WORKERS' COMPENSATION
CASE LAW UPDATE: OCTOBER, 2002

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Effect of maximum medical improvement on compensation for total disability.

Anderson v. Gulistan Carpet, Inc., 144 N.C. App. 661, 550 S.E.2d 237 (2001).

The injured worker's bilateral repetitive motion injuries to her arms and hands were accepted as a compensable occupational disease. She had surgery and was paid compensation for time out of work. Her surgeon opined that she had reached maximum medical improvement and assigned ratings. Ms. Anderson continued to complain of pain and numbness and pain that was spreading up the arms and to the torso. She was seen by Dr. Naso, who pronounced that she was not having any of those problems. She was seen by Dr. Poehling, who opined that she was and that she needed additional treatment. In the meantime, she worked for short periods as desk help at two motels. She was terminated from each, ostensibly for disciplinary violations, but she claimed that she was unable to do the work, due to increased pain in her arms from using the computer, swiping credit cards and the like.

The Commission decided that Ms. Anderson was entitled to compensation for temporary total disability, on-going except for the times she was working at the motels. In response to the defendant's contentions on appeal, the majority of the Court of Appeals, Judge Greene writing, held, first, that Dr. Poehling's testimony that the motel jobs did not cause Ms. Anderson's occupational disease and evidence that her problems increased after surgery but before she took those jobs supported the Commission's decision that there was no subsequent injurious exposure that would insulate the defendant from liability. Second, the Commission did not err in finding that the presumption of on-going total disability created by the Form 21 Agreement was not rebutted by the motel jobs, in that the activities incident to those jobs that increased Ms. Anderson's pain were sufficient to allow the Commission to find that the defendant had not proved that those employments were suitable. The case was reversed and remanded, however, on grounds that the Commission had failed to decide whether Ms. Anderson had reached maximum medical improvement. The Court stated as axiomatic that compensation for temporary total disability could only be paid prior to maximum medical improvement, then acknowledged that there was evidence that could cause the case to go either way as to whether maximum medical improvement had been reached. While the surgeon had opined relatively early that Ms. Anderson had reached maximum medical improvement with a rating, he had later opined that the rating had increased, and Dr. Poehling had opined that she needed additional treatment.

Judge Timmons-Goodson dissented, but only to say that she thought the evidence supported the absence of maximum medical improvement. She agreed with the majority that compensation for temporary total disability was due only prior to maximum medical improvement but did not require an explicit decision by the Commission that MMI had not been reached.

Russos v. Wheaton Industries, 145 N.C. App. 164, 551 S.E.2d 456 (2001).

Ms. Russos suffered an admittedly compensable injury and was paid compensation pursuant to an approved Form 21 Agreement. She reached maximum medical improvement and was released to return to work with restrictions. The employer had no jobs available within the restrictions and terminated her. She entered a paralegal training program. A From 24 Application to Stop Payment was approved. The Deputy Commissioner decided that Ms. Russos was not entitled to further compensation for temporary total disability, apparently on grounds that she had reached maximum medical improvement. The Full Commission reversed, awarding compensation for temporary total disability while Ms. Russos was in the paralegal program and a five percent rating.

The Court of Appeals affirmed, holding that a finding of maximum medical improvement is not the equivalent of a finding of lack of disability and pointing out that disability involves factors other than medical condition. Thus, the presumption of disability created by the Form 21 Agreement was not rebutted. Rebuttal requires evidenced that there is gainful employment that the injured worker can actually get.

Knight v. Wal-Mart Stores, Inc., ___ N.C. App. _____, ____ S.E.2d ____ (2002).

This is a very important case, which is in the process f becoming more important.

Mr. Knight claimed a back injury when he missed a step on a ladder and fell, aggravating pre-existing condition. He underwent surgery and attempted to return to work with the employer on several occasions, always claiming failure due to pain. His doctor testified that return to work slips were, bearing various restrictions, were intended to allow him to attempt to return to work, that there was no objective reason he could not do certain of the jobs, but that his condition produced pain and, while Mr. Knight's pain reports were more severe than those of most people with similar conditions, the doctor had no doubt that they were genuine. The doctor also testified that it was difficult to assign a time of maximum medical improvement, because Mr. Knight never really improved, a date a few months before the hearing was reasonable. The Commission awarded compensation for on-going temporary total disability.

The Court of Appeals affirmed, holding among other things, that Mr. Johnson had satisfied his original burden of proving disability and that maximum medical improvement was immaterial to the duration of compensation for total disability. The Court acknowledged that Mr. Knight had not met the requirements of the last three ways of proving total disability under the framework announced in Russell v. Lowes Product Distribution but held that there was evidence to support the decision that he had satisfied

the first test, by providing medical evidence of total disability. In so holding, the Court included in the medical evidence Mr. Knight's reports of pain and inability to work as a result thereof. Purported evidence to the contrary was found not actually to be contrary, as the treating physician had testified that pain could have prevented Mr. Knight from working and that the pain was real.

On the issue of the effect of maximum medical improvement, the Court held that it is only material, and that distinctions between temporary and permanent disability only matter, when an injured worker claims compensation for permanent partial disability under N.C.G.S. § 97-31. The Court acknowledged case law from the Court of Appeals that attached significance to MMI in determining the duration of compensation for total disability and in reorganizing presumptions and burdens. The Court then explicitly disregarded those cases, opining that they were contrary to statute and established case law from the Supreme Court.

The Court also held that there was evidence to support the Commission's decision that the defendants were liable for detoxification and that the Commission was allowed, by its own mediation rules, to decide not to order Mr. Knight to reimburse the defendants for half of the mediator's fee.

Judge Bryant dissented with respect to the significance of maximum medical improvement, not disagreeing with the majority's opinion but forcing the Supreme Court to resolve the direct conflicts in the opinions of different panels of the Court of Appeals on that subject.

Burchette v. East Coast Mill Work Distributors, Inc., ___ N.C. App. ___, S.E.2d ___ (2002).

Mr. Burchette suffered an admittedly compensable injury to his back, while lifting a pallet off the foot of a coworker. He was paid compensation pursuant to a Form 21 Agreement. He attempted to return to light duty work on eight separate occasions, all of which resulted in increased pain and departure from employment after short periods. After the sixth attempt, the defendants filed a Form 28T, notifying the Commission of the trial return to work. The posture is a bit confusing, because it appears that the defendants did not resume paying after the Form 28T was filed, but the defendants were the ones who filed the Form 33. In any event, the Commission awarded on-going compensation for total disability.

The Court of Appeals affirmed, making some very significant proclamations in the process. First, the Court cited the recent Russos case in holding that the Commission properly did not consider maximum medical improvement in determining the duration of compensation for temporary total disability. Second, the Court held that the defendants had failed to rebut the presumption of on-going disability that arose from the Form 21, both because maximum medical improvement was insufficient to rebut the presumption and because the evidence supported the Commission's decision that the availability of the offered jobs, which Mr. Burchette was unable to do, did not show an end of disability.

Third, the Court affirmed the Commission's award of a 10% penalty for late payment. The defendants had contested the penalty on grounds that Mr. Burchette had not filed a Form 28U. The Court of Appeals held that the Form 28U was not required and that compensation was to have been resumed automatically upon the failure of the trial return to work. The Court stated that Commission Rule 404A(2) had been amended, from providing that the employee "shall" file a Form 28U to providing that if the employee had to stop working during the trial period, he "should" file a Form 28U. The Court stated that the revised rule is "**now** not in conflict with N.C.G.S. § 97-32.1." (Emphasis added) This should eliminate a very frustrating situation, in which the provision for automatic resumption of compensation after an unsuccessful trial return to work in N.C.G.S. § 32.1 has been substantially thwarted by the requirement of a doctor's certification, on a Form 28U, that the injured worker is medically unable to work.

Fourth, the Court affirmed the Commission's striking of testimony from Dr. Pikula and designation of Mr. Burchette's family doctor as the authorized treating physician, based on improper *ex parte* communication with a rehabilitation nurse. Finally, the Court dismissed the defendants' assignment of error based on failure of the Commission to render its decision within 180 days of the close of the record, because the defendants were unable to show any prejudice.

2. Disability, including presumption of on-going.

Foster v. U.S. Airways, Inc., ____ N.C. App. ___, ____ S.E.2d ___ (2002).

This case involves a couple of very important issues and resolves them in favor of the injured worker.

Ms. Foster was a flight attendant for the defendant and sustained an admittedly compensable injury to her shoulder and neck. She was paid for necessary weeks pursuant to a Form 21 Agreement and a subsequent Form 26 Agreement. Her permanent restrictions prevented her from returning to work as a flight attendant. The defendant assigned vocational rehabilitation counselors (RP's) through Comprehensive Rehabilitation Associates (subsequently CRA and now Concentra). The RP was of the opinion that Ms. Foster was unable to obtain work paying anywhere near her pre-injury wage and initiated search for a lower paying job. Ms. Foster went, on her own, to State Vocational Rehabilitation, where the assigned specialist opined that she could not find work wages approaching her pre-injury wages. Ms. Foster asked the defendant to pay for retraining, but the defendant refused. Ms. Foster then enrolled in community college, which was sponsored by VR. The defendant filed a Form 24 Application to Stop Payment, contending that Ms. Foster's school work was getting in the way of the job search that was being directed by the RP. The Form 24 was denied, but Ms. Foster was ordered to comply with the instructions of the RP. When Ms. Foster refused a reservationist position with the defendant, a second Form 24 was filed and approved. Appeal to the Deputy Commissioner resulted in affirmation of the suspension of compensation. The Full Commission reversed, concluding that the first order to comply

had been improvidently granted and ordering on-going compensation for temporary total disability.

The Court of Appeals affirmed, holding that maximum medical improvement had no effect on the award of benefits for temporary total disability. The Court acknowledged the decisions in Demery v. Converse, Inc. and Franklin v. Broyhill Furniture Industries as holding that "reaching MMI signifies the end of the temporary nature of a disability," then disregarded those cases, pointing out that "the Supreme Court of North Carolina has concluded otherwise several times," citing Saums v. Raleigh Community Hospital and Saunders v. Edenton Ob/Gyn Ctr. The burden remained on the defendant to rebut the presumption of on-going disability established by the Form 21 and Form 26. There was some refence in the Commission's Opinion and Award to credit for wages paid during the period of total disability, but there was nothing in the record to indicate that Ms. Foster had worked.

The Court rejected the defendant's argument that the order of compliance in the denial of the first Form 24 was protected by *re judicata*, noting that Commission rules allow issues summarily decided to be addressed a subsequent hearings.

The Court affirmed the Commission's decision not to consider the reservationist job to be suitable employment, citing Dixon v. City of Durham and basing that decision primarily on the fact that the reservationist job would never pay as much as Ms. Foster's pre-injury employment. While the pay scales for the two jobs were similar, Ms. Foster would have been required to start at the low end of the scale if she took the reservationist job, which would have resulted in much less pay than she had been earning as a flight attendant, with her experience in that position. The Commission's decision that formal education was an appropriate form of rehabilitation for Ms. Foster was supported by the opinions of the VR counselor and the RP's assigned by the defendant that she would never obtain employment for suitable wages without it and that, while the degree from the community college would not allow her to earn wages comparable to her wages as a flight attendant, that degree would place her in a position to obtain a four-year undergraduate degree that would likely allow such wages. Attempts by the defendant's RP's to direct rehabilitation toward job search had been characterized by the Commission as reaching the conclusion that Ms. Foster could not get a job paying the same wages as her pre-injury employment, after which the RP's "conducted a job search for inappropriate lower paying jobs." That characterization was endorsed by the Court as evidence to support the decision that the formal education was appropriate rehabilitation.

Bridwell v. Golden Corral Steak House, ___ N.C. App. ___, 561 S.E.2d 298 (2002).

Mr. Bridwell slipped and fell, damaging a prior ACL graft and doing new damage to cartilage in his knee. Surgery was recommended, and he was instructed to stay out of work until it could be performed. Immediately after that recommendation was given, he returned to work. Once there, he called his mother to tell her what the doctor had said. He was fired for failing to get off the phone when his supervisor told him to do so. Mr. Bridwell was unable to have the recommended surgery, because he had no insurance after his firing. There is no discussion as to why the surgery was not provided by workers'

compensation carrier. Mr. Bridwell found a job as a telemarketer for a couple of months. He was unable to do the job in the usual way, because it required too much sitting, but his supervisor allowed him to move around when needed. Mr. Bridwell left that job to look for a better one. A couple of months later, he took a job as a vacuum cleaner salesman, earning, over the course of two weeks, $350 in commissions for the sale of one vacuum cleaner. He stopped doing that job, because it was aggravating his knee. The Commission awarded medical treatment and compensation for total disability.

The Court of Appeals affirmed, holding that while the medical evidence alone was insufficient to prove disability, because the doctor had given the option of working in a brace, but evidence of Mr. Bostick's unsuccessful attempts to find suitable employment was sufficient to prove disability under another prong of the Russell test. The employments did not constitute evidence of wage earning capacity, because the telemarketing job was modified beyond the point of availability in the open market, and the sales job hurt Mr. Bostick's knee too much to be suitable.

This case was obviously well briefed and contains an excellent discussion of the issues. It also contains a useful framework and citations to several of the most important cases in this area. The opinion is a great reference source.

Moore v. Concrete Supply Company, ____ N.C. App. ____, 561 S.E.2d 315 (2002).

Mr. Moore was a concrete truck driver for the employer, when he suffered a back injury. He was paid compensation. A few months later, he underwent a functional capacity evaluation that placed him in the medium demand level. His treating physician opined that he was unable to return to work driving. The defendants assigned John McGregor to do vocational rehabilitation. 120 job contacts in about four months yielded no jobs. Then, the employer offered Mr. Moore a job as a maintenance worker, which he refused. A Form 24 was approved. The Deputy Commissioner affirmed that approval. The Full Commission also affirmed. However, on the second motion for reconsideration, the Commission reversed itself and awarded on-going compensation for total disability.

The Court of Appeals affirmed, holding that the defendants had failed to produce evidence to rebut the presumption of disability. The evidence was sufficient to support the Commission's finding that the maintenance worker position was "make-work," in that it had not existed as a separate job before it was created for Mr. Moore, and it was not filled when Mr. Moore rejected it. It was mentioned in the opinion that Mr. Moore had reached maximum medical improvement, with a 5% rating of his back, but there was no significance attached to MMI. There was great significance attached to the Form 21 Agreement as creating the presumption of disability. The defendants attacked a stipulation that there was a Form 21, because no one was able to find it, but the Court cited evidence that the stipulation had been entered into on the pre-trial agreement and read into the record at hearing a supporting the stipulation and held that the stipulation could only be set aside on grounds of fraud, misrepresentation, undue influence or mutual mistake.

Shoemaker v. Creative Builders, _____ N.C. App. _____, 563 S.E.2d 622 (2002).

Mr. Shoemaker suffered an admittedly compensable back injury. As a result of surgery, he contracted encephalitis, which damaged his brain. He ended up with a 45% rating of his back, permanent light duty physical restrictions, and neurological and psychological problems. As a result of either a seizure or an anxiety attack, he wrecked his car, suffering fractures. The defendants assigned a vocational rehabilitation specialist who tried to force Mr. Shoemaker into a Goodwill Industries program. He attempted to return to work on a couple of occasions, but had to be terminated, due to disruptive behavior and short attention span. During one proceeding, Deputy Commissioner Taylor amended the average weekly wage and awarded reimbursement for travel for the job search and rehabilitation program directed by the vocational rehabilitation specialist. She also denied the defendants' motion to compel participation in the Goodwill program. The defendants filed a Form 33 Request for Hearing, in response to which Mr. Shoemaker claimed permanent and total disability, which rendered job search futile. Deputy Commissioner Bost and the Full Commission decided that he was permanently, totally disabled and that he would not be required to participate in the Goodwill program.

The Court of Appeals affirmed, finding medical opinion evidence sufficient to support the Commission's decisions on both issues, despite the defendants' references to contrary evidence. The Commission also found evidence to support the causal relationships between the original back injury and the more remote consequences. Finally, the Court rejected the defendants' contention that they should not have to pay for a psychiatric hospitalization on grounds of failure to obtain prior authorization, holding that the Commission could approve treatment sought by the injured worker, as long as the request for it is made within a reasonable time.

Skillin v. Magna Corp./Greene's Tree Service, Inc., _____ N.C. App. _____, 566 S.E.2d 717 (2002).

The employee, Mr. Burgess, claimed a back injury when he stepped back into a hole. Ms. Skillin, his mother, as administrator of his estate, was substituted after his death. The medical experts testified to aggravation of a pre-existing condition. There was testimony about a light duty job, but it appeared to be one that was not regularly available, and there was no testimony that Mr. Burgess was actually informed of it. Mr. Burgess did some work between his injury and his death, but there was medical testimony that it was outside his restrictions. The Commission awarded compensation and medical expenses, subject to credit for the money earned at the other jobs and a 10-day stretch of incarceration.

The Court of Appeals affirmed, citing evidence to support the Commission's findings. The defendants attempted to couch the doctors' opinions as speculative and raise other purported evidentiary flaws. The Court mentioned in footnotes that there may not be credit for the money earned at the attempted jobs outside Mr. Burgess' restrictions, but the issue was not addresses, because the plaintiff had not assigned it as error. The same was true about issues surrounding the legality of the defendants' having withheld workers' compensation insurance premiums from Mr. Burgess' paychecks.

Effingham v. the Kroger Company, ____ N.C. App. ____, 561 S.E.2d 287 (2002).

Ms. Effingham suffered an admittedly compensable back injury. While the posture is not clearly stated, it appears that she claimed compensation for total disability that was alleged to have been affected by an unsuccessful attempt to return to work as a greeter. The Commission awarded compensation for temporary total disability from the time of the attempt of the greeter job until further order, allowing for offset on account of wages that were paid for the greeter position.

The Court of Appeals first rejected Ms. Effingham's appeal as to the Commission's denial of her claim for neck problems, holding that evidence that she first complained of her neck for the first 18 months after her injury, failing to mention it to the two doctors who performed low back surgery during that time, was sufficient to support the Commission's decision, despite an opinion from the doctor who treated the neck that was based on Ms. Effingham's report of pain since the time of injury. The Court held that the Commission's decision that the greeter job was not evidentiary of wage earning capacity was supported by lack of evidence that any other employer would provide such a job, but remanded for a Commission decision as to the extent of permanent disability, holding that since Ms. Effingham had exercised her election to seek benefits for permanent disability after maximum medical improvement, the Commission was required to determine it. The Court stated that both parties would be permitted to offer additional evidence on that issue. Ms. Effingham's claim for a 10% penalty for late payment was denied by the Commission, and the Court of Appeals affirmed. The Commission's refusal to order sanctions for unreasonable defense was also affirmed. Judge Hudson, who concurred in the decision, wrote separately to clarify that the defendants reasonably defended on the contention that the greeter job was evidence of wage earning capacity. The Commission apparently decided that greeting was an actual job, but that Ms. Effingham's lack of reliability, due to her injury, would not be tolerated by an employer in the open job market, so the employment arrangement was not indicative of real employability. That was apparently enough dispute to justify the unsuccessful defense.

The defendants' appeal as to the Commission's refusal to grant credit for private disability benefits was rejected, because the benefits were for the neck problems, which were not compensable. The Commission's failure to state limits on the duration of medical compensation in the Award portion of its decision, while including those limitations in the Conclusion portion, was viewed by the Court as something that could be corrected on remand.

Bostick v. Kinston-Neuse Corporation, 145 N.C. App. 102, 549 S.E.2d 558 (2001).

Mr. Bostick sustained an admittedly compensable repetitive motion injury to his right elbow. He underwent surgery and was paid compensation pursuant to a Form 21 Agreement. He returned to modified employment. He then received training as an emergency medical technician and went to work for his brother's ambulance service. He returned to his treating surgeon with additional pain in the right elbow. The surgeon

referred Mr. Bostick to a partner of his, who performed additional surgery. When that was unsuccessful, Mr. Bostick was sent to a doctor in Maryland for yet another surgery. In between surgeries, he returned to work for his brother. He was also paid compensation for total disability while out for surgery and for partial disability when resuming work for his brother, which apparently paid less than the pre-injury employment, after the periods of total disability. Compensation apparently stopped about six months before the hearing, with no explanation in the record. In the meantime, Mr. Bostick's left elbow started giving him trouble.

The Commission determined that Mr. Bostick was entitled to compensation for partial disability, limited to 300 weeks from the date of injury, that his left elbow was not related to his compensable injury, that he was not entitled to a 10% penalty for late payment, and that Mr. Bostick was not entitled to sanctions for unreasonable defense. The Court of Appeals reversed and remanded, holding that the presumption of on-going disability established by the Form 21 had not been rebutted by the subsequent employments, because the defendant had not met its burden of proving that they were available in the regular job market (the employment with the defendant had been modified to a point that it was not normally available and he would not have been hired for the EMT job, if the employer weren't his brother) and suitable (despite the fact that he was doing the EMT work, it was work he should not have been doing with his restrictions). Therefore, Mr. Bostick was entitled to compensation for total disability from the date of injury. Mr. Bostick acknowledged that the defendant was entitled to some form of credit for the payments received from employers during the period of total disability. The Commission had found that Mr. Bostick had not yet reached maximum medical improvement, so that was not a factor in the case. The Court also held that the finding that that left elbow problems were unrelated was not supported by the evidence, as the second surgeon opined that they were and the first surgeon, who had testified to the contrary, had not spoken specifically to Mr. Bostick's case and had deferred to the second surgeon's opinion. The Court held that the 10% penalty was mandatory and payable in this case, because the Form 21 Agreement had never been disturbed by a Commission order. The Court affirmed the Commission in denying Mr. Bostick's claim that his average weekly wage should include wages from his National Guard service, following precedent that limited average weekly wage to wages in the employment of injury.

Pollock v. Waspco Corporation, ____ N.C. App. ____, 559 S.E.2d 567 (2002).

Mr. Pollock suffered a back injury while lifting a bucket of drywall compound. He was paid compensation pursuant to a Form 21 Agreement. In subsequent litigation, the average weekly wage was increased somewhat and compensation was ordered for partial disability based on wage loss, pursuant to N.C.G.S. § 97-30, through the date of hearing and on-going. The amount of the compensation was left undetermined, on Deputy Commissioner Shuping's presumption that the parties would be able to agree on wages earned and unemployment benefits received by Mr. Pollock, without additional litigation. Neither party appealed.

Thereafter, Mr. Pollock filed a show cause motion, the result of which, if any, was not in the record on appeal, a Form 33 Request for Hearing seeking additional

compensation for a change of condition, and a motion to compel payment for medical treatment. Deputy Commissioner Jones determined that Mr. Pollock had failed to prove any disability since three weeks before Deputy Commissioner Shuping's prior award, denied any compensation and ordered payment of medical expenses. The Full Commission affirmed.

The Court of Appeals affirmed, holding that Mr. Pollock's own testimony was sufficient to support the Commission's finding that he had earned more at all times after the hearing before Deputy Commissioner Shuping than he had while working for the defendant employer. Deputy Commissioner Jones had concluded that Mr. Pollock had failed to satisfy his burden of proving disability. The Court of Appeals did not directly address that, holding that Mr. Pollock enjoyed a presumption of on-going disability arising from the From 21 Agreement but that there was evidence to rebut that presumption. However, it was necessary to adjust the date in the Commission's Opinion and Award to reflect that cessation of compensation was effective as of the date of the hearing before Deputy Commissioner Shuping, not on the date three weeks before, because Deputy Commissioner Shuping's unappealed decision could not be disturbed. The Court reversed the Commission's refusal to order a 10% penalty for late payment as to two of the four periods for which compensation was ordered by Deputy Commissioner Shuping, noting that while payment during the other two periods had been conditioned on Mr. Pollock's providing information that he had not provided, two of the periods required no such additional information.

Dancy v. Abbott Laboratories, 139 N.C. App. 553, 534 S.E.2d 601, _353 N.C. 446, 545 S.E.2d 211 (2001).

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.

The Supreme Court affirmed *per curiam*.

Demery v. Perdue Farms, Inc., 143 N.C. App. 259, 545 S.E.2d 485, 354 N.C. 355, 554 S.E.2d 337 (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.

The Supreme Court affirmed *per curiam*.

Frazier v. McDonald's, ____ N.C. App. ____, ____ S.E.2d ____ (2002).

Ms. Frazier had very serious pre-existing knee problems—she was actually working contrary to her doctor's instructions—when she fell at work, twice within four months. Her knee condition had caused her to fall many times in the past. Her claim of January 1998 was accepted without prejudice. She returned to reduced work and was paid compensation for partial disability, pursuant to N.C.G.S. § 97-30. Shortly after her return to work, on March 11, she was terminated, purportedly because her register came up short. The defendants continued to pay compensation for partial disability. The Deputy Commissioner decided that she was entitled to compensation for total disability from the time of termination until June 15, when she reached maximum medical improvement, plus compensation for a 1% rating of her arm. The Full Commission awarded compensation for total disability indefinitely from the date of termination.

The Court of Appeals affirmed the award of total disability after termination, citing Seagraves v. Austin Co. of Greensboro. Ms. Frazier had been warned about short registers before, but the last warning had contained a note that she would be suspended from work for one week, in the event of further violations. Termination, in the face of the employer's own note that termination would not result from the claimed misconduct, was sufficient to support the Commission's decision that she had not constructively refused suitable employment. The award of on-going compensation for total disability after MMI was reversed, because there was evidence that Ms. Frazier had a nursing certificate that would allow her to work as a sitter for disabled people, which she had done and was able to do in her post-injury condition. Also, the treating surgeon's opinion painted the compensable injury as a temporary exacerbation that did not change her underlying condition on the long term, so that she was no more disabled after MMI than she had been before the fall at work, and none of the falls after MMI were made more likely by the compensable injury.

Johnson v. Lowe's Companies, Inc., 143 N.C. App. 348, 546 S.E.2d 616, *aff'd*, 354 N.C. 358, 554 S.E.2d 336 (2001).

Mr. Johnson suffered a compensable knee injury, had a couple of surgeries and was assigned a 30% impairment rating, with extreme restrictions. The defendant obtained surveillance information, including videotape, that showed Mr. Johnson engaged in activities that significantly exceeded his restrictions. There was evidence that he was paid for some of the activity. He was indicted for fraud and perjury. The Commission decided that the evidence was sufficient to rebut the presumption of on-going disability that had been created by the Form 21 Agreement, that Mr. Johnson had the capacity to earn wages in suitable employment, and that the defendants were entitled to an award of attorney's fees as sanctions for unfounded litigiousness.

The Court of Appeals affirmed, with the majority holding that the evidence of fraud, ability to engage in work-like activities and actual work was sufficient to support the Commission's decision that the presumption had been rebutted.

Judge Hudson dissented, opining that there was an absence of evidence of actual work that was available to Mr. Johnson, which is a necessary element in rebutting the presumption. She distinguished other cases that had glossed over that element, pointing out that those cases had involved people with little or no physical limitations who had been released to any job, specifically including the pre-injury employment.

The Supreme Court affirmed, *per curiam*.

Gilberto v. Wake Forest University, _____ N.C. App. _____, 566 S.E.2d 788 (2002).

Ms. Gilberto was Director of Dance for the defendant and developed orthopedic occupational diseases of her foot and ankle. The deputy commissioner awarded compensation for total disability from September 1, 1995 through August 15, 1996, and compensation for partial disability, pursuant to N.C.G.S. § 97-30, for up to 300 weeks from the date of injury. Credit was awarded for salary paid from January 1, 1995 through August 31, 1995. On Ms. Gilberto's motion for reconsideration, the deputy awarded compensation for total disability from September 1 through December 31, 1995, at the rate of $478 per week, and compensation for partial disability from January 1, 1996 through the end of the 300 week period. The Full Commission reduced the award to TTD from January 1 through July 1, 1995, subject to credit for salary continuation during the same period, plus compensation for a 7% rating of the foot.

On Ms. Gilberto's appeal, the Court of Appeals affirmed, holding primarily that the evidence supported the Commission's findings and conclusions that she had not proved continuing disability after the initial period. The Court pointed out that she had applied for 26 jobs over a five-year period.

3. Asbestos-specific issues.

Austin v. Continental General Tire, 354 N.C. 344, 553 S.E.2d 680 (2001).

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.

On appeal, the Supreme Court reversed *per curiam*, stating only that the reversal was "[f]or the reasons stated in the dissenting opinion by Judge Greene." No other issues were addressed. This decision has profound impact on asbestos cases, in which all

parties had previously operated on the assumption that a diagnosis of asbestosis was sufficient to justify 104 weeks of compensation.

Abernathy v. Sandoz Chemicals / Clariant Corp., _____ N.C. App. _____, 565 S.E.2d 218 (2002).

Mr. Abernathy was exposed to asbestos during his employment and ultimately contracted asbestosis. The Industrial Commission awarded compensation, to be paid by the carrier that was on the risk for the last three years that Mr. Abernathy worked for the employer.

Three major, asbestos-specific issues were addressed by the Court of Appeals. First, the Commission's award of 104 weeks of compensation under N.C.G.S. § 97-61.5 was reversed, on grounds conceded by the plaintiff, that the Supreme Court's decision in Austin v. Continental General Tire, 354 N.C. 344, 553 S.E.2d 680 (2001) required that workers be removed from employment in order to qualify for the automatic 104 weeks. As in Austin, Mr. Abernathy had retired years before he was diagnosed. The case was remanded to the Commission to determine whether Mr. Abernathy was disabled, so that he could recover under the same framework as is applicable to other occupational diseases.

Second, the Court addressed the average weekly wage, rejecting the plaintiff's argument that the defendants had failed to preserve the issue for Full Commission review, by failing to mention specifically an erroneous statement in the Deputy Commissioner's opinion and award that a stipulation had been made. The Court held that the issue had been preserved by an exception on the Form 44 to the finding and conclusion regarding the amount of the average weekly wage. However, the Court also held that in the case of a retiree, "it would be obviously unfair" to calculate an average weekly wage of zero, so the fifth method provided by N.C.G.S. § 97-2(5), which allows the Commission free rein to base the average weekly wage on fairness, was required to be used. The Court also held that "the only fair method" was to use Mr. Abernathy's wages from his last year of employment with the employer, which would yield the same result as the Deputy Commissioner reached. It is not clear whether this holding depends on specifics of Mr. Abernathy's case or is generally applicable to all cases of diagnosed retirees.

Third, the Court affirmed the award against the last carrier on the risk, citing evidence to support a finding of exposure, for the statutorily prescribed periods for an asbestosis case, during the last three years of work. The prior carrier was dismissed from the case for remand.

4. Occupational disease, other than asbestos-related.

Woody v. Thomasville Upholstery Incorporated, 146 N.C. App. 187, 552 S.E.2d 202 (2001), *reversed* __ N.C. __ S.E.2d __ (2002).

Ms. Woody was a star employee of the defendant who ended up working under an abusive boss. She reported the abuse, playing a tape for a higher level supervisor that included being called a "bitch." That supervisor brought the situation to the attention of the company president, who promised to take care of the problem. However, the president's conversations with the abusive boss just made matters worse, and the midlevel supervisor was fired when the abusive boss was promoted to vice president. Ms. Woody developed severe depression and exacerbation of pre-existing fibromyalgia, as a result of the depression. Two treating physicians opined that the depression and fibromyalgia were caused by the stress of working for the abusive boss and that the abuse placed Ms. Woody at a greater risk of developing those problems than that to which the general public, not so employed, was exposed. The Deputy Commissioner and the Full Commission concluded that she suffered an occupational disease and awarded compensation.

In the process of litigation, Ms. Woody requested permission from them Commission to request production of notes that an employee of the employer had taken of conversations with employees. The defendant resisted, on grounds that the notes were protected work product. Deputy Commissioner Haigh granted the request to serve the request for production. The defendant objected to the request for production when it was served, and the Executive Secretary denied Ms. Woody's request for production. Ms. Woody appealed and Deputy Commissioner Glenn ordered provision of the documents for *in camera* inspection. After inspection, he directed the defendant to produce the notes. The defendant appealed to the Full Commission and did not comply with Deputy Commissioner Glenn's order. The notes were eventually produced, but late. Deputy Commissioner Glenn awarded sanctions for the discovery violation.

The Court of Appeals affirmed, holding 1) that the issue as to whether the Commission properly ordered production of the documents was moot, 2) that Deputy Commissioner Glenn had properly determined that the production was six days late, instead of one, because the appeal to the Full Commission had not stayed the order to produce, 3) that the defendant had had sufficient notice of the hearing that addressed the sanctions, 4) that Deputy Commissioner Glenn did not abuse his discretion by refusing to recuse himself and the Commission did not err by affirming that decision, and 5) the evidence supported the Commission's findings and conclusions that Ms. Woody had suffered an occupational disease. In response to the defendant's contention that the Court should evaluate whether extreme abuse by a boss is characteristic of and peculiar to the job of "marketing manager in the furniture industry," the Court held that the proper standard is to compare the employee's particular job, as opposed to her general type of job, to employments as a whole.

Judge Martin dissented, opining that being placed under an abusive supervisor can happen at any job and even outside employment, so that it cannot be construed as being characteristic of and peculiar to a particular employment.

The Supreme Court reversed *per curiam*, for the reasons stated in the dissent.

Robbins v. Wake County Board of Education, _____ N.C. App. _____, 566 S.E.2d 139 (2002).

Ms. Robbins worked for three years at a school board administration office, in a building that contained a significant amount of dusty asbestos. 11 years after she stopped working there, she developed a persistent cough and was ultimately diagnosed with mesothelioma, a nasty and generally fatal cancer of certain tissues around the lungs. She died about 17 months after diagnosis. The deputy commissioner denied her claim, but the Full Commission reversed, finding and concluding that Ms. Robbins' mesothelioma was an occupational disease.

The Court of Appeals affirmed, citing expert testimony to satisfy both the increased risk criterion and the causation prong of the definition of an occupational disease. Mesothelioma is a cancer that occurs almost exclusively in those who have been exposed to asbestos, so asbestos exposure was a substantial contributing factor to the development of the disease in Ms. Robbins, and Ms. Robbins' exposure at work placed her at a greater risk of contracting mesothelioma than that of others in the general public, not so employed.

Poole v. Tammy Lynn Center, _____ N.C. App. _____, 566 S.E.2d 839 (2002).

Ms. Poole worked at a residential facility for persons with severe developmental disabilities. After working there for about five years, she was diagnosed with hepatitis C, which she claimed was an occupational disease. The Commission denied the claim.

The Court of Appeals affirmed, holding that while the Commission properly found that Ms. Poole's work exposed her to a greater risk of contracting hepatitis C than members of the general public not so employed, thereby satisfying the "increased risk" prong of the definition of an occupational disease, the Commission was justified in finding insufficient evidence to satisfy the causation prong. While a medical expert had testified that the exposure to blood at work placed Ms. Poole at an increased risk and that she had, more likely than not, been exposed at work, there was other evidence that most of the residents who might have gotten blood on her had been tested somehow, and none of them had had hepatitis C, and that evidence was sufficient to support the Commission's decision.

Nix v. Collins & Aikman, Co., _____ N.C. App. _____, 566 S.E.2d 176 (2002).

Mr. Nix worked in an environment in which he was exposed to chemicals. Over time, he developed hyper-reactive airways disease, which was triggered by a large number of environmental irritants. The Commission denied his claim, on grounds that the greater weight of the medical evidence did not support findings that the occupational exposure caused the disease or that the Mr. Nix was at an increased risk of developing the disease due to his employment, compared to others in the general population, not so exposed.

The Court of Appeals affirmed, holding that testimony from expert physicians that they were unable to opine that the exposure placed Mr. Nix at an increased risk was sufficient to support the Commission's findings and conclusions. The Commission was justified in following Sebastian v. Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872, disc. review denied, 297 N.C. 301, 254 S.E.2d 921 (1979) in concluding that the disease was not occupational, because the disability from it was the result of personal sensitivity to the chemicals, not of a disease caused by work.

Judge Greene dissented, opining that the Commission's decision was infected by a misinterpretation of Sebastian. He thought that the Commission had required evidence that the exposure would increase the risk of disease in "most people," when the proper question was whether it increased the risk for Mr. Nix, taking into account his predispositions. Judge Greene characterized Sebastian as holding not that disease caused by the interaction of exposure and personal sensitivity was not compensable, as compensation had been awarded for a period of time in that case, but rather that when an occupational disease ceases after the employee leaves the work environment that causes the disease, and there are no lasting effects, then compensation will be denied after the healing date. Judge Greene did not seem to challenge the presence of evidence that could support denial of the claim. Instead, he saw the Commission's stated rationale as legally inaccurate and suggested remand for new findings and conclusions.

Futrell v. Resinall Corp., _____ N.C. App. _____, 566 S.E.2d 181 (2002).

Mr. Futrell developed carpal tunnel syndrome. At hearing, he did not produce any evidence that his work had exposed him to a greater risk of contracting CTS than the risk to which the general public, not so employed, was exposed. The Commission denied the claim of occupational disease.

The Court of Appeals affirmed, citing the same lack of evidence. It also affirmed the Commission's refusal to remand the case to the Deputy Commissioner to allow Mr. Futrell to take more evidence on the issue of increased risk. In dissent, Judge Greene opined that the majority had applied the wrong standard by requiring proof that Mr. Futrell's work increased his risk of contracting CTS, when the proper inquiry was whether the evidence showed an increased risk that pre-exiting CTS would be aggravated by the work, when the claim was based on aggravation. In response, the majority opined that whether a claim is for complete causation or aggravation is material only to the

causation prong of establishing an occupational disease, not the increased risk prongs, which require proof of a greater risk of contracting the disease. In any event, the majority held that the issue of aggravation had not been preserved by the plaintiff.

Pressley v. Southwestern Freight Lines, 144 N.C. App. 342, 551 S.E.2d 118 (2001).

Mr. Pressley, a truck driver who ran routes in the southwestern United States, contracted a fungal disease by exposure to an organism that lives in the sands of the Southwest, but not in North Carolina or any other state east of the Mississippi River. The Deputy Commissioner denied the claim, and the Full Commission reversed, awarding compensation for an occupational disease.

The Court of Appeals affirmed, holding that when determining whether an injured worker's disease is caused by a hazard of which the worker has been exposed to a greater risk than the general public, as required for a finding of compensable occupational disease under N.C.G.S. § 97-53(13), the relevant comparison is to hazards to which the general population *of North Carolina* is exposed, even if the general population of the area of exposure is subject to an equal hazard.

5. Credit issues.

Thomas v. B.F. Goodrich, 144 N.C. App. 312, 550 S.E.2d 193 (2001).

Mr. Thomas suffered a compensable injury. About four years later, the Commission awarded compensation for permanent total disability, ordering that a 25% attorney's fee be paid directly by the defendant, to include payment of every fourth check from on-going benefits. However, for about six years, the defendant sent all payments to Mr. Thomas. Mr. Thomas moved the Commission to order payment of the misdirected fees, which totaled about $15,000 by that time, to the attorney. The Commission ordered that, and the defendant paid. The defendant then moved the Executive Secretary to be allowed to take credit from on-going benefits, to reimburse itself for the double payment of attorney's fees. The Executive Secretary refused and suggested a hearing. The Commission denied credit on grounds both that 1) it did not have authority to do so pursuant to N.C.G.S. § 97-42, which provides that credits in cases of permanent disability must be taken by shortening the period of disability and not by reducing the amount of weekly payment, which was impossible in light of the continuation of weekly benefits for life, and 2) the burden of the mistaken payments should be borne by the defendant who made the mistake, instead of by Mr. Thomas, who in light of his IQ of 72 and his functional illiteracy, did not realize he was receiving the checks that should have been for the fee. Also, the Commission recognized that Mr. Thomas' compensation was already below the poverty level and that any further reduction would make that situation worse.

The Court of Appeals affirmed, but not as to all grounds. First, the Court overruled assignments of error as to the sufficiency of the evidence to support the Commission's findings, because there was no transcript in the record on appeal, which

resulted in the Court's deeming the findings to be supported. The Court then held that the Commission had misinterpreted N.C.G.S. § 97-42, agreeing with the defendant that the General Assembly had not intended the prohibition against reducing weekly benefits to make recovery of overpayment impossible in cases of permanent total disability. However, the Court held that the Commission had not abused its discretion in denying the credit under the separate ground that the equities favored placing the burden of the mistaken payments on the defendant.

Farley v. North Carolina Department of Labor, 146N.C. App. 584, 553 S.E.2d 231 (2001).

Mr. Farley suffered an admittedly compensable hip injury. After surgery, he was rated with a 75% permanent impairment. He was paid 150 weeks of compensation, pursuant to a Form 26 Agreement. He elected a lump sum. About 69 weeks after the beginning point for the compensation, Mr. Farley's condition changed, and the defendant started paying compensation for temporary total disability. Additional surgery did not help. The defendant denied liability for permanent total disability, on grounds that Mr. Farley had already elected compensation under N.C.G.S. § 97-31. The Commission awarded compensation for permanent total disability and refused to give the defendant any credit for compensation paid under the prior Form 26, deciding that there was no statutory authority for such a credit.

On appeal, the defendant does not appear to have contested the Commission's decision as to permanent total disability, focusing instead on the denial of the claimed credit. The Court of Appeals reversed, holding that the issue was not exactly about credit, so N.C.G.S. § 97-42 did not apply, and it did not matter that the prior compensation under § 97-31 was due and payable when paid. Instead the Court cited § 97-34, which prohibits double compensation for two injuries at the same time, as indicative of legislative intent to prevent double recovery. The fact that a lump sum had been elected did not change the fact that the compensation was for a 150 week period. Therefore, the 81-week overlap was prohibited, and the defendant was allowed to suspend compensation for total disability for 81 weeks, in order to eliminate that overlap.

Jenkins v. Piedmont Aviation Services, ____ N.C. App. _____, 557 S.E.2d 104 (2001).

Ms. Jenkins hurt her neck in July of 1986, when she was hit by a mirror in a hotel, while on a business trip. She was originally told that it was not compensable. In July of 1998, a new supervisor told her that the injury was compensable and that the employer would take care of filing everything before the deadline to do so. The claim was not filed. She continued to work. Her medical bills were being paid, but she did not realize that they were being paid by a health insurance carrier. In April of 1998, she had a separate injury to her hand, which resulted in surgery and time out of work, for which she was apparently paid. In December of 1989, the employer changed health insurance carriers, and the new one refused to continue paying for medical treatment, contending that is was workers' compensation related. She left work in December of 1989 and filed her claim in March of 1990. Deputy Commissioner Haigh and the Full Commission concluded that the defendants were estopped to assert failure to file as a defense. It is not

clear why compensation was not paid. Ms. Jenkins filed another Form 33 Request for Hearing in May of 1992. Deputy Commissioner Ford awarded compensation, but also awarded a credit for royalties she received from musical compositions. However, he did not decide how much the credit was. In a subsequent hearing before Deputy Commissioner Hoag, a credit was awarded in an amount of about $125,000. The Full Commission reversed that, concluding that Deputy Commissioner Ford's order of a credit was void, because he had not had authority to award a credit, noting that the royalties were apparently for writing that was done before Ms. Jenkins became disabled.

The Court of Appeals affirmed. The defendant contended that the Commission did not have the power to vacate Deputy Commissioner Ford's order of the credit, because it had not been appealed. However, the Court held that the Commission has the power to set aside its own orders, when justice requires such action. The Court stated that the Commission's power was analogous to that conferred on the General Courts of Justice by Rule 60(b) of the Rules of Civil Procedure, which permits setting aside a judgment that is void, or for any other reason justifying relief. The Commission had made specific findings that the order in question was void, because the Commission did not have the power to award the credit for "property rights acquired by plaintiff for the lyrics to two songs prior to the date of her disability." Further, the Workers' Compensation Act only permits credit for money paid by the defendants, so that N.C.G.S. § 97-42 did not apply to give authority for a credit. The Commission's calculation of the amount of credit due on account of Ms. Jenkins' home-based jewelry making business was supported by the evidence, and the assignment of error as to that was abandoned.

Christopher v. Cherry Hospital, 145 N.C. App. 427, 550 S.E.2d 256 (2001).

Ms. Christopher was injured during an employer-mandated self-defense class. Her claim was denied, but she used 52 days of accrued sick leave and vacation time. The Commission awarded compensation. In response to the defendant's contention, credit was awarded, on a dollar-for-dollar basis, for the sick leave and vacation time that had been paid, less the attorney's fee. However, the Commission also ordered that Ms. Christopher's sick and vacation time was to be restored, on a dollar-for-dollar basis.

On the defendant's appeal, the Court of Appeals reviewed the case law having to do with credits for payments made under private disability and other similar plans, then pointed out that the type of benefit paid in this case was different, because it was an accrued benefit that had been earned by Ms. Christopher and could have been used at another time. Therefore, the benefits were "due and payable when paid" independently of whether the claim had been accepted or won. The Court reversed, holding that since the benefits were due and payable, the Commission did not have statutory authority to grant any credit on account of those benefits. The issues as to accounting for the attorney's fee and whether the Commission had jurisdiction to order restoration of the sick and vacation time were obviated by the Court's elimination of the credit.

Shockley v. Cairn Studios LTD., ___ N.C. App. ____, ___ S.E.2d ____ (2002).

Mr. Shockley worked around isocyanates while working for the employer in the manufacture of plastic figurines. In November of 1995, he started having breathing problems. His claim was denied by the employer. In April of 1996, the defendants changed their minds and accepted the case, paying some compensation. In the meantime, Mr. Shockley had gone to work for another company in Tennessee, where he was exposed to similar chemicals. The compensation from the defendants began after he was forced to leave work with the Tennessee employer, due to breathing problems. The Commission determined that Mr. Shockley had been last injuriously exposed at the Tennessee employment and that he had been overpaid about $67,000 in benefits. The Deputy Commissioner awarded a credit to the defendants, while the Full Commission did not.

The Court of Appeals remanded to the Commission, holding that the claim had been accepted by operation of N.C.G.S. § 97-18(d), when compensation was paid without prejudice for 90 days after the date it was started (without mentioning whether there was an issue as to whether the 90 days should have started earlier, when the employer had notice of the injury). The only way to retroactively deny was for the Commission to find that "material evidence was discovered after the period that could not have been reasonably discovered earlier," as provided by § 97-18(d). The case was sent back to the Commission for findings as to when the defendants had learned of the subsequent exposure. The Court also held that the defendants would be entitled to reimbursement of the benefits they overpaid, if the Commission determined that they could contest the award on the basis of newly discovered evidence.

6. Specific traumatic incident.

Zimmerman v. Eagle Electric Manufacturing Co., ____ N.C. App. ____, 556 S.E.2d 678 (2001).

Ms. Zimmerman worked as an electrical parts assembler. On June 19, 1996, while doing a particularly fast job, she felt a stiff neck and right arm and shoulder pain. She reported the problem and was moved to a lighter job for two months. On September 16, 1996, while working, she felt tingling from her right shoulder down to her thumb and index finger. The company doctor treated for four months, with no improvement. Her family doctor diagnosed a herniated disc in January of 1998 and referred her to a surgeon, who performed neck surgery on March 16, 1998. She got some better, but her family doctor placed her on restrictions, and she was unable to find work. The doctors opined that Ms. Zimmerman's condition was the result of her working position and was due to causes and conditions characteristic of and peculiar to her work. The Commission awarded continuing compensation for total (and apparently permanent) disability, until she returned to work at her pre-injury wage or Commission order.

The Court of Appeals affirmed, holding that the evidence that Ms. Zimmerman suddenly experienced pain at judicially cognizable times, on two occasions, was

sufficient to support the Commission's decision that there was a specific traumatic incident. There was no need for an inciting event. The Court also found evidence to support the finding that Ms. Zimmerman's job increased her risk of injury above that of the general public. The finding of permanent and total disability was supported by medical evidence of her limitations and lay evidence of her unsuccessful attempts to obtain employment.

7. Standard of review of Commission decisions.

Smith v. Beasley Enterprises, Inc./Red Apple, ____ N.C. App. ____, 560 S.E.2d 885 (2002).

Ms. Smith was a deli worker who spent two to three hours each work day washing pieces of chicken and cutting fat off of them. She reported pain and numbness in both hands during a routine physical. She was referred to a neurologist, who diagnosed bilateral carpal tunnel syndrome. A neurosurgeon performed surgery on her left hand. After recovery, he told her to come back if she had troubles with the left hand or wanted surgery on the right. The Deputy Commissioner and the Full Commission denied her claim, due to failure to prove a causal relationship between the work activity and the carpal tunnel syndrome.

The Court of Appeals affirmed, holding that specific references in the Commission's opinion and award to evidence from the physician's assistant at the family doctor's office and the neurologist indicated that the Commission had not improperly failed to consider their evidence. Failure to mention the physician's assistant's supervising physician was not error, as he had not actually examined Ms. Smith and testified that he was unaware of her job duties. Furthermore, the favorable opinions were damaged by inaccuracy of the job duties presented in a hypothetical question. There is no mention of the neurosurgeon, other than that he was deposed.

Sheehan v. Perry Alexander Construction Co., _____ N.C. App. _____, 563 S.E.2d 300 (2002).

Mr. Sheehan had a significant history of back problems, having undergone three surgeries, but he could work. About two years after the most recent surgery, he claimed to have suffered an injury by accident, when the bulldozer he was driving fell a few feet off a rock, jolting his back. About three weeks after the alleged accident, he went to an emergency room, reporting that he had injured his back in the bull dozer accident. He continued to work, with continuing pain, until he was terminated about two weeks after the visit to the emergency room. About two months later, Mr. Sheehan started getting treatment at the Veterans Administration hospital. A couple of months after that, he filed his Form 18, and his claim was denied. Throughout his treatment, he consistently reported the accident as the beginning of his problems. The deputy commissioner awarded compensation, but the Full Commission denied the claim on credibility grounds. On the first appeal, in an unpublished opinion, the Court of Appeals reversed and

remanded, because there was nothing in the opinion and award to indicate that the Commission had considered the corroborative testimony of the VA orthopedist. On remand, the Commission added findings to the effect that it had considered that doctor's testimony, but had found it unpersuasive, because it was based on Mr. Sheehan's history, which was unreliable.

On the second appeal, with Judge Hudson writing, the Court of Appeals affirmed, reminding that the Commission is the final determiner of the weight to be accorded evidence, holding that the revised opinion and award adequately indicated that the doctor's testimony had been fully considered and citing evidence sufficient to support the Commission's credibility decision. The Commission was not required to explain itself, but the Court noted that it did, by pointing out conflict in the lay testimony. An obvious typographical error, in which the year of a date was misstated, was held not to be significant.

Johnson v. Southern Tire Sales and Service, _____ N.C. App. _____, 567 S.E.2d 773 (2002).

Mr. Brown suffered an admittedly compensable back injury. He worked for about a month before seeing a doctor, then saw Dr. Bennett. Several months later, he began treatment with Dr. Gwinn. After about 14 months, Dr. Gwinn had developed the opinion that Mr. Johnson was reporting pain in excess of that supported by objective findings and discontinued treatment, supposedly because of Mr. Johnson's attorney's involvement. Mr. Johnson went back to Dr. Bennett, then started treatment with Dr. Cook, who opined as to fairly severe restrictions. In the meantime, vocational rehabilitation specialist Ronald Alford was reporting that Mr. Johnson was telling him and prospective employers that he could not work. Twelve job leads yielded no offers. A Form 24 Application to Stop Payment was referred to hearing, on grounds that the special deputy commissioner was unable to reach a conclusion. At hearing, the deputy commissioner found in favor of the defendants, allowing compensation to be stopped. The Full Commission reversed, ordering compensation for on-going temporary total disability and medical expenses and assigning Dr. Cook as the authorized treating physician.

The Court of Appeals affirmed. There was evidence to support the Commission's decision that Mr. Johnson had cooperated with vocational rehabilitation, and the Commission was allowed to assign greater weight to the testimony of Dr. Cook and less to the testimony of Dr. Gwinn and Mr. Alford. The Court noted that the defendants were unable to point to any specific finding of fact that was not supported by evidence. The defendants' contention that the Commission erred by assigning Dr. Cook as the authorized treating physician was deemed abandoned, because no authority was cited to support the argument. The Court cited the recent decision in Russos v. Wheaton Industries, 145 N.C. App. 164, 551 S.E.2d 456, (2001), disc. review denied, 355 N.C. 214, 560 S.E.2d 135 (2002) in holding that Mr. Johnson's having reached maximum medical improvement did not preclude a finding of continuing temporary total disability. The order of payment of all related medical expenses was not overly broad, because Mr. Johnson's entitlement to medical expenses was open-ended by statute.

In dissent, Judge Tyson opined that the Commission had impermissibly ignored competent evidence in deciding that Mr. Johnson had not constructively refused suitable employment. In so opining, Judge Tyson focused on testimony from Dr. Gwinn and Mr. Alford, "a certified rehabilitation counselor and expert in the field of vocational rehabilitation," perhaps betraying some naïveté concerning the reliability and biases of some players in the real world of workers' compensation. The tone of the dissent indicated that Judge Tyson also considered Mr. Johnson to be generally dishonest, with references to some instances of testimony.

Ruffin v. Compass Group USA, _____ N.C. App. _____, 563 S.E.2d 633 (2002).

Ms. Ruffin serviced vending machines, often having to lift cases of soda and 40-pound boxes of syrup. In April of 1998, her route became more demanding as to work load, though the nature of the work remained the same. On May 9, 1998, she claimed that she was lifting a box of syrup when she felt a cramp in her left shoulder blade. The next morning, she had pain and numbness down her arm. She went to the emergency room, where she was noted to complain of pain in the left side of her upper back. She was eventually examined by an orthopedist, who diagnosed pre-existing spine problems that had been aggravated by the alleged specific traumatic incident, performed surgery and returned her to work with lifting restrictions. Deputy Commissioner Pfeiffer denied the claim, but the Full Commission reversed. Commissioner Riggsbee dissented, referring to credibility decisions that had been made by the deputy commissioner and opining that the evidence did not prove a causal connection between the work-related episode and Ms. Ruffin's spinal problems.

The Court of Appeals affirmed, holding that there was evidence, in the form of expert testimony of aggravation of a pre-existing condition, to support the award. The Court also held that the evidence was sufficient to show a specific traumatic incident, while also discussing the possibility that the injury qualified as an accident. Judge Tyson dissented, opining that the evidence showed, if anything, a shoulder injury, which would require finding an accident, which the evidence would not support. Judge Tyson disregarded the treating physician's testimony, pointing out that it was based on a question that contained reference to Ms. Ruffin's having felt a catch in her neck instead of her shoulder, which was contrary to the evidence, which rendered the testimony incompetent. It appears that the majority viewed the medical evidence as a whole as indicating that the pain that Ms. Ruffin described as being in her shoulder was actually coming from her neck.

Kanipe v. Lane Upholstery, _____ N.C. App. _____, 566 S.E.2d 167 (2002).

Ms. Kanipe contracted bilateral carpal tunnel syndrome, which started giving her major problems in April of 1997. On May 6, she was seen by Dr. DePerczel, who diagnosed her condition. Upon finding out that the condition was work-related, the defendant attempted to direct medical treatment. On June 4, 1997, Ms. Kanipe was seen by Dr. Nicks, who diagnosed CTS and recommended surgery, which was scheduled for June 12. She cancelled the surgery with Dr. Nicks and had surgery with Dr. DePerczel

on July 7, 1997 on her right side and on August 13, 1997 on her left. She filed her Form 18 on June 26, 1997and her Form 33 Request for Hearing on July 11, 1997, asking both that Dr. DePerczel by assigned as her authorized treating physician and that she be paid compensation for disability. On September 9, 1997, the defendant filed a Form 60 admitting Ms. Kanipe's "right to compensation for an … occupational disease as of 4/10, 1997" but denying that she had suffered any disability. The defendant refused to pay for anything. The deputy commissioner awarded compensation and ordered payment of all medical expenses. The Full Commission reversed, finding and concluding that the defendant had the right to direct treatment. The Commission pointed out that while surgery with Dr. DePerczel did not go well, Dr. Nicks had testified that if he had done surgery, then Ms. Kanipe would have been back at work, at light duty, before the expiration of the seven-day waiting period for compensation.

On the first appeal, the Court of Appeals affirmed denial of the medical benefits, but remanded, because the Commission had made no findings to explain its denial of compensation. Denying compensation for refusal to undergo surgery with Dr. Nicks would not have been proper, but basing denial on Dr. Nicks' treatment plan that would have resulted in less than a week out of work would have been permissible. On remand, the Full Commission added a few findings and conclusions, to the effect that Ms. Kanipe would likely not have missed 7 days from work, if she had been treated by Dr. Nicks.

On the second appeal, the Court of Appeals reversed, holding that the law of the case doctrine did not bar the appeal, because the issue had not been decided before. Rather, the case had been remanded because of the absence of a decision on a critical issue. The Court then went on to hold that the Commission's decision on the disability issue was not supported by evidence, because Dr. Nicks had testified that after a few weeks of recovery from surgery and light work, he evaluated each individual patient for ability to work, and some were unable to work. Since he had not examined Ms. Kanipe after her surgery, his testimony about her supposed condition was viewed as useless speculation.

Boles v. U.S. Air, Inc., ____ N.C. App. ___, 560 S.E.2d 809 (2002).

Ms. Boles, a reservationist for the defendant, tripped over a curb and fell, injuring her neck. Her claim was accepted. After surgery, she returned to work and settled on a Form 26 Agreement for a 10% rating of the back. About six months later, she reported to her neurosurgeon that she was feeling suicidal and asked to be written out of work. He told her to go to an emergency room for psychiatric evaluation, to her family doctor or to a psychiatrist. She went to a psychiatrist who took her out of work and maintained, from September of 1993 forward, that she was unable to work, due to chronic pain and, at times, concentration and memory problems associated therewith. The defendant sent Ms. Boles to a psychologist and a psychiatrist, both of whom did a bunch of tests that showed that Ms. Boles could work, from a psychological perspective. Both of the defense experts also disagreed with the treating psychiatrist's treatment approach.

Ms. Boles' change of condition claim was successful, in 1995, and neither party appealed the Deputy Commissioner's decision. In 1997 the defendant filed a Form 24

Application to Stop Payment, claiming that Ms. Boles has refused suitable employment as a reservationist. A Deputy denied the Form 24, and the Full Commission modified and affirmed. The Court of Appeals affirmed, citing the standard of review and holding that the treating psychiatrist's opinions and Ms. Boles' own testimony about her pain and mental problems were sufficient to support the Commission's decision, despite the testimony of the defendant's experts to the contrary.

Norton v. Waste Management, Inc., 146 N.C. App. 409, 552 S.E.2d 702 (2001).

Mr. Norton was sprayed with raw sewage, which abraded his skin, entered through a puncture wound and entered his eyes and mouth. Shortly thereafter, he began to suffer flu-like symptoms, which never got better. He was seen by several doctors who diagnosed him with chronic fatigue syndrome and fibromyalgia. Some of the doctors were unable to give an opinion as to the cause of the disorder but did not rule out the accident. One doctor, an expert specializing in chronic fatigue syndrome and fibromyalgia, and who had worked for the Centers for Disease Control and the National Institute of Health in developing definitions for chronic fatigue syndrome, cited specific criteria in opining that the accident caused the disorder. The Deputy Commissioner denied the claim, finding no occupational disease. The Full Commission reversed, finding an injury by accident.

The Court of Appeals affirmed, holding that there was evidence of an accident and that the one doctor's opinion was enough to support the Commission's finding on causation.

Holley v. ACTS, Inc, _____ N.C. App. _____, 567 S.E.2d 457 (2002).

Ms. Holley was a nursing assistant who injured her left lower leg when she turned and her foot caught on carpeting. She was out of work for about a week. Almost two months later, she had the onset of pain and swelling in her same lower leg, that was diagnosed as deep venous thrombosis (DVT). The deputy commissioner denied her claim for significant periods of disability, on grounds that the DVT was not proved to be related to the compensable accident. The Full Commission reversed, with Commissioner Mavretic dissenting, and awarded compensation for temporary total disability and $20,000 for organ damage, under N.C.G.S. § 97-31(24).

On the most significant issue, the Court of Appeals held that the evidence supported the Commission's findings and conclusion that the DVT was caused by the accident, despite the fact that the medical opinions were stated with no greater certainty than "possibility," taking into account all of the circumstances. The Court held that the evidence was competent, and the Commission could base its decision thereon. Judge Tyson, in dissent, opined that the evidence as a whole showed that the doctors' opinions were nothing more than speculation. The opinions provide useful case citations for difficult causation cases.

The Court remanded, because it was unclear whether the Full Commission had considered whether Ms. Holley had a ratable injury to her lower leg, which would preclude compensation under § 97-31(24). The Court affirmed as to some inconsistency between the evidence and the specifics of the accident stated in the opinion and award, holding that despite the lack of evidence to support the specifics, there was evidence to support the general compensability of the event, and the defendants did not really contend that the event was not compensable.

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

Groves v. The Travelers Insurance Company, et al., 139 N.C. App. 795, 535 S.E.2d 105 (2000), 354 N.C. 206, 552 S.E.2d 141 (2001).

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, and that the case was really no different from Johnson.

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.

On appeal, the Supreme Court reversed *per curiam*, for the reasons stated in the dissent.

Riley v. DeBaer, 144 N.C. App. 357, 547 S.E.2d 831, *remanded*, 354 N.C. 575, 147 S.E.2d __ (2001), *reversed*, ____ N.C. App. ____, 562 S.E.2d 69 (2002).

Ms. Riley sued a couple of vocational rehabilitation specialists who had placed her in the Job Club, after which her compensation was unilaterally stopped by the carrier, claiming negligent infliction of emotional distress. The case was dismissed by the Superior Court, on grounds that are not related to workers' compensation. The Court of Appeals reversed, holding that the trial court had dismissed on authority that had been practically overruled. Neither party raised any issues having to do with workers' compensation exclusivity. On the defendant's petition for discretionary review, the Supreme Court, on its own initiative, remanded for reconsideration in light of Johnson v. First Union Corp.

The Court of Appeals then vacated its prior opinion, remanding to the trial court for dismissal. The Court held that workers' compensation was the exclusive remedy in this circumstance. Judge Eagles dissented, pointing out that the defendants were not the employer, that the claimed injury did not arise out of the employment and that third party lawsuits, including those against providers of treatment, including rehabilitation personnel, are not generally barred. As of June of 2002, the case was pending appeal to the Supreme Court.

Alford, et al. v. Catalytica Pharmaceuticals, _____ N.C. _____, 564 S.E.2d 267 (2002).

Several employees sued a third party and their employer over a chemical leak that caused serious injury. The Woodson claim against the employer was dismissed as barred by the one-year statute of limitations in N.C.G.S. § 1-54(3). On interlocutory appeal, the Court of Appeals, Judge Tyson writing, characterized § 1-54(3) as applying in general to intentional torts, held that Woodson claims are for intentional torts, and affirmed dismissal. In dissent, Judge Thomas opined that since the Supreme Court has defined Woodson claims as not being quite intentional torts, the limitations on intentional torts should not apply. It is worth noting that § 1-54(3) as it existed at the time of the injuries giving rise to this case, applied to "libel, slander, assault, battery, or false imprisonment," not to intentional torts in general. It will be interesting to see how the Supreme Court views this case on appeal. It is also important to note, as the majority did, that § 1-54(3) has been amended, in 2001, to apply only to libel and slander, so this case will have time-limited effect, in any event.

Seymour v. Lenoir County, et al., _____ N.C. App. _____, 567 S.E.2d 799 (2002).

Mr. Seymour, a volunteer fireman, was sent into a burning house during an exercise and was burned severely. He sued the fire department, the county and Mr. Goff, the instructor in charge of the exercise, alleging claims under Woodson and Pleasants. The fire department and Mr. Goff moved to dismiss for lack of subject matter

jurisdiction, on grounds of exclusive remedy and sovereign immunity. The motions were denied, and both defendants appealed.

The Court of Appeals reversed as to the fire department and affirmed as to Mr. Goff. The fire department was held not to have waived its sovereign immunity. The insurance policy exclusion for intentional injury did not apply so as to bar the claim, because it is possible for intentional conduct that meets the Woodson standard to occur, without the actor's intending the resulting injury, and intended injury was what was excluded. However, the Supreme Court has held that in the absence of a specific definition of "accident" in a policy, "that term *does* include injury resulting from an intentional act," but only "if the injury is not intentional *or substantially certain to be the result of the intentional act.*" Citing, N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 706, 412 S.E.2d 318, 324 (1992).

Mr. Goff's defense was based on exclusive remedy. He contended that he was not subject to the Pleasants standard of willful and wanton conduct, because he was a corporate officer of the employer and, therefore, protected by the more restrictive Woodson standard of deliberate conduct, substantially certain to result in serious bodily injury or death. The Court affirmed the trial court's decision that he was more of a co-employee, subject to the Pleasants standard.

Caple v. Bullard Restaurants, Inc., et al., _____ N.C. App. _____, 567 S.E.2d 828 (2002).

Ms. Caple was an assistant manager for a Burger King franchise. She was lent to another franchise that was owned by the same people as her home franchise was. As she was closing one night, a night porter, hired by the employer to protect against robberies, attacked her and stole the store safe. She suffered physical and emotional injury. The night porter had a significant criminal history for violent and property crimes and had become violent after termination from his previous employment. None of this was known to the employer, apparently because absolutely no attempt was made to check his criminal or employment history. Ms. Caple signed a Form 21 Agreement and began to receive workers' compensation benefits. She then sued the employer, as well as her assailant. The trial court granted summary judgment against her.

The Court of Appeals affirmed, holding that the emotional distress she claimed was not necessarily injury that was not covered by the Workers' Compensation Act and distinguishing Hogan v. Forsyth County Country Club by noting that the sexual harassment in Hogan was something to which people outside of employment are equally exposed, while robbery is part of the risk associated with closing a store and counting the money. The Court held that the alleged negligent hiring did not meet the standard of a Woodson claim. The Court also implied that the act of accepting workers' compensation benefits may have precluded a Woodson claim, stating that an injured worker can receive only one recovery for an injury and that it was not clear from the Woodson decision that an employee can receive workers' compensation benefits and then sue the employer.

Baker et al. v. Ivester, _____ N.C. App. _____, 563 S.E.2d 245 (2002).

A large number of employees sued Fieldcrest Cannon and some employees thereof, under Woodson and Pleasants theories. This opinion is about one group of claims against an industrial hygienist, under Pleasants. The trial court granted summary judgment against the plaintiffs.

On appeal, the Court of Appeals affirmed. In the process, the Court reviewed the high standard of improper behavior necessary to qualify as willful, wanton or reckless conduct that will allow a cause of action outside workers' compensation, despite the usual exclusivity of the comp remedy. Several very restrictive cases were cited and compared to the conduct of the defendant. The Court also found no evidence that the industrial hygienist had any direct contact with the plaintiffs or any duty to them. The plaintiffs' contention was characterized as nothing more than that the industrial hygienist, having been delegated the duty of conducting Fieldcrest's asbestos protection program, had done such a dismal job of it that he was liable. The hygienist's duty was seen as being to the employer, and the duty to maintain a safe workplace, being non-delegable, stayed with the employer.

Maraman v. Cooper Steel Fabricators, et al., 146 N.C. App. 613, 555 S.E.2d 309 (2001), __ N.C. __, __ S.E.2d __ (2002).

The deceased employee fell from a beam while connecting steel, 30 feet off the floor. He had gone up to the beam, had gotten out of the man-lift and found no "rat line" off to which to tie himself, because they had been removed earlier for use elsewhere. The operator of the man-lift had some problems getting it back up to the decedent. The decedent continued to work and was bumped off the beam by a large steel joist. The night after the accident, employees of the employer came to the site, installed a rat line and used the crane, so as to disrupt its "memory" of the accident, which apparently could have been taken from the crane by OSHA inspectors. The decedent's estate sued the employer and the general contractor. The trial court directed verdicts in favor of both defendants at the conclusion of the plaintiff's evidence.

The Court of Appeals affirmed in part and reversed in part, in a somewhat confusing opinion. Judge John voted to reverse as to both defendants, Judge Tyson voted to affirm as to both, and Judge Greene concurred with Judge John in the reversal of the dismissal as to the direct employer and concurred with Judge Tyson in affirming the dismissal as to the general contractor. This description is simplified, because the opinions focus on details that cannot be summarized effectively in this paper. If greater detail is needed, the reader is encouraged to read the whole opinion. Judge John held that evidence from the OSHA inspector that the removal of the line created a high risk of severe injury, along with other evidence, and particularly the evidence that the employer had snuck into the job cite after the accident to tamper with evidence, was sufficient to create a jury argument as to the employer's Woodson liability. Judge Tyson noted in dissent that there was another way that the decedent could have tied off and that the general attention to safety issues displayed by the employer did not support the kind of deliberate indifference necessary for employer liability. As to the general contractor,

Judge John opined that knowledge of the inherently dangerous nature of the activity was significant, and lack of knowledge of the direct employer's taking down the lines was not required. Judge Tyson focused on lack of evidence that the general contractor supervised or should have supervised the direct employer's activity.

The Supreme Court reversed the portion of the opinion that had reversed the dismissal of the claim against the direct employer and affirmed the portion that had affirmed the dismissal as to the general contractor. The Court also scolded the Court of Appeals for writing an opinion that was "confusing and inappropriate. All of that was done *per curiam*.

Wood v. Guilford County, et al., 355 N.C. 161, 558 S.E.2d 490 (2002).

Ms. Wood, an employee of the Administrative Office of the Courts, a State agency, worked in the Guilford County Courthouse. She was assaulted in the courthouse. Her assailant was convicted of attempted rape and assault with a deadly weapon inflicting serious injury. She sued the County and the private security company that had been hired by the County, claiming inadequate provision of security. The case truned on application of the public duty doctrine, which the Supreme Court held was a bar to the claim against the County. Security in the courthouse was held analogous to provision of police protection to the general public, with respect to which government has no duty to individuals injured by criminals.

The significant holding for purposes of this manuscript was rejection of the County's contention, properly first raised at the Court of Appeals, that the trial court had lacked subject matter jurisdiction over the claim, on grounds of the exclusive remedy of workers' compensation. The County argued that in fulfilling its obligation to provide a courthouse for State courts, it was acting as an agent of the State and was, therefore, a co-employee of Ms. Wood's. The Supreme Court held that provision of the building did not constitute assisting the AOC and that the County was a "stranger to the actual employment relationship" between Ms. Wood and the State.

Midgett v. N.C. Dept. of Transportation, _____ N.C. App. _____, _____S.E.2d _____ (2002).

Mr. Midgett, a seaman on a ferry between Hatteras and Ocracoke, slipped on a wet deck, that had been painted with the wrong paint, and fell, injuring his back. He received worker's compensation benefits, eventually clinchering his claim. He then filed a tort claim, which was dismissed by both the deputy commissioner and the Full Commission, for lack of jurisdiction.

The Court of Appeals, Judge Hudson writing, affirmed, holding that the State had not waived immunity to Jones Act claims, noting that the Jones Act's provision for comparative negligence was not consistent with North Carolina law.

N.C. Insurance Guaranty Assoc. v. International Paper Co., et al., _____ N.C. App. _____, 567 S.E.2d 468 (2002).

By 1992 amendments to the Insurance Guaranty Association Act and the Workers' Compensation Act, the Guaranty Association was vested with responsibility to cover certain claims made against insurance carriers that became insolvent before January 1, 1993, out of funds that were transferred to it. The Association sought a declaratory judgment as to its responsibilities for injuries that arose before 1993, but for which claims were filed after January 1, 1993. The Superior Court dismissed the action for lack of subject matter jurisdiction, and the Court of Appeals affirmed, holding that the Industrial Commission had exclusive jurisdiction.

9. Medical treatment, including control thereof and attendant care.

Bailey v. Western Staff Services, _____ N.C. App. _____, 566 S.E.2d 509 (2002).

Ms. Bailey was working as a machine operator, through defendant employment agency, when she hit her elbow on a machine. Her condition got worse with time and ultimately required surgery. The defendants first denied her claim for supposed "noncompliance," which apparently meant failure to give a recorded statement. After getting a letter to that effect, she gave the recorded statement immediately. The following day, the employment agency offered her a temporary job with ill-defined requirements. She was terminated for failure to appear for that job—three days before it was scheduled to start. Along the way, the defendants informed Ms. Bailey that they acknowledged that she had experienced a compensable event, but required further medical investigation before they could accept that her current symptoms were related. They also asserted that they had the right to direct medical treatment, because they had "accepted" the claim. The Commission found and concluded that Ms. Bailey had suffered a compensable injury by accident, that the defendants did not have any right to direct medical treatment, and that she was entitled to compensation for total disability through the date of hearing.

The Court of Appeals affirmed, rejecting the defendants' contention that they had accepted the claim. The Court pointed out that N.C.G.S. § 97-18 provides for acceptance of a claim by filing certain forms with the Commission, none of which had been filed by the defendants. The Court was also unimpressed with the defendants' attempts to accept the case without accepting all of it and without paying anything. The evidence was sufficient to support findings and conclusions of disability, as the treating physicians kept her out of work for some periods, she was right-hand dominant with a right arm injury, and other factors. The purported offer of employment by the employer was of no effect, because the employer ordinarily employed only employed two people, there was never any clear description of the job, and Ms. Bailey was terminated before the job was scheduled to start. Under the circumstances, she did not unreasonably refuse employment.

Levens v. Guilford County Schools, _____ N.C. App. _____, 567 S.E.2d 767 (2002).

Ms. Levens suffered an admittedly compensable injury to her arm, which developed into a severe case of reflex sympathetic dystrophy. Her primary treating physician prescribed attendant care for her. It was provided by family members for some time, and the defendant failed to provide anyone else. The doctor also recommended either modifications to Ms. Levens' home or provision of a new house. The Deputy Commissioner found in favor of Ms. Levens and ordered payment for the family members, both retroactively and prospectively, at the rate of $14.00 per hour, for a new house and of a fee for unreasonable defense in the amount of 25% of the amount of retroactive attendant care. On appeal to the Full Commission, the rate was reduced to $10.00 per hour, the fee was affirmed, and the Commission modified the order regarding housing to allow the defendant to make renovations to Ms. Levens' existing home, as an alternative to building a new home, provided that the renovations satisfied her medical requirements.

Both parties appealed, and the Court of Appeals affirmed as to all issues. There was evidence to support the decrease in the hourly rate for attendant care, in that the amount paid to care givers was $9.00-10.00 per hour, and the amount paid to the companies that supply them was $14.00-15.00 per hour. There was also evidence to support that high an amount, as family members were opined to be able to handle the attendant care as well as those hired to do so. The order allowing the housing needs to be met either by renovation or new construction was held to be consistent with the treating physician's opinions about that. The attorney's fee was supported by evidence that the defendant did not do anything to arrange for the care, for years. The adjuster testified that "there seemed to have been a dropping of the ball somewhere."

10. Effect of illegal alien status.

Ruiz v. Belk Masonry Co., __ N.C. App. __, 559 S.E.2d 249 (2002).

Mr. Ruiz fell 70 feet, suffering brain injuries, among other things. The defendants denied the claim, on purported grounds that he was an illegal alien at the time of his injury and had presented a false Social Security card and I-9 form when he was employed. The Commission awarded compensation for permanent total disability and attendant care.

The Court of Appeals affirmed, holding that the definition of "employee" in the Workers' Compensation Act includes illegal aliens, and that awarding compensation to illegal aliens does not conflict with federal immigration law. Provision of attendant care was adequately supported by testimony of Mr. Ruiz's brother, who had been providing care, and of a certified life care planner and nurse, who opined that such care was necessary. The Court pointed out that pre-approval of the fees for attendant care was unnecessary, as the care involved did not fall within the exceptions in N.C.G.S. § 97-90(a) for doctors, hospitals or other medical facilities. The finding of permanent and total

disability was supported by testimony of a vocational rehabilitation expert that Mr. Ruiz's educational deficits and physical limitations, including limited use of his left arm and inability to walk even short distances without help, prevented him from doing even sedentary work. The findings as to permanent total disability and attendant care were claimed by the defendants to be contrary to the opinions of the treating physician, to the effect that Mr. Ruiz could stay at home by himself and that vocational rehabilitation was appropriate.

Gayton v. Gage Carolina Metals, Inc., ____ N.C. App. ____, 560 S.E.2d 870 (2002).

Mr. Gayton was an illegal alien who had obtained his job with falsified documents. He herniated two discs moving a pallet. His claim was accepted. His permanent restrictions prevented him from returning to work for his employer. When a vocational rehabilitation specialist attempted to get Mr. Gayton a job with an employer for whom he had previously worked, the temporary service that was doing the hiring discovered that Mr. Gayton was illegal and informed the voc person that he could not be hired. A labor market survey was completed, but no jobs were specifically identified that Mr. Gayton could have performed, regardless of his immigration status. The Commission awarded on-going compensation for total disability.

The Court of Appeals affirmed, holding that immigration status could only become a factor in determining entitlement to compensation after the defendant made a showing of specific employments that Mr. Gayton would have been able to perform, but for his illegal status. However, once the defendant had done that, the burden would shift to the injured worker to show that he was unable to perform the jobs or that they were otherwise unsuitable. The Court rejected the defendant's claim that federal law prohibited rehabilitation activity, pointing out that it did not prohibit labor market surveying or anything else, other than actual job search. Interestingly, the Court held that acceptance of the claim created a presumption of on-going disability, without any mention of whether the acceptance was by some form other than a Form 21 Agreement, and there was no mention of maximum medical improvement

11. Intoxication.

Willey, et al. v. Williamson Produce, ____ N.C. App. ____, 562 S.E.2d 1 (2002).

Mr. Mullins was killed in a truck accident, while driving for the employer. Two eyewitnesses testified that thy had seen him driving erratically for about 45 minutes before the truck left the road and slid down an embankment. His urine contained indications of cocaine and marijuana. Dr. Arthur Davis testified that Mr. Mullins was impaired by cocaine at the time of his accident and that the impairment caused the accident. He also testified that the threshold level established by the federal government of 300 nanograms per milliliter is sufficient to cause impairment. Dr. Arthur McBay testified that it was impossible to determine whether Mr. Mullins was impaired, or even if he had consumed drugs in the 12 hours before his death, from the drug screen or any other information that was in evidence. The Deputy Commissioner considered the

testimony of the eyewitnesses in placing greater weight on Dr. Davis' testimony and denying the claim, on grounds that Mr. Mullins was impaired and that his impairment caused his accident. The Full Commission reversed, with one Commissioner dissenting, noting that a person can test positive for cocaine metabolites for three or four days after use and for marijuana metabolites 20 days after. Dr. Davis' opinion was explicitly given no weight, while Dr. McBay's opinion was given much. The Commission pointed out that Dr. McBay had extensive experience in forensic toxicology and had served as Chef Toxicologist at the Office of Chief Medical Examiner in North Carolina.

The Court of Appeals reversed, holding that the Commission had failed to evaluate the medical testimony properly, in that there was no evidence that the height, weight or medical history of the injured worker would make any difference in intoxication, announcing a rebuttable presumption of impairment that is created by proof of the use of a non-prescribed controlled substance, and holding that the defendants had produced sufficient evidence to establish that Mr. Mullins' impairment caused his wreck.

Judge Greene dissented, opining that the majority had misapplied the standard of review by focusing on what the defendants had produced, instead of evaluating whether the Commission's decision was supported by competent evidence. Judge Greene found sufficient evidence in the testimony of Dr. McBay, even if the record contained other evidence to the contrary.

This case has been appealed to the Supreme Court.

12. Proving cause and compensability of unexplained injuries.

Janney v. J.W. Lumber Company, Inc., 145 N.C. App. 402, 550 S.E.2d 543 (2001).

Mr. Janney was working as a lumber grader when his ear was injured. He had no recollection of how his injury occurred, testifying only that he was doing his job one moment and lying on the floor the next. There was testimony from a neurologist that he could have had a seizure or a syncope episode. While nothing was clear, there was evidence to the effect that the ear injury may have been cause by contact with a console on the way to the floor. The Commission decided in favor of Mr. Janney.

The Court of Appeals reversed. The majority held that there was no evidence as to how Mr. Janney had fallen, so he had failed to meet his burden of proving that his accident arose out of his employment. The Commission erred in applying the Pickrell presumption to fill in that blank, because the presumption does not apply when the worker survives his injury and is therefore in no worse position than the employer to explain the injury. Even if the presumption was applied, it was rebutted by competent evidence that Mr. Janney might have had a seizure or syncope, so the burden of proof shifted back to Mr. Janney. There was also no evidence to support the Commission's findings that Mr. Janney's work placed him in an especially dangerous position, so that even an idiopathic fall would produce compensable consequences.

Chief Judge Eagles dissented, opining that the Pickrell presumption is appropriate in this case. He quoted the Supreme Court in that case as applying the presumption to "injury or death," not just death. He also opined that the majorities statement that there was evidence to support the finding that Mr. Janney hit the console was sufficient to allow the Commission to decide that he was placed in a particularly dangerous position.

13. Third party lien related issues.

Grant Construction Company v. W. Philip McRae, et al., 146 N.C. App. 370, 553 S.E.2d 89 (2001).

Defendant Dennis Ward was injured at work, due to negligence of a third party. He settled his workers' compensation claim, but his attorney failed to file his third party claim in time. Mr. Ward settled his claim for legal malpractice against his lawyer. The employer plaintiff sued everybody, claiming that its lien had been improperly ignored. The trial court dismissed the employer's lawsuit for failure to state a claim.

The Court of Appeals affirmed, holding that the malpractice recovery was not for the workers' compensation injury and, therefore, was not a recovery from a third party, as defined in the Workers' Compensation Act. The Court also mentioned that the amount of settlement of the third party case had reflected a reduction in damages on account of the workers' compensation recovery, so Mr. Ward did not receive a double recovery. The Court also pointed out that the employer could have sued on its own behalf, pursuant to N.C.G.S. § 97-10.2, but failed to do so. The Court rejected the employer's contention that the lawyer had represented both Mr. Ward and the employer in the third party litigation, holding that that would have been a clear ethical violation for conflict of interest.

Blair Concrete Services, Inc. and Smith v. Van-Allen Steel Co., Inc., _____ N.C. App. _____, 566 S.E.2d 766 (2002).

Mr. Smith worked for Blair Concrete, which was a subcontractor. He was injured when a steel joist fell on him. Four days before the statute of limitations would have run, Blair Concrete filed suit against two upstream contractors, claiming that their negligence caused the injury to Mr. Smith, so that Blair Concrete was entitled to be reimbursed for workers' compensation benefits paid to Mr. Smith. About a year after filing, Mr. Smith was added as a plaintiff. The trial court granted summary judgment, with vague reference to N.C.G.S. § 97-10.2.

The Court of Appeals affirmed. It appeared that the parties were focusing on the portion of § 97-10.2(c) that grants exclusive standing to the injured worker to sue third parties during the last 60 days of the limitations period, and Blair Concrete was planning on arguing that it had cured the problem by adding Mr. Smith as a plaintiff.. However, the Court of Appeals pointed out that there was nothing in the record to indicate that Blair Concrete had filed a written admission of liability with the Industrial Commission, which

is a prerequisite to an employer's filing, before the issue of the statute of limitations is reached. The Court also affirmed admission of an affidavit from Mr. Smith's lawyer, to the effect that he had decided that there was no case, as a discretionary decision.

14. Employment status, including subcontractor issues.

McCown v. Curtis Hines, 140 N.C. App. 440, 537 S.E.2d 242 (2000), 353 N.C. 683, 549 S.E.2d 175 (2001).

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. The 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.

The Supreme Court affirmed, holding that the jurisdictional issue of the employer-employee relationship was subject to the appellate courts' independent evaluation of evidence and going through all of the factors announced in Hayes v. Board of Trustees of Elon College for determining employment status. The Court viewed Mr. McCown's work as free from interference as to the details of performance and the payment arrangement to be indicative of independence.

Harris v. Thompson Contractors, Inc., ___ N.C. App. ____, 558 S.E.2d 894 (2002).

Mr. Harris, who was serving a life term in prison for murder, was working at a work release job at a quarry when a crane fell over on him, seriously injuring him. The defendants denied the claim. The Commission awarded compensation, to be paid to the Department of Corrections for distribution under its rules.

The Court of Appeals affirmed. The defendants' contention that Mr. Harris was barred from receiving compensation while in prison was rejected, on grounds that his injury occurred while he was in prison, which distinguished his case from Parker v. Union Camp, in which an injured worker receiving compensation was subsequently incarcerated, thereby removing himself from the work force for reasons independent of his injury. Mr. Harris was not a prisoner "being worked by the State," because he was working for a private company, without direct supervision by the State. There was no evidence of intentional self-injury, and Mr. Harris' negligence in trying to move his crane while the ball was raised was not so direct a violation of the employer's instructions as to move him outside the scope of employment.

15. Presence or lack of an accident.

Landry v. U.S. Airways, Inc., ____ N.C. App. ____, ____ S.E.2d ____ (2002).

Mr. Landry was unloading a small plane with his supervisor. The supervisor was inside the plane passing items out, and Mr. Landry was receiving the items. As he received a bag of mail, he injured his shoulder. Mr. Landry testified that the bag was heavier than he had expected it to be, because it contained processed photos, instead of regular mail. He could usually estimate the weight of a bag by sight, but he admitted that he never knew the actual weight before he touched a bag. His job involved handliong items that ranged in weight from a couple of pounds to 400. The Commission decided that the injury was the result of normal work routine and denied benefits, for lack of an accident.

The Court of Appeals reversed, holding that the undisputed testimony that the bag was heavier than anticipated required a finding and conclusion of accident. The Commission's finding that mail bags were often heavier or lighter than anticipated was not supported, as Mr. Landry had testified only that the bags were sometimes overweight, not that excessive weight was generally anticipated.

Judge Hunter dissented, opining that the majority had focused inappropriately on a single sentence of testimony and that the evidence as a whole was sufficient to support the Commission's decision that there was nothing unusual about an overweight mail bag.

Pitillo v. N.C. Dept. of Environmental Health and Natural Resources, _____ N.C. App. _____, 566 S.E.2d 807 (2002).

Ms. Pitillo received annual performance ratings ranging from "outstanding" to "good" with which she was very dissatisfied. She requested a meeting to discuss it. During the meeting, she became overwrought and, shortly thereafter, suffered an emotional breakdown. She made alternative claims based on accident and occupational disease theories. Both were denied by the Commission.

The Court of Appeals affirmed. The Commission's credibility decision as to the nature and atmosphere of the meeting, to the effect that it was a routine, problem solving meeting that was not as stressful or unusual as Ms. Pitillo claimed was supported by testimony of the others who were there, and whose testimony the Commission explicitly accorded more weight. In turn, those findings supported the conclusion that the meeting did not constitute an accident. The occupational disease claim failed for inability to show that Ms. Pitillo was exposed to a greater risk of emotional breakdown at her work than are other members of the general public, not so employed. The Commission's failure to rule on Ms. Pitillo's motion to disclose financial arrangements between the defendants and Dr. Arnoff (sic) was not preserved as an issue, because there was no evidence that she had sought a ruling. In any event, the failure, if error, was harmless, because cross-examination had disclosed plenty of information to show the doctor's bias.

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

Arp v. Parkdale Mills, Inc., _____ N.C. App. _____, 563 S.E.2d 62 (2002).

Mr. Arp left work near the end of his shift, though there was conflicting evidence as to whether he left a few minutes early. Employees had the choice of leaving through the front or rear, passing either way through parking lots owned and maintained by the employer. Mr. Arp left through the rear. When he arrived at the back gate, just outside which his mother was waiting for him in her car, he found the gate locked. Unable to squeeze through, he tried to climb the gate, which was seven feet tall, with barbed wire on top. In the process, he fell and injured himself. The Deputy Commissioner found that he had left early, but concluded that he had sustained a compensable injury by accident, arising out of and in the course of his employment. The Full Commission reached the same conclusion, but found in accordance with other evidence that Mr. Arp had left work around the time of the usual end of his shift.

The Court of Appeals affirmed, holding that the evidence was sufficient to support that the accident arose out of and in the course of employment, under the exception to the "coming and going" rule for injuries occurring on the employer's

premises, despite the fact that Mr. Arp had made a foolish decision when he tried to climb the fence, instead of taking the extra few minutes to go through the front exit and around the plant to his ride. The decision to climb the fence was viewed as a minor deviation and not a violation of direct instructions. The Court also cited Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998) in rejecting the defendants' contention that the Full Commission had improperly weighed evidence differently from the Deputy Commissioner. According to Adams, the Full Commission, not the Deputy Commissioner, is the ultimate finder of fact, and there is no requirement that the Full Commission explain decisions to weigh evidence differently.

Judge Tyson, in dissent, opined that Mr. Arp's decision to climb the fence was so unreasonable that the action taken in climbing the fence was not sufficiently connected to the employment for the injury to arise from the employment. Particularly with the focus on the term "unreasonable," it is difficult to separate the defense propounded by the dissent from contributory negligence.

Osmond v. Carolina Concrete Specialties, _____ N.C. App. _____, 568 S.E.2d 204 (2002).

Mr. Osmond lived in South Carolina, south of Charlotte and was working on a project that was also south of Charlotte. He and his brother generally caught a ride to work with a co-employee, Mr. Whitehead. On the date of injury, Mr. Whitehead's car had broken down. Mr. Osmond's supervisor arranged to pick up the three employees earlier than they usually went to work. He decided to have Mr. Whitehead stay home to fix his car, so that he could drive the Osmond's to work in the future. The supervisor then drove toward his home north of Charlotte, where he planned on having one of the employees—probably Mr. Osmond, because his brother did not have a driver's license—drive a dump truck back to the job site south of Charlotte, while the supervisor drove his pick-up truck, so he would have a way to drive home. He picked up the Osmond brothers very early, so that this whole operation could be completed without rush hour traffic problems. On the way north, the supervisor lost control of his vehicle, and Mr. Osmond was injured. After a few months of total disability, he was able to find work that paid less than his pre-injury average weekly wage, with some periods out of work completely. The Commission awarded compensation for temporary total disability and partial disability pursuant to N.C.G.S. § 97-30.

The Court of Appeals affirmed, holding that the evidence supported the Commission's findings and conclusion that Mr. Osmond was injured while in the course of a special errand, which is an exception to the general non-compensability of injuries while coming from or going to work. The award of compensation for partial disability was affirmed, because Mr. Osmond presented evidence that he had obtained work at a reduced wage, which shifted the burden to the defendants to prove capacity for higher earnings. The defendants did not present any evidence to satisfy that burden.

Bowser v. North Carolina Department of Correction, 147 N.C. App. 308, 555 S.E.2d 618 (2001).

Ms. Bowser was in a training program out of town. She stayed in a dormitory during the week and went home on weekends. Three meals each day were provided for free on the campus. Students received no reimbursement for meals taken off campus. There were no stores on campus. One late afternoon, after class, Ms. Bowser went with two classmates to a store, for the primary purpose of purchasing feminine hygiene products for one of the classmates. On the way back to campus, they stopped at a Burger King for supper, because the dining hall on campus was already closed. On the way back to campus, the three were involved in a serious car wreck, which caused Ms. Bowser to suffer severe brain injury, among other things. She lost her job, because she was unable to do it. The Commission awarded compensation, finding that the trip to the store was a reasonable activity under the circumstances, and even if the trip was a personal detour, the employees had resumed the scope of employment by traveling back to the campus. The injury was deemed the result of "risks associated with traveling, especially in unfamiliar areas." Commissioner Sellers dissented, opining that the employees were on a distinct personal errand.

The Court of Appeals reversed, holding that when meals are provided for a traveling employee, injuries occurring while traveling to or from meals that are not reimbursed by the employer do not occur within the scope of employment. The Court acknowledged the general rule that when employees are required by their work to travel away from the employers' premises, they are continuously within the course of employment, except when on a distinct departure for a personal errand. However, when meals are provided, employees who leave the work location to take meals that are not provided are on personal errands that are not necessary or incidental to the employment.

Ragland v. Harris, _____ N.C. App. _____, 566 S.E.2d 827 (2002).

Mr. Ragland sued a co-employee for negligence arising out of a car wreck. He had been let out of work early, so he did not have his usual ride home. He made arrangements with Mr. Harris to drive him. Mr. Harris said that he had some business to attend to before leaving, and Mr. Ragland sat around for 20 or 25 minutes waiting. Mr. Ragland then gave up on Mr. Harris and went out into the parking lot to look for another ride. He saw Mr. Harris there and the two of them got in Mr. Harris' car. Mr. Harris then ran into another co-employee's car, while still in the company parking lot, causing neck and back injuries to Mr. Ragland.

The trial judge dismissed the case on exclusive remedy grounds, and the Court of Appeals affirmed. The Court focused on Mr. Ragland's activity and held that there was no evidence that he had behaved unreasonably in proceeding home, so that the injury arose out of and in the course of employment. The Court noted that Mr. Ragland had devoted the time between getting off work and getting into Mr. Harris' car exclusively to trying to find a way home. While the Court's decision is bad for this case, it is good for those trying to prove compensability.

Dildy v. MBW Investments, Inc., _____ N.C. App. _____, 566 S.E.2d 759 (2002).

Ms. Dildy had an abusive ex-boyfriend who frightened her enough that she had required psychological treatment. He was subject to a restraining order, but routinely violated it. While Ms. Dildy was working at defendant's convenience store, the boyfriend came in, purchased a six-pack of beer, threw it at her, then left the store. Ms. Dildy told her supervisor that the boyfriend was going to come back and kill her and begged him to call the police. The supervisor refused. He also did not take Ms. Dildy seriously when the boyfriend called and threatened to kill her if she hung up the phone. The supervisor ordered her to hang up and get back to work. Shortly thereafter, the boyfriend returned to the store and shot Ms. Dildy, causing injuries. The Commission denied benefits.

The Court of Appeals affirmed, holding that while the supervisor's failure to heed Ms. Dildy's requests to call the police or let her leave did contribute to her injury, the root cause of the injury was still a conflict that arose outside the work, and the risk of a boyfriend's coming to shoot an employee is not incident to the employment.

Lewis v. Orkand Corporation, ____ N.C. App. ____, 556 S.E.2d 685 (2001).

Ms. Lewis worked for a federal government subcontractor in an office in a federal government building. During a paid break, she went to a cafeteria in the building. As she passed the security area at the entrance to the building, a table began to fall. She moved toward the table to try to catch it, injuring herself in the attempt. The Commission awarded compensation.

On appeal, the defendants contended that the accident had not arisen from the employment, claiming that the injury was not related to the employment. The Court of Appeals affirmed, holding that taking a paid break to get refreshment is within the sphere of attending to personal needs that results in an indirect benefit to the employer. The Court also stated that the attempting to catch the table was for the benefit of the employer and all other tenants of the building.

Ward v. Long Beach Volunteer Rescue Squad, _____ N.C. App. _____, 567 S.E.2d 465 (2002).

This case involves provisions of the North Carolina Emergency Management Act. Ms. Ward had worked for the Rescue Squad as a volunteer. When she took a paid position with Oak Island Emergency Medical Services, she was required to quit her volunteer position with the Rescue Squad, but she remained an honorary member who could be called up to active duty during extenuating circumstances. In 1999, when Hurricane Hugo struck, she volunteered for active duty and was allowed to do things. While she was out on a patrol with other emergency personnel, they saw some people on the beach in violation of curfew and drove over to them to tell them to leave. On their way back to their original path, the driver lost control of the Humvee in which they were

riding and rolled it, causing serious injuries to Ms. Ward. The deputy commissioner denied benefits, but the Full Commission reversed and awarded compensation.

On appeal, the primary issue was whether Ms. Ward was in the course of "employment" for the Rescue Squad at the time of her injury. The Court of Appeals affirmed, holding that she had gone to active duty status as a volunteer and that she was in the course of her activities, despite evidence that she reported to duty and went on the specific trip in question because she was bored doing nothing else. The Court pointed out that N.C.G.S. § 166A-4(4) provides that part of emergency management is the "never-ending preparedness cycle of prevention, mitigation, warning, movement, shelter, emergency assistance and recovery." The Court also held that the Commission did not abuse its discretion in allowing an offer of proof into the record on appeal.

17. Procedural issues, including sanctions.

Stevenson v. Noel Williams Masonry, Inc., ____ N.C. App. ____, 557 S.E.2d 554 (2001).

Mr. Stevenson's claim was denied. At mediation, the parties settled on a clincher agreement that provided for payment of unpaid medical expenses. The defendants were slow in paying the outstanding medical expenses. Mr. Stevenson claimed that out of pocket expenses for drugs, travel and a chiropractor were unpaid medical expenses and demanded reimbursement. The defendants refused. Mr. Stevenson filed a motion with the Commission's Executive Secretary, seeking an order of payment. She ordered payment of the outstanding medical expenses and a 10% penalty for late payment. At hearing, Deputy Commissioner Glenn decided that the defendants were required to reimburse the cost of drugs and travel, denied payment of the chiropractor bill, ordered a 10% penalty and ordered attorney's fees as a sanction against the defendants. The Full Commission decided that the out of pocket payments were not "unpaid medical expenses" and reversed the award of attorney's fees, but left in place the 10% penalty.

The Court of Appeals affirmed, holding that out of pocket medical expenses, paid by the injured worker, are not "unpaid" as defined in Industrial Commission Rule 502(2)(b) (2000). Attorney's fees were properly denied, despite the presence of some issues that were not subject to serious dispute, because there was generally dispute as to the terms of the clincher, and there would have been a hearing over the other issues, anyway. There was no abuse of discretion. The Court rejected the defendants' cross-assignment of error claiming attorney's fees, holding that Mr. Stevenson's appeal was not frivolous.

Johnson v. United Parcel Services, _____ N.C. App. _____, 561 S.E.2d 349 (2002).

Mr. Johnson suffered an admittedly compensable back injury, and compensation was paid, at the maximum rate of $406 per week, pursuant to a Form 21 Agreement. Three years later, the carrier notified Mr. Johnson of a job with another employer that

paid $4.25 per hour. Mr. Johnson filed a Form 33 Request for Hearing. The defendants filed a Form 24 Application to Stop Payment, based on Mr. Johnson's refusal to take the job. Mr. Johnson then accepted the job under protest. He continued to work, apparently part time, for a couple of months before stopping due to pain. A hearing was scheduled for about two months after he left work. With about a month to go before hearing, the defendants wrote to plaintiff's counsel, acknowledging that Mr. Johnson was being paid compensation for temporary total disability, so there were no issues in dispute, and the hearing could be cancelled. About a year and a half later, the defendants stopped paying compensation, contending that the 300 week period for partial disability compensation under N.C.G.S. § 97-30 had expired. The defendants filed a Form 24 on grounds that the period of compensation had ended, which was initially approved. The Commission then determined that the Form 24 had been improvidently approved and set it aside, awarding on-going compensation for total disability. However, the Commission determined that the defendants had had reasonable grounds to defend the claim and refused to awarded sanctions, to include attorney's fees, under N.C.G.S. § 97-88.1.

The Court of Appeals reversed, holding that while the award of an attorney's fee is within the discretion of the Commission and will not be disturbed absent an abuse of discretion, the issue of whether there were reasonable grounds to bring a hearing is reviewed by the Court of Appeals *de novo*. The Form 21 created a presumption, there was nothing later to disturb that presumption, and the defendants even acknowledged that the compensation being paid was for total disability. The Court held that there were no reasonable grounds.

Bryson v. Phil Cline Trucking, _____ N.C. app. _____, 564 S.E.2d 585 (2002).

The defendant denied Mr. Bryson's claim, and Mr. Bryson prevailed at hearing. Thereafter, the defendant refused to pay for a dorsal column stimulator that had been recommended by Mr. Bryson's doctors. Mr. Bryson prevailed at hearing on that issue, also, and attorney's fees of $10,500 were awarded as a penalty, pursuant to N.C.G.S. § 97-88.1, for unreasonable defense. The Full Commission affirmed the decision as to providing the stimulator, but cut the attorney's fee to $200. On reconsideration, the Full Commission increased the fee to $2500. Both sides appealed.

The Court of Appeals affirmed, holding that the award of the fees, and the amount thereof, were discretionary and would only be disturbed upon an abuse of discretion. The Commission's decision indicated that it did not consider the fee previously awarded, even though that fee was mentioned and did not improperly consider its unsupported finding that dorsal column stimulators are controversial. The Court viewed the Commission as having decided that while there may have been some reason to question the recommendation of the stimulator early on, the defendant did nothing to investigate and presented no evidence to support its continued refusal to pay. The Court also affirmed the Commission's decision not to award fees for the appeal, pursuant to § 97-88, because such fees are discretionary and the defendants actually prevailed on the primary issue on appeal to the Full Commission, which was the amount of the fee awarded to Mr. Bryson.

Harvey v. Cedar Creek BP, ____ N.C. App. ____, 562 S.E.2d 80 (2002).

Ms. Harvey filed a claim for a foot injury. Three years later, she filed a Form 33 Request for Hearing. On her scheduled hearing date, she and her lawyer failed to appear. On the defendants' motion, the claim was dismissed by the Deputy Commissioner. The dismissal order did not indicate whether the dismissal was with or without prejudice. A couple of months after the missed hearing, Ms. Harvey filed another Form 33. On the defendants' motion, the Executive Secretary of the Commission struck the Form 33, on grounds that the claim had been dismissed with prejudice. The Full Commission reversed, concluding that there was no statutory authority for the dismissal and that, in the alternative, termination of the claim was improper, when lesser sanctions were appropriate and available.

The Court of Appeals held that the Commission was incorrect as to the lack of statutory authority, because all tribunals have the inherent power to dismiss cases for failure to prosecute. Though the Rules of Civil Procedure are not technically applicable to workers' compensation case, they can provide guidance, so the involuntary dismissal was properly considered to be with prejudice, as it would have been under Rule 41(b). However, the Commission properly reversed the dismissal, because the failure to use lesser sanctions, when dismissal would terminate Ms. Harvey's exclusive remedy, constituted an abuse of discretion.

James v. Wilson Memorial Hospital, ___ N.C. App. ____, 558 S.E.2d 228 (2002).

Ms. James was injured at work, and the defendants paid for her medical expenses. She missed no work. She was laid off about two months after her injury, but the defendants continued to pay medical expenses. She filed her claim about two years and three months after her injury. The Commission determined that it had no jurisdiction, because the claim was not filed with two years, as required by N.C.G.S. § 97-24 at the time of the injury.

The Court of Appeals affirmed, holding that the revised version of § 97-24, which allows filing within two years of the last payment of medical expenses, when no other compensation has been paid, was not applicable to the case. Ms. James pointed out that the revised version applies, by its terms, to claims filed on or after its effective date, and she filed her claim after that date. However, the Court held that enlarging the time for Ms. James to file would affect retroactively a vested right the employer had at the time of the injury, which is impermissible. There is no mention in the opinion of estoppel as a possible alternative option for extending the time to file.

Cummins v. BCCI Construction Enterprises, ____ N.C. App.____, 560 S.E.2d 369 (2002).

Mr. Cummins hurt his back setting steel columns at work. He was treated and attempted to return to work, which he was unable to do, due to pain. Three months after

his original injury, he hurt his back again while raking leaves. He was diagnosed with a herniated disk and had surgery a couple of months later. He was released to return to work with a 20 pound lifting restriction. He suffered a recurrent disk herniation and underwent more surgery from another doctor. The claim was denied by the defendants.

The Deputy Commissioner granted some extensions to take medical evidence, but only the original surgeon's deposition was taken. After the Deputy closed the record, Ms. Cummins moved for reconsideration, asking that previously stipulated packages of medical records from two of the doctors be supplemented with more recent records or that the two doctors be deposed. The Deputy denied that motion, then found in favor of Ms. Cummins, but limited compensation to the time between the date of injury and the raking episode a couple of months later. On review by the Full Commission, Ms. Cummins again requested that the additional medical records be introduced. The Full Commission granted that request, then modified the Deputy's decision by awarding compensation until return to work.

The Court of Appeals affirmed, holding that the Commission did not abuse its discretion in accepting the additional evidence or denying the defendants' request to depose the second surgeon, who was one of the doctors whose records were supplemented. The Court distinguished the case of Allen v. K-Mart, in which the Court of Appeals had required that a defendant be given the opportunity to depose physicians whose records had been allowed into evidence after the record was closed. In the instant case, the Court pointed out that the records were merely updates from doctors who were already represented in the record. Further, the defendants had had records from the doctor in question for years and had actually opposed Ms. Cummins' earlier attempt to depose the same doctor and did not ask for the deposition until after the Full Commission had filed its Opinion and Award. The Court also rejected the defendants' contention that the Commission should have ended compensation on the date that the second surgeon released Ms. Cummins to return to work with "no specific work restrictions" other than to by guided by her symptoms. This was held not to be the equivalent of an unequivocal return to unrestricted work, such as that involved in the case of Harrington v. Adams-Robinson Enters. Finally, the Court affirmed the Commission's decision that there was no evidence that the raking episode was an intervening cause, holding that the record supported that decision.

Hawley v. Wayne Dale Construction, et al., 146 N.C. App. 423, 552 S.E.2d 269 (2001).

Mr. Hawley suffered an admittedly compensable injury, and there was dispute as to compensation under N.C.G.S. § 97-31. The treating doctor initially rendered no rating. Another doctor assigned 20% and a third assigned 3%. Plaintiff's counsel refused to stipulate to the treating doctor's records, because there was no rating. The Deputy Commissioner ordered that the doctor's deposition should be paid for by the plaintiff. The doctor had moved out of state, and defense counsel started trying to find him, to arrange for the deposition. In the meantime, plaintiff's counsel received a 10% rating from the treating doctor. He notified the Commission that he would no longer require a deposition. He noted a copy to defense counsel on the letter to the Commission, but the

copy was never sent to defense counsel, who continued to spend time on the unnecessary deposition. The Deputy Commissioner awarded compensation for the 10% rating, and awarded sanctions of $2000 against defense counsel. On review by the Full Commission, the sanction was reduced to $1000.

The Court of Appeals affirmed, holding that the Commission did not err by considering information contained in settlement discussions, since the information was not considered for an evidentiarily improper purpose and the information probably did not have an effect on the Commission's decision, and holding that the sanction was not granted pursuant to a statutorily unauthorized rule and was not an abuse of discretion. Interestingly, the Court also held that while the time and rate information propounded by defense counsel indicated only about $680 of time spent, the award of $1000 as a sanction was not improper, as the Commission's discretion is not limited by formula.

Ratchford v. C.C. Mangum, Inc., ___ N.C. App. ____, ___ S.E.2d ____ (2002).

Mr. Ratchford agreed to a clincher agreement in an accepted case, while under threat of a Form 24 Application to Stop Payment. He filed a Form 33 Request for Hearing, seeking to set aside the clincher as having been improvidently approved. The Deputy Commissioner and the Full Commission denied the motion.

On appeal to the Court of Appeals, the Commission's decision was reversed and the clincher held to be voidable. The defendants petitioned for discretionary review. Shortly thereafter, the Full Commission entered an opinion and award concluding that the clincher was voidable and remanding the case to a Deputy Commissioner for determination of the benefits due Mr. Ratchford, who then appealed that decision to the Court of Appeals. The Court of Appeals affirmed and dismissed the appeal, holding that the petition for discretionary review did not deprive the Commission of jurisdiction and that Mr. Ratchford had shown no substantial right that would be lost through failure of the Court to hear the interlocutory appeal.

18. Average weekly wage.

Larramore v. Richardson Sports Limited Partners, d/b/a Carolina Panthers, __ N.C. App. __, 540 S.E.2d 768 (2000), 353 N.C. 520, 546 S.E.2d 87 (2001).

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 found 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.

The Supreme Court affirmed *per curiam*.

Loch v. Entertainment Partners, ____ N.C. App. ____, 557 S.E.2d 182 (2001).

Mr. Loch was an actor who worked for the employer very sporadically. He suffered an admittedly compensable knee injury and was compensation at the maximum compensation rate, pursuant to a Form 60 that stated that the compensation rate was subject to wage verification. A rating was assigned. A hearing was held on the issue of average weekly wage. The Deputy Commissioner concluded that the calculation should be made under the catch-all method of N.C.G.S. § 97-2(5), then used wages from the 52 week period in the five years before injury that contained the largest amount of wages and divided by 52, which resulted in an average weekly wage of about $80. Mr. Loch appealed to the Full Commission, which agreed that the catch-all provision should be used, then divided the wages in the 52 weeks before the injury by 52, which yielded an average weekly wage of $58.

The Court of Appeals reversed, holding that while the Commission had properly found "exceptional reasons" to justify use of the catch-all method, it had then proceeded to use the first method in § 97-2(5), by dividing the wages earned in only five days of work during that period by 52 weeks. The Court stated that the purpose of the average weekly wage calculation was to reach a fair determination of what the injured worker would earn in the absence of injury. No specific guidance was given as to how to calculate Mr. Loch's average weekly wage, but the Court seemed to understand that it was odd for an employee who earned over $3000 in five days of work to be compensated at a rate of less than $40. The Court affirmed the Commission's award of a credit for any overpayment during the 11 months that Mr. Loch was compensated at the maximum rate, agreeing with the Commission's decision that the defendants were not estopped to claim the credit, since Mr. Loch did not rely to his detriment on the mistaken payments.

Davis v. Taylor-Wilkes Helicopter Services, Inc., et al., 145 N.C. App. 1, 549 S.E.2d 580 (2001).

Mr. Davis suffered a minor injury in 1991 and was terminated, because he was considered an unacceptable health risk. The following year, the employer and Mr. Davis agreed that he would be hired as an "independent contractor" to do herbicide spraying that had been part of his job before he was terminated. In 1995, he was injured when a sprayer tipped over. The Deputy Commissioner denied the claim, on grounds that he was an independent contractor and had failed to file proper notice. The Full Commission reversed that decision and awarded benefits for permanent total disability.

The Court of Appeals affirmed, holding that, even assuming that Mr. Davis was not an employee, he would be covered under the subcontractor provisions of N.C.G.S. § 97-19. His written waiver of his right to compensation was not effective, because it had been for only one year in 1992 and had not been renewed. Lack of notice was not a defense, because the employer had known of the accident on the day it occurred and could, therefore, not be prejudiced by lack of written notice, and lack of notice was excused, because both parties assumed at the time that Mr. Davis was an independent contractor who could not claim benefits. The average weekly wage was calculated by dividing the amount Mr. Davis was paid for his seasonal work by 52 weeks. It was

considered inappropriate to use wages from the prior season, because the amount of spraying available to Mr. Davis had been declining from year to year. Since he was injured in the middle of the season, it was necessary to use wages from an employee of the employer who finished the spraying that season. The Court affirmed using "spray tickets" from that employee, instead of his full wages, because he was also paid for other work.

Derosier v. WNA, Incorporated/Imperial Fire Hose Company, ____ N.C. App. ___, 562 S.E.2d 41 (2002).

Ms. Derosier suffered an admittedly compensable injury to her back. When she was ultimately released to return to work with permanent restrictions, she was unable to return to her job as a floater. Her rating was 2%. She returned as a lab technician, at the same hourly rate of pay. However, she was able to work less overtime than she had as a floater before her injury, so her overall wage was lower. She was paid compensation for partial disability for about five months, while she worked part-time. Thereafter, the defendants refused to pay additional compensation, contending that her reduction in weekly wage was the result of an economic downturn in the fire hose industry and not the result of her injury. The Commission awarded compensation under N.C.G.S. § 97-30.

The Court of Appeals remanded, holding that the Commission did not have sufficient evidence in the record to compare effectively any difference in wage earning capacity before and after the injury. The Court pointed out that there is a difference between the amount of earnings and wage earning capacity. In this case, the Court wanted to compare the number of hours of overtime available to the current floater and to Ms. Derosier in her current position as a lab tech. Since there was not clear evidence to provide that comparison in the record, the case was remanded, apparently for purposes of getting that evidence.

Judge Greene dissented, pointing out that the majority had accepted the defendants' position that Ms. Derosier experienced a drop in overtime hours due to an economic downturn. However, the evidence of a drop in wages was sufficient to raise a presumption that the drop was indicative of a decrease in wage earning capacity. Since the Commission found implicitly that the defendants had failed to overcome that presumption, there was no need to get involved in the comparison required by the majority.

19. Change of condition.

Shingleton v. Kobacker Group, ___ N.C. App. ____, 559 S.E.2d 277 (2002).

In June of 1989, Ms. Shingleton hurt her back while working as a manager in a shoe store. She was placed on light duty, then left her job, moving to West Virginia. She went to a couple of osteopaths, an othopedist and a physiatrist, in West Virginia and Ohio. She was diagnosed with a disc bulge and a lower back sprain. She filed for a

hearing and was awarded compensation, in 1994, for total disability during appropriate times and compensation for partial disability based on wage loss, pursuant to N.C.G.S. § 97-30, until a date 300 weeks after her injury. In March of 1996, the defendants filed a Form 28B, reporting that all compensation had been paid. In August of 1996, Ms. Shingleton filed a request for hearing, claiming a change of condition. The Deputy Commissioner denied the claim, concluding that Ms. Shingleton had failed to prove a change of condition or that several of her many health problems were related to her compensable injury. The Full Commission reversed and awarded additional compensation.

The Court of Appeals reversed, holding that there was no evidence to support the Commission's decision, in that the medical evidence showed that Ms. Shingleton's condition was the same as at the previous hearing, particularly with respect to capacity to earn wages. Ms. Shingleton's testimony that she was unable to work at all was insufficient, because medical evidence was required. The Court further noted that her testimony as to her physical ailments "barely changed" from the prior hearing.

Pomeroy v. Tanner Masonry, _____ N.C. App. _____, 565 S.E>2d 209 (2002).

Mr. Pomeroy suffered a compensable back injury. A couple of months later, he was released to return to work without restrictions or permanency and did so. The defendants filed two Form 28B's, the second of which purported to close the case. About three months after returning to work, Mr. Pomeroy left the employer and moved to New York, taking work with two masonry contractors. He claimed that he left each employment due to back problems that gradually increased. He saw an MD and a chiropractor in New York, more than a year after moving there, both of whom opined that Mr. Pomeroy was having back problems related to his compensable injury. Mr. Pomeroy filed a Form 18 that was considered sufficient as an application for additional benefit on account of a change of condition. The Commission awarded on-going medical compensation without specifying which medical treatment it applied to, but denied the claim for change of condition.

The Court of Appeals affirmed the denial of the change of condition claim, noting that both of the New York treating professionals had relied entirely on Mr. Pomeroy's representations, that Mr. Pomeroy had worked for three different masonry contractors for more than a year after he returned to work with no restrictions, that there was no evidence of reduced wage upon return to work and that he had admitted his ability to work in order to obtain unemployment benefits in New York. In the process, the Court stated that the Form 28B was sufficient to close the claim and start the two-year period to claim a change of condition under N.C.G.S. § 97-47, which may be a new obstacle to such claims. The award of future medical expenses was justified under the rule from Hyler v. GTE Products Co., 333 N.C. 258, 425 S.E.2d 698(1993), but that award was remanded, because the Commission had made only a general award, without specifying which medical bills would be covered. The Court stated that the Commission was to give Mr. Pomeroy the benefit of a presumption that additional medical treatment is related to the compensable injury. Mr. Pomeroy had moved the Commission to reconsider, for purposes of getting a more specific award of medical compensation. The Commission

had decided that it lacked jurisdiction to address that motion to reconsider, because the award of medical expenses had been appealed. In light of the remand, Mr. Pomeroy's appeal of the refusal to address the motion was rendered moot. However, the Commission was to rule on Mr. Pomeroy's motion for attorney's fees.

20. Heart attack.

Smith v. Pinkerton's Security and Investigations, 146 N.C. App. 278, 552 S.E.2d 682 (2001).

Mr. Smith was a patrol supervisor for the defendant security company. He had persuaded the employer to hire his nephew. The nephew stopped working for the employer, but did not hand in his uniform, patrol book, statement log and keys. Shortly thereafter, Mr. Smith's wife called him at work to tell him that the nephew was there. Mr. Smith went home to find the nephew arguing with a friend of Mr. Smith's about money that was owed the friend. Mr. Smith asked the nephew to return the employer's keys. When the nephew refused, Mr. Smith began to get out of his truck and suffered a heart attack. He was out of work for several weeks, but was able to return to work with no restrictions. The Commission denied his claim.

The Court of Appeals affirmed, citing several heart attack cases for the proposition that even though the confrontation over the keys was an unusual event, the heart attack could not be compensable, unless there was a finding that the event involved unusual or extraordinary exertion. The Commission had gone as far as to acknowledge that Mr. Smith was angry and that the confrontation precipitated the heart attack. There was also evidence that Mr. Smith had pre-existing heart disease and testimony from his treating physician that the attack could have occurred with no precipitating event.

21. Organ damage and disfigurement.

Russell v. Laboratory Corp. of America, _____ N.C. App. _____, 564 S.E.2d 34 (2002).

Ms. Russell fell and hit her head on a counter, chipping some teeth and sustaining a concussion. She required a root canal and tooth restoration with resin and developed migraine headaches. The Commission awarded compensation for temporary total disability and medical expenses, but denied compensation for permanent partial disability, based on disfigurement or organ damage, and denied an enhanced fee.

The Court of Appeals affirmed on all issues. Evidence of normal imaging and electrical studies, along with Ms. Russell's apparent capabilities, was sufficient to support the Commission's decision that there was no organ damage under N.C.G.S. § 97-31(24), despite the continuing headaches, for which she was to continue seeing a doctor. It can be inferred that the Commission focused on lack of observable organic damage, while the

Court would have allowed the opposite result as well, if there was evidence that the continuing headaches suggested microscopic organic damage. The chipped teeth generated no compensation for disfigurement, pursuant to § 97-31(21), because they did not "mar" Ms. Russell sufficiently to interfere with her job prospects. Also, the Commission's rating guide provides that compensation for tooth damage is only available when there has been extraction or crowning. The "plaintiff" challenged the award of a 25% attorney's fee, on grounds that the contract of representation provided for one-third, on grounds that the Commission had not given reasons why it did not approve the full fee. The Court affirmed, noting that N.C.G.S. § 97-90(c) provides that appeal of a fee awarded by the Commission is by appeal to the Full Commission within five days of receipt of notice of the fee, and appeal from an adverse decision of the Full Commission must be filed in superior court within 10 days, none of which was done by plaintiff's counsel. On an evidentiary issue, the Court of Appeals found no error in exclusion of some records from a couple of doctors, when the testifying physician did not use the records to form opinions, the defendants refused to stipulate to the records, and Ms. Russell did not take advantage of the Commission's permission to take depositions of the doctors in question, which required the plaintiff to make the arrangements.