form 22 Wage Chart that showed fewer hours, because Mr. Webb had credibly testified that he always worked five eight-hour days each week, with some of the work's being done on loan to other, related employers.

Allen v. Roberts Electrical Contractors, __ N.C> App. __, __ S.E.2d __ (2001).

Mr. Allen fell and hurt his arm and back. He was paid compensation for about four months pursuant to an approved Form 21. At that point, he was released to light duty for six weeks, to be followed by full duty. He went to another doctor, on referral from his lawyer, who opined that Mr. Allen suffered a chronic pain syndrome and should be placed in a functional rehabilitation program. Light duty was offered and refused, after which a Form 24 was approved. Mr. Allen appealed the termination of compensation, and Deputy Commissioner Berger affirmed it, though he ordered the defendants pay for an inpatient pain management program of the defendants' choice. Mr. Allen They chose Cape Fear Valley Medical Center in Fayetteville, but Mr. Allen refused, because it was outpatient only. After a conference call with Deputy Commissioner Berger, the parties agreed to send Mr. Allen to the Spine Center at Bowman Gray, where Dr. Davis treated him for three weeks and pronounced him capable of medium work, with a 3% rating of the back. Mr. Allen showed up at one of the employer's job sites, without telling anyone who he was, and was told the employer was not hiring. He then went to about 12 other places in an eight-day period and failed to get jobs. He then went back to the doctor he had chosen, who diagnosed him with fibromyalgia and pronounced him totally disabled. from any work. Mr. Allen then moved to Maryland.

He filed for a second hearing, which was also held before Deputy Commissioner Berger, who sent Mr. Allen for an independent medical examination—with Dr. Sanitate. Dr. Sanitate opined that Mr. Allen did not have fibromyalgia and that his reports of pain were not reliable. In his second Opinion and Award, Deputy Commissioner Berger decided that Mr. Allen was exaggerating his symptoms, gave greater weight to the testimony of Drs. Jaufmann, Davis and Sanitate, and awarded compensation for the three weeks Mr. Allen was in Dr. Davis' program, plus nine weeks for permanent partial disability, while limiting future medical care to conservative treatment without addictive pain killers. The Full Commission affirmed.

The Court of Appeals affirmed, citing the power of the Commission to weigh testimony and the presence of testimony to support the decision. Along the way, the Court mentioned that the burden of proving total disability was on Mr. Allen because the decision on the Form 24, once affirmed and not appealed to the Full Commission, shifted the burden from that established by the Form 21 Agreement. The implication is that if Mr. Allen had appealed the approval of the Form 24 to the Full Commission, he would have enjoyed a presumption of on-going total disability. There was no mention in the opinion of the impact of maximum medical improvement. It appears that Mr. Allen argued that the finding that he was totally disabled for three weeks while in Dr. Davis' program should have re-established the presumption. The Court viewed the burden on the plaintiff as requiring proving disability at all times in issue at the hearing and found no evidence of total disability after Mr. Allen was released by Dr. Davis. The Court also affirmed the Commission's decision not to mention three lay witnesses, who were the sister and brothers of the plaintiff. Finally, the Court affirmed the Commission's discretionary decision not to reopen the record for additional evidence from Mr. Allen's Maryland doctor. The evidence was held to be cumulative and unlikely to change the result, despite the fact that the case turned on weighing evidence between doctors and the Deputy Commissioner's decision not to believe Mr. Allen's doctor._

Jenkins v. Easco Aluminum Corp., __ N.C. App. __, __ S.E>2d __ (2001).

Ms. Jenkins had her fingers crushed by an unguarded machine. She was paid compensation for about 11 months out of work, pursuant to a Form 21 Agreement. She then returned to work, at or above her pre-injury wage, inspecting parts. She was rated at 75% of each of four fingers. After a couple of years of inspecting, she was laid off in a general force reduction, because she was the junior person in the quality control department. She sought resumed compensation for temporary total disability and finger prostheses. The Deputy Commissioner decided in favor of Ms. Jenkins, and also awarded a 10% penalty for safety regulation violation. The Full Commission reversed, awarding only the prosthetic fingers.

The Court of Appeals reversed and remanded. The case turned on whether the job as an inspector was sufficient to rebut the presumption of on-going total disability, in a Saums/Peoples evaluation. The Court cited evidence that supported the Commission's decision that the defendants had satisfied their burden of proving that the job was actual

employment, available in the competitive market, but remanded to consider expert testimony to the contrary that was not addressed at all in the Commission's opinion and award. Similarly, the Commission was held to have erred by failing to address Ms. Jenkins' motions to submit newly discovered evidence or her objection to the defendants' submission of new evidence at the Full Commission hearing. The denial of the 10% penalty was also remanded, both because the Commission's findings did not support its conclusions and because the Full Commission "inexplicably" failed to mention testimony from a coworker that had provided much of the basis for the Deputy Commissioner's award of the penalty. Finally, the Commission was instructed to consider the disability ratings as appropriate on remand. Interestingly, there was no mention of maximum medical improvement or any effect it might have on Ms. Jenkins' entitlement to compensation for total disability.

Judge Greene dissented, but actually in favor of Ms. Jenkins, opining that remand was unnecessary, because there were no evidence and no findings that Ms. Jenkins was capable of obtaining employment in the competitive job market. He voted for outright reversal on that issue, though he concurred on the 10% penalty and permanent partial disability issues.

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.

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. Asbestos-specific issues

Clark v. ITT Grinnell Industrial Piping, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

This is an asbestos disease case that addresses numerous messy issues. Mr. Clark worked for the employer for about 26 years, starting in 1969. He was a pipe fitter who worked with asbestos gloves and around other asbestos containing materials, until 1974 or 1975, when the employer replaced the materials with non-asbestos materials. Until January 1, 1972, the employer was self-insured. Thereafter, it was insured by Liberty Mutual. The Deputy Commissioner apparently denied the claim, and the Full Commission reversed that, awarding 104 weeks of compensation for the diagnosis of asbestosis. On appeal, the defendants raised a number of defenses, which the Court addressed serially, affirming everything, but remanding for more findings on average weekly wage.

The first argument was that the facts were insufficient to prove the existence of asbestosis. While the evidence was not revealed in detail, it appears that there was a question as to whether Mr. Clark had scarring of interstitial tissue or only thickening of the pleura. There was no discussion of whether pleural plaques qualify separately as an occupational disease, but the implication was that while two doctors testified positively, the radiographic evidence was limited to pleura effects. The Court affirmed the Commission's finding of asbestosis.

Second, the defendants contended that there was no proof that Mr. Clark had been exposed to the hazards of asbestos, because there was no scientific evidence as to the presence of airborne fibers. The Court did not mention whether there was expert testimony about the certainty that fibers were present, relying instead on the testimony as to the presence of asbestos materials and x-ray evidence that Mr. Clark had been exposed. The Court noted that a requirement of scientific measurements would make proof of any occupational exposure case practically impossible.

Third, the defendants claimed that the examination and compensation scheme of N.C.G.S. §§ 97-61.1 through –61.7, including the payment of 104 weeks of compensation for a non-disabling diagnosis of asbestosis, applied only 1) when the employee was working in a pre-designated dusty trade and 2) when the employee had been removed from the exposing employment. The Court disagreed, holding that the requirement of dusty trade designation applied only to the screening procedures in § 97-60 and that removal from the employment is unnecessary, at least when the employee is already not working there.

Fourth, the defendants asserted that application of the 104 weeks of automatic compensation violated the equal protection clauses of the State and Federal Constitutions.

The Court cited Jones v. Weyerhauser Co., decided the same day, in rejecting the defendants' argument. The argument in this case was weaker than in Jones, because there was no contention of disparate economic impact, and the defendants relied on under-inclusion of workers injured by other substances.

Finally, the defendants assigned error to the calculation of the average weekly wage. The Commission had used the wages in the last full year of employment, while the defendants claimed that compensation should be based on the wages at the time of exposure. The Court noted that while N.C.G.S. § 97-61.5(b) links compensation to the wages before removal from the industry, it was silent as to how wages were to be calculated when the injured worker has already left employment, before his cause of action accrues. Thus, the method used by the Commission was actually under § 97-2(5), and the Commission had not made any findings as to whether they were using the first or fifth methods of determination. Thus the case was remanded for further findings on that issue.

Austin v. Continental General Tire, __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Austin worked for the employer for over 20 years, before retiring in 1987, for reasons unrelated to asbestos exposure. He worked around asbestos for most of that time, often creating or stirring up dust. In 1986, during a routine screening sponsored by his union, Mr. Austin was found to have pleural plaques consistent with asbestos exposure. Over time, his condition developed until some doctors, including Dr. Kelling of the Commission's Occupational Disease Panel, diagnosed him with asbestosis, with minimal fibrosis of the lung bases. Mr. Austin filed his Form 18 in 1989, but waited to file his Form 33 until 1995, after the diagnosis had firmed up. Deputy Commissioner Hoag decided in favor of Mr. Austin, awarding 104 weeks of compensation for a non-disabling diagnosis, but at the minimum compensation rate of $30 per week. The Full Commission heard the case *en banc* and affirmed, except for its decision that the average weekly wage was to be based on Mr. Austin's last year of work, which yielded the maximum compensation rate of $308 per week, for a 1987 injury.

The defendant raised a laundry list of purported errors that have shown up in other cases around this time. The Court of Appeals affirmed as to all issues, though Judge Greene dissented as to one issue. The Court held that there was evidence to support the Commission's finding that Mr. Austin had asbestosis, despite opinions to the contrary from the defendant's doctors, and that the Commission had properly exercised its authority to weigh the evidence. The Court rejected the defendant's contention that a finding of exposure to the hazards of asbestos required expert testimony on scientific information that there were hazardous levels of breathable dust in the air. The Court recognized that the defendant was arguing for a requirement of scientific measurements of exposure and pointed out that such a requirement would make proof of cases practically impossible, because no employee would make measurements, just in case he developed asbestosis at a later date. The defendant contended that Mr. Austin did not qualify for the 104 weeks of compensation, because he was not employed in a dusty trade and because he was not ordered to be removed from his employment. The Court rejected

both arguments, holding that the dusty trade requirement applied only to the screening procedures in N.C.G.S. § 97-60, and not to the several sections following it, and that the removal requirement only applied if the employee was working in an exposing job at the time of diagnosis. An equal protection argument was summarily rejected, on grounds that it had not been raised below. As to the average weekly wage, the Court found evidence to support the Commission's finding that the first four methods of computation in § 97-2(5) would not be fair to the parties, so that invocation of the fifth method was justified by exceptional circumstances in cases of retirees first diagnosed with asbestosis or silicosis after employment had ended. That method was found fair to defendants, because premiums had been paid based on that year's payroll, and the Court agreed. The difference from the decision in Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996) to use wages at the time of diagnosis was justified as being fair under the circumstances of that case, when the employee was working at the time of diagnosis.

There was no mention of the issue as to whether the Commission's *en banc* hearing of the case was authorized, which apparently was not raised. Please note that that procedure was held not to be authorized by statute in Sims v. Charmes/Arby's Roast Beef, __ N.C. App. __, __ S.E.2d __ (2001).

Judge Greene opined, in his dissent, that the provision for 104 weeks of compensation for a non-disabling diagnosis of asbestosis was applicable only when an injured worker was removed from employment. He considered the plain language of the statute to be clear and saw no need for compensation to encourage employees to leave employment, when they were already gone. Thus, retirees should be limited to compensation for disability or death.

Jones v. Weyerhauser Company, __ N.C. App. __, __ S.E.2d __ (2000).

There was no real issue as to whether Mr. Jones had compensable, but non-disabling, asbestosis. The defendant challenged the Commission's award on constitutional grounds, claiming an equal protection violation. The defendant argued that the unique provision of N.C.G.S. § 97-61.5(b) that provides for 104 weeks of compensation for asbestosis and silicosis, even in the absence of disability, is unfairly discriminatory against employers who expose their employees to asbestos and silica.

The Court of Appeals affirmed the award, holding first that the defendant was without standing to challenge the constitutionality of the statute, since the aggrieved group, if any, was the class of workers injured in cases other than those involving asbestosis or silicosis. The Court then went on to hold that no fundamental right was involved and that there was a rational relationship between the different treatment of asbestosis and silicosis claims and the need to address unusual characteristics of those diseases, such as their progressive nature and the latency between exposure and development of the disease.

Judge Greene concurred, opining that the defendant had standing, as one who bore the additional liability of paying compensation in claims that did not involve disability. However, he agreed with the majority as to the result on the merits.

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.

Deem v. Treadaway & Sons Painting & Walcovering, Inc., et al., __ N.C. App. __, __ S. E.2d __ (2001).

Mr. Deem suffered a compensable injury when he fell of a ladder. After about 16 months, he returned to work as a foreman. His condition worsened, and he left work again about 14 months after returning. Concentra was hired to provide vocational rehabilitation. Mr. Deem was released to return to work with restrictions, but the employer had filled his job. Therefore, he was returned to work as a laborer. He clinchered his case for $100,000 about 16 months after returning to work as a laborer. About 17 months later, Mr. Deem then sued over the handling of his claim. The trial court dismissed the case on grounds that the Industrial Commission has exclusive jurisdiction over such matters, pursuant to the second Court of Appeals decision in Johnson v. First Union Corp., 128 N.C. App. 450, 496 S.E.2d 1, reversed 131 N.C. App. 142, 504 S.E.2d 808 (1998).

The Court of Appeals affirmed. After holding that the Johnson case controlled, the Court went on to discuss some of the foundation for the principle asserted. In so doing, the Court emphasized the societal bargain represented by the Workers' Compensation Act, apparently clumping the rehabilitation personnel with the employer in evaluation of that bargain. The Court quoted Johnson as holding that the Industrial Commission has "exclusive jurisdiction over workers' compensation claims *and all related matters, including issues such as those raised in the case at bar.*" Interestingly, Mr. Deem's contention that his claims were based on intentional conduct was evaluated in light of Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) and rejected on grounds that the conduct was not "substantially certain to cause serious injury or death." The Court cited N.C.G.S. § 97-17 as giving the Commission "exclusive jurisdiction over worekers' compensation agreements and employee claims of fraud, misrepresentation, undue influence, mutual mistake, *intentional infliction of emotional distress, and unfair and deceptive trade practices* with respect to those agreements." The Court went a bit beyond Johnson by stating that Mr. Deem's sole remedy was to petition the Commission to set aside his clincher agreement. It is not clear how this would address claims against rehabilitation personnel.

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.

Johnson v. Trustees of Durham Technical Community College, __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Johnson was hired, under a series of short contracts, to teach literacy to inmates. She had significant pre-existing impairment from polio and was required to use crutches and a wheelchair. She had been determined to be partially disabled by the state of Georgia and totally disabled by the Federal Government. On June 8, 1994, she fell while opening a security door and fractured her spine. Thereafter, she had to use the wheelchair exclusively. She received compensation for temporary total disability and returned to work on January 2, 1995, under her fourth contract. In February of 1995, she fell in her bathtub at home and broke her leg. She was out of work for two weeks before returning with a cast on her leg. Administrators for the employer became concerned that Ms. Johnson would get hurt again and suggested that she work on campus, instead of at the jail, teaching disabled and mentally ill students. She refused, saying that she had no training in special education. The employer refused to renew her contract in June of

1995. She sued under the Retaliatory Employment Discrimination Act and the Americans with Disabilities Act. Her REDA claim was dismissed on summary judgment, and the trial judge granted the defendant's motion for a directed verdict with respect to the ADA claim.

The Court of Appeals affirmed as to the REDA claim, but reversed as to the ADA claim. The Court first noted that the failure to offer a new contract could be the kind of adverse action that triggers REDA or the ADA, then held that there was no evidence that Ms. Johnson was fired in retaliation for her workers' compensation claim. The Court cited the facts that she had been signed to a couple of new contracts after the workers' compensation claim, that a lot of time had passed between the injury and the termination, and that there had been an intervening injury that was clearly not compensable. However, a jury issue was found in the ADA claim. Since the ADA is too far outside the scope of this paper, that issue will not be discussed in detail here. Interested readers are encouraged to read the case.

6. Effect on disability of unauthorized medical treatment

Kanipe v. Lane Upholstery, Hickory Tavern Furniture Co., __ N.C. App. __, __ S.E.2d __ (2000).

Ms. Kanipe developed carpal tunnel syndrome. She finally reported her problems to her gynecologist, who referred her to an orthopedist. He diagnosed her as having bilateral carpal tunnel syndrome that was caused by her work. The employer then sent her to the company doctor, who concurred in the diagnosis, put Ms. Kanipe on light duty and referred her to a different surgeon. That surgeon scheduled surgery for June 12, 1997. Two days before that, Ms. Kanipe cancelled, because she did not like the company surgeon, and went back to her surgeon. She told her employer about that and was told that the employer would refuse to pay for the surgery, because only the company surgeon was authorized. On July 1, 1997, the defendant's adjuster wrote plaintiff's counsel that the claim was being accepted as compensable and that only the company surgeon was authorized. Ms. Kanipe visited her surgeon on July 7, 1997 and had carpal tunnel release surgery on each wrist over the following week or so. Her surgeon then took her out of work indefinitely. The employer refused to pay not only the medical bills but also any compensation for disability. The Deputy Commissioner decided that the defendant never obtained control over medical treatment, because it had never officially accepted liability, and awarded compensation and medical expenses. The Full Commission reversed, finding that the employer had accepted liability, denying a motion to assign Ms. Kanipe's surgeon as the authorized physician and awarding nothing.

The Court of Appeals affirmed as to most of the Commission's decision. The Court held that the employer had effectively accepted liability by the informal methods employed, and had thereby gained the right to control medical treatment. The Court pointed out that there is really no effective way provided by Industrial Commission procedures to accept a claim when it is in a medical only status. The Court further held that Ms. Kanipe's request for authorization of her doctor was timely, but that the Commission did not abuse its discretion in denying that request, when there was no

challenge to the quality of the company surgeon, but only Ms. Kanipe's dislike for his attitude.

The Court vacated and remanded as to the issue of whether Ms. Kanipe was entitled to compensation for disability. The Court held that denial of compensation would be proper, if it was based on the company surgeon's testimony that Ms. Kanipe would have missed less than a week of work, if she had been treated by him. However, it would not be proper if it were based on failure to cooperate with medical treatment, because there was no pre-requisite order to cooperate. Since the Commission did not explain its decision on that issue, the case was sent back for findings and conclusions.

7. Proving cause and compensability of death

Bason v. Kraft Food Service, Inc., __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Bason, the plaintiff's decedent, was a delivery driver for the employer. As such, he was subject to being called in on his days off to substitute for other drivers. On one such occasion, Mr. Bason was found dead in his delivery truck at one of his stops. An autopsy revealed severe atheroslerosis and death by ischemic heart disease. The Commission found and concluded that the plaintiff was entitled to a presumption, pursuant to Pickrell v. Motor Convoy, Inc., 322N.C. 363, 368 S.E.2d 583 (1988), of compensable death, because Mr. Bason was found in a place and time within the course of his employment. However, the Commission also found and concluded that the defendants had produced evidence to rebut the presumption and denied the claim.

The Court of Appeals affirmed, holding that once the defendants produced sufficient, credible evidence that the death was non-compensable, the Commission properly considered the evidence, with "the burden of persuasion remaining with the claimant." (Citing Pickrell) The Court also held that the Commission's conclusion that there was no accident was supported by evidence that substitute driving was a normal part of the job and that there was no unusual exertion in what Mr. Bason was doing at the time of his death.

8. 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.

9. Employment status, including subcontractor issues

McCown v. Curtis Hines, __ N.C. App. __, __ S.E.2d __ (2000).

Mr. McCown was a roofer who was hired to re-roof a rental property owned by Mike Hines. He fell and was paralyzed from the waist down. He had been approached for the job by Curtis Hines, Mike's father. He had done roofing for Curtis Hines during the year before his accident, but had also worked for others. The Deputy Commissioner denied the claim, finding that Mr. McCown was an independent contractor, as opposed to an employee. The Full Commission decided that Mr. McCown was an employee, with an average weekly wage of $400 and awarded compensation for permanent and total disability.

The majority of the Court of Appeals reversed the Commission's decision. The Court noted that the issue of employment relationship is jurisdictional, so that the appellate courts are required to evaluate the evidence and make their own decisions. The Court held that Mr. McCown was an independent contractor, on grounds that while the Hines men supervised as to the quality and specifications of the work, they did not assert control over how it was done. Particular attention was paid to the fact that Mr. McCown had special skills, which the Hineses did not. Mr McCown failed to establish that he was paid on an hourly basis, even though he was paid $170 for 17 hours of work, because there was never any discussion as to how that figure was determined. Mr. McCown also provided his own hammer and nail apron, and apparently a borrowed truck. The majority also found that the Hineses did not set any hours.

Judge Walker dissented, shedding a different light on some of the facts. He found control in the fact that the Hineses obtained the shingles and instructed Mr. McCown to used mismatched ones, which he testified he would not have done, because it results in a sloppy finished product. Curtis Hines "ordered" Mr. McCown to stop what he was doing to unload and sort shingles when they arrived and instructed him on where to place the shingles. He borrowed truck was apparently not used for the work, other than for Mr. McCown to get there. The only tools provided by Mr. McCown were the hammer and apron. Judge Walker found no evidence of an independent business operated by Mr. McCown. He also stated that the fact that an employee is competent enough that he does not require much supervision, so that the employer does not need to assert its right to control very often does not mean that the employer does not possess that right to control.

Judge Walker did vote to vacate and remand on the average weekly wage issue, expressing concern that the Commission had used wages from other employments.

State v. Frazier, __ N.C. App. __, __ S.E.2d __ (2001).

Mr. Frazier, an inmate, was working in a prison canteen on a mandatory work assignment, for which he was paid $1.00 per day. Some money and goods disappeared. He was convicted of larceny by an employee, which felony rendered him a habitual felon.

The Court of appeals reversed, holding that Mr. Frazier was not an employee. The Court stated that his work assignment was mandatory, and employment must be pursuant to contract. Further, the wage was one that could not legally have been paid outside of the prison setting.

10. Presence or lack of an accident

Lovekin v. Lovekin and Ingle, __ N.C. App. __, __ S.E. 2d __ (2000).

Mr. Lovekin was a partner in the employer law firm. Over the course of about two years, several events occurred which increased his work load and overall stress level, culminating in a heart "incident" and bypass surgery. The medical experts testified that the work-related stress contributed to his heart disease. The Deputy Commissioner denied the claim, and the Full Commission reversed, concluding that the increased work stress were an interruption of the normal work routine that constituted an accident.

The Court of Appeals reversed, holding that accident is defined as an event and that a series of events over a period of time cannot constitute an accident. It is not clear whether Mr. Lovekin was allowed to pursue an alternative theory of occupational disease. In a footnote, Judge Greene stated that the argument as to whether the injury could constitute an occupational disease was not before the Court, because Mr. Lovekin had not cross-assigned error.

11. Occupational disease, including filing and notice

Terrell v. Terminix Services, Inc., __ N.C. App. __, __ S.E.2d __ (2001).

Mr. Terrell worked for the defendant pest control company and was exposed to pesticides. After 10 years in the field and seven years as a supervisor with reduced chemical exposure, he began to show symptoms that were ultimately diagnosed as allergic asthma. It continued to worsen, resulting in a few hospitalizations of up to a week and, eventually, total disability. He filed his Form 18 on January 24, 1994. He was not advised clearly by a doctor of the probable causal relationship between his work and his asthma until April of 1994, though there had been discussion of the possible relationship in June of 1992. The Commission found that the claim had been filed timely and awarded compensation.

The Court of Appeals affirmed. There is some confusion between whether the defendants were contending that notice was untimely or that the claim was not timely filed, and the Court did not separate the issues, speaking primarily in terms of filing. The Court applied a limit of two years from the time 1) that the employee was advised by

competent medical authority that he had an occupational disease and 2) disablement. The Court noted that the discussion of suspicions as to the etiology of the asthma in 1992 was not sufficient to satisfy the requirement of being advised, holding that the employee must be advised clearly. This case is a bit hard to understand, since even the discussion of suspicions was less than two years before filing. Either the defendants were just stalling with their appeal, or there is a twist to the argument that did not filter through to the opinion.

Meadows v. N.C. Department of Transportation, 140 N.C. App. 183, 535 S.E.2d 895 (2000), rev. __ N.C. __, __ S.E.2d __ (2001).

Ms. Meadows had several pre-existing, congenital foot problems. Her job required her to wear plastic shoes, which aggravated her pre-existing conditions. The employer allowed employees to get different shoes, with a doctor's note. Ms. Meadows did not get a note. Over the course of five years, her congenital problems became worse. Ultimately, she had surgery, which was complicated by reflex sympathetic dystrophy that was totally disabling.

Deputy Commissioner Hoag and the Full Commission denied the claim, on grounds of both failure to prove occupational disease and failure to provide timely notice. The Commission concluded that wearing the shoes was not a condition of employment, because the employee had the opportunity to obtain different ones upon request. The Commission seemed to view the injurious condition not as the shoes themselves, but the employee's choice to keep wearing them. The excerpts from the Commission decision seemed to imply something akin to contributory negligence, coupled with concern that the employer had been unfairly denied the opportunity to prevent the injury. This theme continued in the Commission's decision that the claim was barred by failure to provide proper notice, which prejudiced the employer by preventing it from managing Ms. Meadows' condition so that it would not become disabling. The Commission was so taken with that concern that it disregarded the statutory requirement that the employee be advised by competent medical authority of her occupational disease, stating that the employee's belief that the aggravation of her condition was caused by her shoes was sufficient.

The Court of Appeals reversed, holding that the evidence did not support the findings and conclusion that the aggravation was not an occupational disease, because the shoes were a required part of the job. The Court found no law to support the Commission's decision that the opportunity to be exempted changed that, nor did the Court find evidence that Ms. Meadows was aware that the exemption was available. Judge Hunter dissented, opining that the Commission was correct that the available election of different shoes removed the required shoes as a condition of employment and that the requirement that injured workers exercise diligence to discover the cause of their illnesses in cases involving radiation means, taken *in pari materia*, that there is no prerequisite that a doctor tell a worker of the work-related cause before the time to give notice begins to run.

The Supreme Court reversed *per curiam*, holding in a short opinion that the Commission had properly found and concluded that there was no occupational disease, because the shoes were not required as a condition of the job. The Court did not mention the notice issue.

This is an odd case, and it may be well for the practitioner not to place too much reliance on it. The imbalance in magnitude between the pre-existing condition and the aggravation may have had an effect on the outcome, since there was no evidence cited that someone with normal feet would be at an increased risk of sustaining the kind of aggravation Ms. Meadows had. If applied to other cases, this opinion could have wide-ranging effects. For example, an argument could be made that an employee who fails to use safety equipment that is provided to her, though use is not enforced, is exercising choice more forcefully than Ms. Meadows did by failing to exercise an election to obtain shoes that were an alternative to those that were explicitly required as part of her work uniform. Does that mean that employers can avoid liability for occupational diseases that employees could avoid by better adherence to safety procedures? If so, that would be a dramatic departure from current practice and would introduce a form of contributory negligence into the limited list of available conduct-related defenses.

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.

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

Tew v. E.B. Davis Electric Co., __ N.C. App. __, __ S.E.2d __ (2001).

Davis Electric hired Mr. Burney as a subcontractor. Mr. Burney hired plaintiff Tew. Mr. Tew went to Mr. Burney's home the next morning, and the two of them went to the job site in Mr. Burney's truck. They worked about eight hours, then left in Mr. Burney's truck. On the way home, they were involved in an accident that killed Mr. Burney and seriously injured Mr. Tew. The Deputy Commissioner and the Full Commission found and concluded that the ride home in the employer's truck was an incident to his contract of employment and awarded compensation. The Full Commission decision was unanimous, but Chairman Bunn left the Commission before it was filed.

The Court of Appeals first held that the Full Commission opinion and award was valid, because it was signed by a majority of the Commissioners who heard the case. The

Court then reversed on the merits, holding that the facts supported the inference that the transportation was provided as a mere accommodation to Mr. Tew, not as a right under his contract that he could demand.

Judge Greene dissented, but only to opine that the Full Commission opinion and award was void, because there were not three authorized Commissioners on the case at the time the opinion and award was filed. He viewed the Commission's decision as tentative until actual filing.

13. Procedural issues, including burdens of proof.

Shah v. Howard Johnson, __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Shah was shot during a robbery, while working as a night auditor at a motel. He was paid $200 per week, plus room and board. About two weeks after the incident, the servicing agent for the defendant employer executed a Form 63 and started paying without prejudice, at the rate of two-thirds of $200 per week.. Mr. Shah went to California to recuperate at his brother's home. His condition improved with treatment from a doctor in California, and he was released to return to work as a night auditor, provided he did not have to stand too much. The employer immediately offered Mr. Shah his old job, at the $200 weekly wage, but apparently without the room and board. Mr. Shah refused the job and, a few days less than 90 days after the shooting, the defendant filed a Form 61 denying further liability for the claim on grounds that Mr. Shah had refused suitable employment.

At hearing, the Deputy Commissioner found that the value of the room and board was $100 per week and ordered an additional $66.67 per week for the time during which compensation was paid. The Deputy Commissioner also found that the use of the Forms 63 and 61 had been proper. The Full Commission adopted as to the wage and the appropriate period for compensation, but concluded that the use of the forms had been improper and ordered sanctions of $2500. Both parties appealed.

On the defendant's appeal, the Court of Appeals held that the Commission was correct as to the use of the Forms, since there was evidence to support the Commission's finding that Mr. Shah's injury occurred under "unquestionably compensable circumstances," so that the defendant should have used a Form 21 Agreement or a Form 60 acceptance. The Court held that the defendant had the burden to produce evidence of uncertainty "on reasonable grounds" as to the compensability of the claim or its liability, in order to justify use of payment without prejudice, under N.C.G.S. § 97-18(d). The Court went on to point out that even if there had been reasonable grounds of uncertainty for using the Form 63 initially, the defendant would still not have been allowed to stop compensation unilaterally in this case, because the purported ground for doing so—that Mr. Shah had refused suitable employment—is not related to whether the claim is compensable. The Court recognized that defendant was attempting to use the Form 63 procedure in order to avoid the necessity of obtaining Commission approval to stop

compensation, and the Court approved the Commission's assessment of sanctions for that improper use.

The defendant also contended that there was no evidence to support the Commission's decision that the lodging provided to Mr. Shah as part of his compensation package was worth $100. The Court affirmed the Commission's decision, pointing out that while the defendant had tried to disown its prior representations, it had stated that as the value on a Form 22 Wage Chart and had confirmed it in answers to interrogatories. On the other side of the coin, the Court also rejected the plaintiff's argument that the value should have been greater, holding that the Commission had the power to reject evidence that the usual nightly rate at the motel was $42, plus tax.

The Court also affirmed the Commission's decisions with respect to the other issues appealed by the plaintiff. Mr. Shah argued that his refusal of the job was justified, because it was too far away, since he had moved to California, and because he feared going back. The Court noted that some courts in other jurisdictions have held that the reasonableness of the distance to an offered job is determined with respect to the injured worker's location at the time of the offer, but did not rule on that principle, because there was no evidence that Mr. Shah had asserted that as the reason for refusing the job at the time he refused it. Similarly, the Court noted that while fear of a job can be a justification for refusal, the Commission correctly found no evidence that that was the reason Mr. Shah had refused. The Court also affirmed the Commission's rejection of Mr. Shah's argument that he should be entitled to compensation based on the difference in pay between his pre-injury job and the job he refused. The Court held that N.C.G.S. § 97-32 provides only for complete suspension of compensation.

Tilly v. High Point Sprinkler, __ N.C. App. __, __ S.E.2d __ (2001).

Mr. Tilly suffered an admittedly compensable injury on April 8, 1991. He was out of work for about a month. A Form 21 Agreement was approved on March 20, 1992. On October 19, 1992, he fell off a ladder at work, hurting his wrist and head. He was treated and returned to work within a day. In November of 1992, he went out of work for a long time. In the meantime, on October 28, 1992, he filed a Form 18, claiming "neurological difficulties" from the April 8, 1991 injury. No mention was made of the accident nine days before. A Form 33 was filed on March 10, 1993, which referred only to the April 1991 injury. Deputy Commissioner Haigh concluded that the April 1991 injury did not cause Mr. Tilly's disability after November 1992 and that there was no claim before the Commission related to the incident in October of 1992. Mr. Tilly filed his appeal to the Full Commission on March 25, 1996 and a Form 18 for the second accident on July 1, 1996. The Full Commission reversed Deputy Commissioner Haigh's decision, finding that the defendants had actual notice of the second accident and were not prejudiced by Mr. Tilly's failure to file a Form 18. The Full Commission further found that Mr. Till's disability was "caused by" the first injury and "exacerbated by" the second and awarded compensation for temporary total disability.

The Court of Appeals reversed, holding that answers to interrogatories, medical records and testimony in the hearing concerning the October 1992 injury were not a sufficient substitute for the filing of a Form 18. The case was remanded for determination of whether further benefits were due on account of the first injury.

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

Ms. Young suffered a compensable back injury, was paid compensation for total disability, returned to work, and was paid compensation for 5% permanent partial disability of her back. Sometime later, she was discharged from employment on grounds that she was physically unable to do her job. A rheumatologist diagnosed her with fibromyalgia. Ms. Young filed for a hearing on her claim of change of condition. The Deputy Commissioner awarded compensation for on-going total disability. The Full Commission affirmed, with a dissent. In an unpublished opinion, a unanimous Court of Appeals remanded for more definitive findings and conclusions. The Full Commission again awarded compensation, again with a dissent. The Court of Appeals affirmed, with a dissent.

The Supreme Court reversed, holding that there was no evidence to support the Commission's findings and conclusion that the fibromyalgia was caused by the compensable back injury, despite an apparent statement by the rheumatologist that there was a likely causal relationship. The Court noted several statements that the same doctor made in his testimony that revealed that the doctor's opinion was based on speculation and a "*post hoc, ergo propter hoc*" analysis, which rendered the testimony incompetent.

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 lay 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.

Morris v. L.G. Dewitt Trucking, Inc., __ N.C. App. __, __ S.E.2d __ (2001).

The parties reached a clincher agreement. Payment was received by the plaintiff 40 days after the defendant received the approval order. Mr. Morris moved the Commission for a 10% penalty for late payment. The Commission denied the motion.

The Court of Appeals affirmed, citing Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E.2d 815 (1998), disc. review denied, 350 N.C. 94, 527 S.E.2d 666 (1999), for the rule that a defendant has 39 days after receipt of approval of a clincher agreement to make payment, before a penalty can be assessed. Receipt of the payment on day 40 was excused, because day 39 was a Sunday. The hidden background of the plaintiff's argument is revealed in a footnote, where mention is made that Mr. Morris contended that N.C.G.S. § 97-17, by providing that parties to an approved agreement cannot deny the truth of the matters set forth, deprived the parties of the right to appeal and that language in the agreement that the agreement was binding upon approval by the Commission constituted a waiver by the parties of their right to appeal. The Court rejected both of those arguments.

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.

Goff v. Foster Forbes Glass Division, __ N.C. App. __, __ S.E.2d __ (2000).

Mr. Goff experienced an electric shock at work, which was followed by complaints of headaches and tinnitus. After a hearing, compensation was awarded for about a year of temporary total disability, followed by partial disability. The Deputy Commissioner decided that Mr. Goff's depression problems were unrelated. The Full Commission agreed with the decision as to the disability, but ordered additional examination, before rendering a decision as to the compensability of the depression. Mr. Goff was seen again by his treating psychiatrist, who rendered a written opinion that the depression was related. The Full Commission accepted the report into evidence, over the defendant's objection, without allowing the defendant the opportunity to examine the doctor. The Commission then ruled that the depression was compensable.

The Court of Appeals affirmed as to the compensability of the headaches and tinnitus and the disability, citing evidence to support those decisions. However, the case was remanded to allow the defendant the opportunity to examine the psychiatrist. The Court held that while the rules of evidence in the general courts of justice are not strictly applicable to Commission proceedings, the Commission was required to allow cross examination "to preserve justice and due process."

Coppley v. PPG Industries, Inc., __ N.C> App. __, __ S.E.2d __ (2001).

Ms. Coppley claimed a compensable hip injury. Deputy Commissioner Glenn decided in her favor. The case was appealed to the Full Commission, which, by a two-to-one vote (Commissioner Rigsbee dissenting), upheld the award. The Court of Appeals, in a prior decision, remanded for further proceedings. On remand, the Commission made some additional findings and reached the same conclusion, again by a two-to-one vote, with Commission Bolch and Chairman Bunn voting in favor of Ms. Coppley, and Commissioner Rigsbee, again, dissenting. Chairman Bunn signed the Opinion and Award on June 22, 1999 and left the Commission on September 21, 1999. The Opinion and Award was not filed until October 19, 1999.

The Court of Appeals vacated and remanded, on grounds that Chairman Bunn's retirement before filing of the Opinion and Award removed him as a necessary vote for a majority decision, leaving the decision a one-to-one tie. A Commissioner's vote on an Opinion and Award is valid only if he is still a qualified Commissioner at the time of filing.

Judge Greene dissented, but only to insist that the majority had erred in implying that if the vote had been unanimous, the retirement of one vote would not vacate the decision. Judge Greene opined that all three Commissioners must be members of the Commission at the time of filing, even if loss of one would still leave two a two-vote majority.

14. Average weekly wage.

Clark v. The Sanger Clinic, P.A., __ N.C. App. __, __ S.E.2d __ (2001).

Ms. Clark was a nurse who sustained an admittedly compensable back injury. During treatment, she was referred for stomach reduction surgery, which led to complications. The Commission awarded compensation at the maximum compensation rate of $442 for permanent and total disability, but denying her motion for coverage of the stomach surgery and its complications. She appealed, asserting that her compensation rate should be allowed to increase with increases in the maximum compensation rate.

The Court of Appeals affirmed the Commission's decision as to the compensation rate, noting first that Ms. Clark had waived her right to challenge it by signing a Form 21 containing the maximum compensation rate of $442 and not raising the issue until later, but going on to address the merits of the argument in the Court's discretion. Plaintiff's counsel made several creative arguments, but none of them worked. As to the denial of medical coverage, the Court reversed and remanded, holding that while the decision was within the discretion of the Commission, the Commission had failed to make adequate findings and conclusions to allow review of that discretion.

Larramore v. Richardson Sports Limited Partners, d/b/a Carolina Panthers, __ N.C. App. __, S.E.2d __ (2000).

Mr. Larramore was signed by the Panthers to a contract that would pay a $1000 signing bonus and $85,000 for 10 months. Toward the end of a two week pre-season camp, he fell and hurt his back. Players at the camp were paid a per diem amount for expenses and work. He was excused from the last day of practice. A little over a month later, he reported to regular training camp, underwent a physical from the team doctor, was founf to have a resolving lumbar strain and was released to practice. The next day, he was cut, along with several others. His contract had conditioned payment on being officially added to the roster. Injury would result in full payment, though the player cut be terminated for insufficient skills.

Upon being cut, Mr. Larramore underwent an exit physical, at which time the team doctor recommended that he rest his back and consult a spine surgeon, if symptoms continued. He returned home to Jacksonville, Florida, saw an orthopedist, had an MRI and was diagnosed with disc disease and sacroiliac joint sprain. The doctor recommended microdiscectomy. In the meantime, Mr. Larramore drew unemployment for about three months, then took jobs as a teacher's assistant and with a temporary service. He tried out for the Cowboys about two years after his attempt with the Panthers, but he did not make the team. The Commission found a compensable injury, awarded compensation for temporary total disability from the date of accident until the return to training camp, a period of about five weeks, and awarded compensation for partial disability under N.C.G.S. § 97-30. The average weekly wage was determined by dividing the contract salary, plus bonus, by 52 weeks, which yielded $1653.85. The Commission also ordered reimbursement of the expenses of the orthopedist in Jacksonville.

The Court of Appeals affirmed the decision as to how to calculate the average weekly wage, holding that there was evidence to support the Commission's decision that exceptional reasons required resort to a method other than using the employee's actual

wages prior to injury. While the Court agreed with the defendants that there was no certainty that Mr. Larramore would have made the team in the absence of his injury, there was sufficient circumstantial evidence to allow that inference. The Court also affirmed the decision that Mr. Larramore was entitled to compensation for partial disability based on wage loss. The Court held that production of evidence that the employee has obtained employment that pays less than the employment of injury shifts the burden to the defendants to prove that he could have earned more. Since the defendants did not produce any evidence to prove that, the Commission's decision was supported by the evidence.

As to payment of medical expenses for the Florida doctor, the Court remanded, holding that the Commission had failed to make any findings as to whether Mr. Larramore had requested approval of the treatment within a reasonable time after he sought the treatment. The Court mentioned that while the Commission might be justified in finding reasonableness, in light of the defendants' "protracted denial of the Commission's jurisdiction over this matter," the Commission was still required to find facts. The Court's decision on that issue is interesting, in that this case was apparently denied, and the employer's company doctor made the recommendation that Mr. Larramore see a specialist.

Judge Greene dissented, opining that the Commission erred by failing to make any explicit findings of fact comparing the post-injury wages to the pre-injury wages and that the circumstantial evidence did not support the inference that Mr. Larramore would have made the team if he had not been injured, since there was no evidence that he was cut because of his injury.

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 more 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.

15. 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.

16. 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 under-compensate 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.

17. Jurisdiction

Watts v. Hemlock Homes of the Highlands, Inc., __ N.C. App. __, __ S.E.2d __ (2001).

Mr. Watts was paid compensation with a Form 60. The defendant decided, unilaterally, that the average weekly wage had been miscalculated, sent a letter to that effect to the employer to have Mr. Watts sign it, filed the letter with the Commission and started paying less compensation. Mr. Watts filed a certified copy of the Form 60 in Superior Court, which entered judgment for the amount of the disputed compensation and ordered continued payments at the original compensation rate.

The Court of Appeals vacated the order, holding that the Superior Court lacked subject matter jurisdiction over the average weekly wage issue. The Court distinguished Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998), review dismissed, 350 N.C. 92, 532 S.E.2d 524 (1999), pointing out that Calhoun involved enforcement of a Form 60, when the employer filed it, thereby admitting compensability and liability, then refused to pay, which can be done by Superior Court judgment, while the defendant in Watts did not dispute those issues. The dispute over the average weekly wage was exclusively within Industrial Commission jurisdiction.