WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2004

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Disability, including presumption of on-going, with some MMI.

Clark v. Wal-Mart, _____ N.C. App. _____, _____ S.E.2d _____ (2004).

Ms. Clark, a 66-year old greeter with osteoporosis, hurt her back moving something at work. Dr. Taft, her treating physician, diagnosed new compression fractures that were caused or aggravated by moving the object. The defendants sent her to Dr. Rowan. Both doctors testified that the compression fractures should have healed within several months and that Ms. Clark's smoking habit probably slowed healing. Both testified that the primary limiting factor in re-employment would be the pre-existing osteoporosis, which would make it dangerous for her to work anywhere that lifting was required, and that she might be able to work in sedentary employment, but Dr. Taft also said that he was "not optimistic" that she could actually find real a real job. The Commission found that the compression fractures were also a contributing factor to disability, but it is not clear which doctor said that. The award was for compensation for permanent and total disability. On review by the Full Commission, the defendants were granted 15 days to schedule a bone scan, based on Dr. Rowan's testimony that he could not tell whether the compression fractures had healed without one. The defendants apparently failed to authorize the scan when it was scheduled, so it was cancelled and the case was decided without it.

The Court of Appeals affirmed, holding that total disability and its permanency were supported by Dr. Taft's testimony. The Court stated that since Ms. Clark had shown disability, the burden shifted to the defendants to produce evidence of available suitable employment, which the defendants did not do. The defendants argued that the finding and conclusion of the permanence of the total disability were improper without a finding of MMI, but the Court rejected that, citing Walker v. Lake Rim Lawn & Garden and Russos v. Wheaton Industries for the proposition that MMI, which is a purely medical determination, does not determine disability.

The Court also rejected the defendants' argument that the Commission had erred in giving Ms. Clark the benefit of a presumption of on-going disability, in the absence of a From 21 Agreement. The Court noted that the defendants had admitted compensability of the injury on the Form 33R, that the Commission had stated in denying a Form 24 Application to Stop Payment that the defendants had failed to rebut the presumption, and that the payment of in-going compensation after the injury was sufficient evidence that the defendants had stipulated to compensability. There was no reference to the Sims v. Charmes/Arby's Roast Beef case, which held that payment without an agreement does not raise a presumption of disability. The defendants, finally, argued that there was no evidence that they had been ordered to schedule and pay for the bone scan. The Court held otherwise, though it is hard to tell what the defendants were driving at, since the bone scan was ordered at their request.

Guerrero v. Brodie Contractors, Inc., 158 N.C. App. 678, 582 S.E.2d 346 (2003).

Mr. Guerrero suffered an admittedly compensable injury when he fell down an elevator shaft and broke his neck. After a confusingly long delay, he was paid compensation without prejudice, pursuant to N.C.G.S. **§** 97-18(d), and a Form 63 was filed. After surgery and other treatment, a case manager provided a job description to the treating physician, who opined that Mr. Guerrero was able to do the job. He made several attempts to return to work, but the jobs were not as described. The doctor, when advised of the actual demands of the job, wrote a note to the effect that Mr. Guerrero was unable to do it. The defendants filed a Form 24, claiming a refusal to accept suitable employment, which was approved. The deputy commissioner awarded compensation until maximum medical improvement, followed by 30 weeks of compensation for a 10% rating to the neck. The Full Commission modified to award indefinite compensation for total disability.

The Court of Appeals mostly affirmed. The defendants' argument that the Commission had erroneously granted the plaintiff a presumption of on-going disability, in the absence of a Form 21 Agreement or other award of the Commission was not addressed, on grounds that it was not material to the Form 24 decision. The evidence supported the Commission's decision that the job had been justifiably refused. The issue as to whether the Commission had erred in awarding compensation for total disability after maximum medical improvement was resolved by the Knight v. Wal-Mart case. The contention that Mr. Guerrero had waived his right to contest the limitation on the duration of his total disability compensation by accepting the compensation awarded by the deputy commissioner was rejected as having no basis in law. The Court did remand for application of a credit for the 30 weeks of compensation that had been paid for permanent partial disability, as the Full Commission had only given credit for the total disability compensation received under the deputy's award. The plaintiff's cross-assignments of error were either contingent on decisions the Court did not make or, in the case of fees under **§§** 97-88 and 88.1, rejected.

Watts v. Hemlock Homes of Highlands, Inc., 160 N.C. App. 81, 584 S.E.2d 97 (2003).

Mr. Watts suffered an admittedly compensable injury. He was paid compensation at the rate of $320.01 per week. The defendants later asserted that his average weekly wage had been miscalculated and started paying less. Mr. Watts moved in Superior Court that payment be made pursuant to the original Form 60. The Superior Court judgment was vacated by the Court of Appeals. The defendants then filed a Form 24, alleging that Mr. Watts had been working. The Special Deputy was unable to make a decision, and the claim was assigned for hearing. The Deputy Commissioner refused to stop the compensation and ordered that it be increased to $320.01 again. The Full Commission affirmed the decision not to stop the compensation, but sent the case back for re-evaluation of the average weekly wage.

The defendants appealed the refusal to stop compensation. The appeal was dismissed as interlocutory, because there had been no decision as to exactly what Mr. Watts would get, in that the average weekly wage issue remained undecided.

Drakeford v. Charlotte Express, 158 N.C. App. 432, 581 S.E.2d 97 (2003).

Mr. Drakeford slipped and fell at a truck stop and suffered an admittedly compensable back and neck injury. He improved somewhat over the next few months, but then got worse. Several doctors had difficulty finding an objective reason for his on-going symptoms. Eventually, he was diagnosed with Chronic Inflammatory Demyelinating Polyneuropathy (CIPD). The Form 24, based on a superceding cause of disability, was denied. At hearing, the medical evidence supported the Industrial Commission's decision that Mr. Drakeford had pre-existing CIPD, that that condition was not aggravated by his compensable fall, that he had suffered a back injury that disabled him for a period of time and that disability after that time was caused entirely by the CIPD. The Court of Appeals affirmed. The Commission mentioned in its conclusion that since compensation (which began in May of 1995) was started without a Form 21 Agreement (or any other documentation), Mr. Drakeford retained the burden of proving the nature, extent and cause of his disability. The Court of Appeals did not mention that.

2. Standard of review of Commission decisions and the quality of evidence.

Holley v. ACTS, Inc, 152 N.C. App. 369, 567 S.E.2d 457 (2002), 357 N.C. 228, 581 S.E.2d 750 (2003).

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.

The Supreme Court reversed, holding that while "could or might" testimony from a

doctor is competent and admissible, it is not sufficient to support a Commission decision on complicated medical causation. The evidence as a whole was seen as mere speculation.

Towns v. Epes Transportation, _____ N.C. App. _____, _____ S.E.2d _____ (2004).

Ms. Towns was a truck driver who had three episodes that hurt her neck within a few days of each other, only the last of which happened at work. On August 24, 1998, she was hurt at home, while trying to avoid stepping on her dog. On September 1, her bed collapsed. On September 2, she was pulling particularly hard on a fifth-wheel pin, when she felt pain in her neck and numbness in her hands. She notified her dispatcher immediately and went to a doctor. Within a few days, she was diagnosed with two ruptured discs in her neck, The first surgery was done by Dr. Pikula. Additional surgery was performed by Dr. Brown, for non-union, after Dr. Pikula had retired. In her communications with doctors, Ms. Towns focused on the collapsing bed episode. Dr. Pikula testified that he could not tell which incident caused the disabling neck problems for which she was treated, because any one of them could have. Dr. Brown wrote a note in which he recounted her report of the bed injury, that she had been able to go to work the next day, and the pin-pulling episode, rendering the opinion that her neck pain and surgeries had been the result of the injury at work. During his deposition, Dr. Brown was unable to remember generating the note, but he testified to essentially the same thing, relying on the fact that Ms. Towns was able to work before that episode, but not after, and that the symptoms she described, including her report in the emergency room that she feared she was having a heart attack, were consistent with a ruptured disc that occurred at that time. The Commission awarded compensation.

The Court of Appeals affirmed, holding that there was sufficient evidence to support the Commission's causation finding. The defendant's contention that Dr. Brown's opinion was mere speculation, based on his testimony that he could not remember the conversation with Ms. Towns that had led to his note regarding causation, failed, in the face of Dr. Brown's other testimony that was based on facts presented in the relevant questions at deposition.

Faison v. Allen Canning Co., _____ N.C. App. _____, _____ S.E.2d _____ (2004).

Ms. Faison worked at a canning plant, which required her to load lids into a machine. She developed upper extremity pain that was diagnosed as shoulder bursitis, for which she was taken out of work. As time went on, her diagnosis changed to arm neuropathy and carpal tunnel syndrome. She never gave a decent description of her job duties to her treating physician. He testified that there was a "probability" that the CTS resulted from her job duties, but that he really didn't know. When pushed as to whether she "could have" gotten the condition from her work, the doctor blamed Ms. Faison's failure to give him a useful history for his inability to give an answer. The Commission denied compensability and the Court of Appeals affirmed.

Martin v. Martin Bros. Grading, 158 N.C. App. 553, 581 S.E.2d 85 (2003).

Mr. Martin worked for his son's grading company when he was struck in the head by a

tree limb. He had subdural hematoma, in addition to a gash in his scalp. After the accident he started showing psychological symptoms that were diagnosed as arising from closed head injury. He went back to very light duty. Within a month, he suffered another injury to his head, when he rolled a piece of equipment. There was some indication of pre-existing small vessel disease that one doctor saw as an unrelated cause of the symptoms. However, Mr. Martin saw some other doctors who opined that the accidents caused his symptoms. The deputy commissioner and the Full Commission awarded compensation.

On appeal, there was an implication of a defense argument that some of the medical opinion had not been sufficiently certain as to support causation. The Court of Appeals noted the difference between admissibility of evidence that is couched in terms of possibility and sufficiency of evidence that requires a higher standard of certainty. The Court noted that there was evidence to support the Commission's decision, so that the decision must stand, despite some contrary evidence..

Dunn v. Marconi Communications, Inc., _____ N.C. App. _____, 589 S.E.2d 150 (2003).

Mr. Dunn was a lead man who supervised installation of telephone equipment. He was on the road a lot, was provided a company van and was paid for travel time. During a job in Richmond, he drove back to his home in Maysville with his fiance and, while returning on little sleep, ran his car off the road, suffering serious injuries. Mr. Dunn testified that the trip was for the purposes of retrieving a crimping tool he had at home and that he checked his mailbox for his paycheck while there. The defendants presented evidence that Mr. Dunn had signed up to have his paycheck deposited directly (though he testified that he had cancelled that arrangement) and that there was no need to make an 8-hour round trip for the tool, because another employee on the site had the tool and Mr. Dunn knew that he was authorized to buy such tools locally. The Deputy Commissioner and Full Commission denied the claim, on grounds that Mr. Dunn had not proved a business purpose for his trip, which was based on credibility.

The Court of Appeals affirmed, holding that the Commission's credibility decision undercut claims that the trip was covered under the "traveling salesman," "contractual duty," "special errand" or "dual purpose" exceptions to the usual lack of compensability of injuries occurring while coming to or going from work. The Commission's failure to find facts, such as that Mr. Dunn was on call at all times and that he was given a company van, was not error. Mr. Dunn also argued that the Commission had erred by relying on the Deputy's credibility determination. The Court rejected that argument, holding that the holding from Adams v. AVX Corp. that the Full Commission is not required to accept the Deputy's credibility decisions does not imply that it is prohibited from doing so. In any event, the Full Commission stated that it had considered all the evidence independently and even made some different findings.

Whitfield v. Laboratory Corp. of America, 158 N.C. App. 541, 581 S.E.2d 778 (2003).

Ms. Whitfield worked collecting specimens. On one of her trips, she slipped on some water, twisted and almost fell, injuring her back. She was sent to a succession of doctors by her employer, each of which dismissed her complaints as she felt more pain. After about 40 days,

her medical treatment was cut off and she was fired for missing work. She got a job driving a bus part time and went to a pain doctor at Duke, who thought she was having real pain. She was unable to afford to see him as often as she should or to buy some of the medicines he prescribed. The deputy commissioner found her not to be credible and awarded nothing. The Full Commission reversed.

The Court of Appeals emphasized the standard of review in rebuffing the defendants' arguments, which were essentially variations on the complaint that the Commission had assigned greater weight to the doctor Ms. Whitfield chose than on the doctors they chose. The Court did remand for findings on the reasonableness of the timing of her seeking authorization for her doctor from the Commission. Ms. Whitfield cross-appealed regarding attorneys' fees. The Court held that the Commission had erroneously failed to address the issue of unreasonable defense for penalty fees under N.C.G.S. § 97-88.1 and ordered the Commission to determine the amount of the fee for the appeal, pursuant to § 97-88.

Smith v. Housing Authority of Asheville, 159 N.C. App. 198, 582 S.E.2d 692 (2003).

Ms. Smith fell to the floor when a chair rolled out from under her. She apparently did not suffer a serious injury. Shortly thereafter, the safety coordinator came around to talk to her about her accident report. His manner was reportedly arrogant, and Ms. Smith somehow got the idea that he was accusing her of suing the employer. The encounter upset her, and a few months later, she developed a panic disorder. Her psychologist linked it to the fall, but on closer examination, could only link it to her reaction to the investigation of her accident. The Commission denied her claim, concluding that reactions to legitimate personnel actions are not compensable.

The Court of Appeals emphasized that there is no difference in principle between psychological and physical injuries, then held that the psychologist's difficulty in connecting the symptoms to something other than the injury itself was sufficient to support the Commission's decision.

Hodgin v. Hodgin, d/b/a Hodgin Carpet, 159 N.C. App. 635, 583 S.E.2d 362 (2003), 357 N.C. 578, 589 S.E.2d 126 (2003).

Mr. Hodgin had suffered from chest discomfort that felt like trapped gas and other symptoms of upper digestive problems. On a specific date, he was lifting an unusually heavy chest of drawers at work, when he felt more severe pain. Shortly thereafter, he was diagnosed with a paraesophageal hernia. The Industrial Commission found and concluded that his hernia had occurred suddenly at the time he felt the increased pain.

The Court of Appeals reversed, holding that the expert testimony linking the hernia to the time of the increased symptoms was too speculative to support a positive finding.

Dial v. Cozy Corner Restaurant, Inc., _____ N.C. App. _____, 589 S.E.2d 146 (2003).

Ms. Dial worked as a waitress for the uninsured employer. She was involved in a car wreck, in which she injured her knees. Two days later, she claimed that she hurt her right foot, when she hit it on a chair at work. There was some testimony from a customer that Ms. Dial had mentioned an injury to her left foot, instead of the right, and there was an apparently erroneous notation on the medical records associated with her car wreck of a foot injury. However, there were also corroborating medical records. Deputy Commissioner Berger decided that Ms. Dial had failed to carry her burden of proving that she had suffered a compensable accident. On review, the Full Commission decided the opposite and awarded compensation for the six months she was out of work, followed by compensation for a 5% rating of the foot.

The Court of Appeals affirmed in part, holding that the defendant's appeal amounted to an argument that the Commission had made an erroneous credibility decision and that the decision was supported by evidence. Apparently the defendant had argued that Ms. Dial did not comply with treatment, which was of dubious relevance. The Court did remand for recalculation of the average weekly wage, as the Commission's calculations did not match the evidence, resulting in an average weekly wage that was about 50% higher than it should have been. Ms. Dial essentially conceded that point.

France v. Murrow's Transfer, _____ N.C. App. _____, 593 S.E.2d 450 (2004).

Mr. France, a truck driver, suffered a compensable accident when he was trying to unload a heavy desk. He stopped working immediately, but did not see a doctor for several months. He testified that he had tried to contact the orthopedist who had treated him for his previous back injury over 50 times but had been unable to reach him until shortly before the first appointment. A couple of months later, he refused an offered "switch-out" job. The Commission found and concluded that his excuse for not seeing the doctor for over six months after the injury was not credible, so that he had no medical evidence to prove total disability before he saw the doctor. His compensation was limited to the couple of months between the time he saw the doctor and the time he refused the job.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision and that the Court did not have the power to re-weigh the evidence. It also found evidence to support the Commission's decision that the injuries suffered in the accident, which were to the upper back, were separate from his prior lower back injury, so his condition was not a continuation of his prior claim. The compensation rate was very low, but it was consistent with dividing the wages for the past year by 52, and Mr. France did not present an alternative method of calculation, arguing instead that the compensation rate should have been the same as in the prior claim.

Holcomb v. Butler Mfg. Co., 158 N.C. App. 267, 580 S.E.2d 376 (2003).

Mr. Holcomb claimed an injury to his back. He did not tell anyone about it for months, despite seeing doctors. He mentioned instead an episode while on vacation. He claimed that he

did not want to tell anyone, because he was afraid that he would get in trouble, if he cost the employer an award for avoiding work injuries. The Full Commission denied the claim, with a dissent. The Court of Appeals affirmed, citing evidence to support the Commission's decision and case law requiring the appellate courts to limit their review to that issue. This is a strange case to be reported, as it seems to be a simple credibility case.

3. Occupational disease

James v. Perdue Farms, Inc., 160 N.C. App. 560, 586 S.E.2d 557 (2003).

Ms. James performed a job involving repetitive motion. Over time, she developed pain in her hands, then in her neck, shoulder s and arms which forced her out of work. She was diagnosed with carpal tunnel syndrome, fibromyalgia, chronic pain and depression. The Deputy Commissioner awarding compensation and the Full Commission denied it, finding that the evidence was insufficient to show that the conditions were "a direct result" of the job and that the job placed her at an increased risk of developing the occupational diseases, compared to the general public not so employed.

The Court of Appeals affirmed, holding that while the Commission erred by requiring evidence that the diseases directly resulted from the work, as opposed to the work's having been a "significant contributing factor," the case was still properly denied, because of lack of evidence of increased risk. The treating physician testified that the work activity would make anyone hurt, and that it would make people with fibromyalgia hurt worse, but that it would not cause fibromyalgia. The Commission's error had gone only to the causation element, and increased risk was also required. Assigned errors as to the same issues applied to Ms. James' carpal tunnel syndrome and depression were abandoned by being left out of the brief. There are some tricky parts of the decision that should be watched out for. First, it brushes against, then glosses over the issue as to whether the job activities must create an increased risk of contracting a disease, or whether it is sufficient to show an increased risk of aggravation of a pre-existing condition. Second, the holding in the Supreme Court case of Rutledge v. Tultex, Corp. is couched as requiring evidence that "the condition for which the plaintiff seeks compensation is 'characteristic of persons engaged in" the particular job, instead of showing that the disease is "due to causes and conditions which are characteristic of and peculiar to" a job. While the distinction in the first, which has popped up more directly in other cases, will seldom create much practical trouble—it will be rare that a job activity that causes aggravation will not also cause the disease in the first place—the second is much more of a problem. For example, lung cancer is not something that occurs so frequently in asbestos workers that it can be considered characteristic of and peculiar to the job, but exposure to asbestos is characteristic of and peculiar to working around the stuff, and that exposure increases the risk of cancer. Do not get surprised by careless misapplication of the law on this point.

Matthews v. City of Raleigh, _____ N.C. App. _____, 586 S.E.2d 829 (2003).

Mr. Matthews worked as a vehicle painter for the employer, spray painting an average of

two cars per week in a booth the size of a two-car garage. After about seven years, he started having breathing problems, which Dr. Saltzman at Duke attributed to exposure to isocyanates in the paint fumes. Dr. Saltzman recommended that Mr. Matthews stop exposure to paint fumes. Mr. Matthews did that for three months, then resumed painting, with his partner's assuming more of the painting duties. As time went on, Mr. Matthews experienced increasing psychological and cognitive problems, which was diagnosed as toxic encephalopathy, ultimately becoming unable to work. The Deputy Commissioner denied the claim, but the Full Commission awarded compensation for permanent, total disability.

The Court of Appeals affirmed, despite some creative attacks by the defendant. As to causation, the Commission's decision to assign greater weight to Mr. Matthews' experts than to Drs. Freedman and Hayes, was allowed. The defendant contended that there was an absence of evidence of the levels of exposure, which prevented the Commission from finding exposure greater than that experienced by the general public not so employed, but the Court held that there is no requirement of showing the quantity of exposure, due to the impracticality of expecting an employee to measure it while working (particularly before symptoms appeared, when he would not even realize there was a reason to care about levels). The evidence was "easily" sufficient to support the findings. The defendants next attacked the opinions of Mr. Matthews' expert witnesses, on grounds that they were based on "overstatement" of the exposure, apparently relying on, among other things, an allegation that the co-worker did most of the painting. The Court declined to allow that nit to be picked and pointed out, **very importantly for the practitioner**, that "'omission of a material fact from a hypothetical question does not necessarily render the question objectionable or the answer incompetent. It is left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his earlier opinion." (citing Rutledge v. Tultex Corp.) The Court also noted that non-medical evidence can be important in proving exposure. The defendant then contented that the opinions of Mr. Matthews' experts were not adequately supported by medical literature. The Court distinguished Beaver v. City of Salisbury, in which absence of medical literature may have been fatal to the claim, due to other large gaps in the evidence, but holding that there is no requirement that the plaintiff always produce medical articles in occupational disease cases. The Court also mentioned that the experts had testified as to support in the medical literature, without specifying the articles. Permanent, total disability was adequately supported by evidence of Mr. Matthews' medical condition, his limited education and literacy, and testimony of vocational expert Stephen Carpenter, as well as testimony from one of the medical experts that he was totally disabled and that the damage is permanent. Significantly, the Court explicitly rejected the defendant's contention that disability must be proved with medical evidence, holding that other types of evidence can be sufficient, while noting that one of the doctors had testified that he was totally disabled.

Smith-Price v. Charter Pines Behavioral Center, 160 N.C. App. 161, 584 S.E.2d 881 (2003).

Ms. Smith-Price testified to working in terrible conditions at a psychiatric hospital. There had been a highly publicized death of a young patient, subordinate employees were extremely hostile to her, her supervisors did not support her, and she ultimately broke down. She was diagnosed with post-traumatic stress disorder, and the expert testimony was very persuasive. The deputy commissioner denied compensation, and the Full Commission reversed, with

Commissioner Mavretic dissenting.

The Court of Appeals conducted an exhaustive review of the pertinent cases and ultimately held that the evidence was sufficient to support the Commission's findings and conclusions. The Court focused primarily on the nature of nursing in a psychiatric hospital in general and did not appear to rely on the problems Ms. Smith-Price was having with co-employees.

Clark v. City of Asheville, _____ N.C. App. _____, 589 S.E.2d 384 (2003).

Mr. Clark had a long history of post-traumatic stress disorder that had been attributed to his service in Vietnam. He had worked for the employer as a fire fighter for about 24 years, driving a truck for about 20 of those years. When he started driving, several of the firefighters in the department drove as a shared duty. Before that, driving had been a promotional position for which applicants were required to pass a test. In 1998, the employer decided again to require a test, which Mr. Clark and 20 others failed, including eight others who had been driving before. Being removed from the pool of drivers did not carry a demotion or pay cut, but Mr. Clark viewed it as a demotion, became angry and claimed an aggravation of his PTSD. The Commission denied the claim, concluding that taking and failing tests was not characteristic of and peculiar to Mr. Clark's employment as a firefighter and that firefighting did not increase his risk of experiencing stress as a result of failing a test or perceiving demotion. The Court of Appeals affirmed. Oddly, the Commission found that the PTSD resulted from service during the Vietnam War and other items of psychological diagnosis after "having reviewed and considered the testimony of" the examining psychologists, but there is no reference to what the psychologists said in that testimony, which may be a hint as to why this case was appealed.

Carroll v. Town of Ayden, _____ N.C. App. _____, 586 S.E.2d 822 (2003).

Mr. Carroll worked in the water and sewer department for the employer. In the course of that job, he was "regularly exposed" to raw sewage and all the bodily products therein. The sewage came in contact with cuts and scrapes and got in his eyes and mouth. Several years later he was diagnosed with Hepatitis C. While his diagnosing doctor testified that the disease likely was caused by exposure to sewage, a more highly qualified specialist testified that there was no medical literature to support that. The Commission denied compensation, giving greater weight to the testimony of the defendant's expert, with one dissent. The Court of Appeals affirmed, holding that there was evidence to support the decision and that that Court was not empowered to reweigh the evidence.

Judge Wynn dissented, opining that the Commission had failed to evaluate the evidence properly, relying entirely on the testimony of the experts that they were unaware of medical literature linking sewage work to Hepatitis C, which Judge Wynn did not view as the same thing as saying that there is no such connection. He also noted that the Commission failed to make any findings referring to OSHA regulations that stated as a foundation that employees were at risk when they handled regulated waste, were required to clean up contaminated spills or worked in maintenance or plumbing.

4. Credit issues.

Moore v. Fed. Express, _____ N.C. App. _____, 590 S.E.2d 461 (2004).

Mr. Moore suffered an admittedly compensable back injury in 1992, which required fusion surgery. He returned to work and was apparently paid compensation for his permanency. In 1997, apparently more than two years after his last payment of compensation for the 1992 injury, Mr. Moore hurt his back while helping a customer load a computer into a car, when the customer dropped his or her end. He had had flare-ups of his back pain during the period between the two claimed injuries, but this was the first one that did not get better with conservative treatment. The medical evidence showed that Mr. Moore had suffered an aggravation of his pre-existing condition in the 1997 episode, though there is an implication that there was other testimony linking the problems at that time to the prior injury. The significance of the difference was that the time for filing for a change of condition in connection with the 1992 injury had expired. The Commission awarded compensation for the 1997 injury, along with credit for short term and long term disability payments. Both parties appealed.

The Court affirmed in part, reviewing the evidence and holding that it supported the Commission's decision that the 1997 episode was a new injury, despite evidence that the prior injury contributed. As to Mr. Moore's appeal, the Court remanded for a determination of the effect of a reimbursement agreement on the allowance of a credit, opining that if the reimbursement agreement required reimbursement of the disability carrier from the workers' compensation benefits, then credit should not be granted. The Commission was also instructed to address Mr. Moore's claim for sanctions for unreasonable defense, which had been left unaddressed.

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

Whitaker v. Town of Scotland Neck, 154 N.C. App. 660, 572 S.E.2d 812 (2002), 357 N.C. 552 (2003).

The plaintiffs' decedent worked on a garbage truck for the employer. One time, when the truck was lifting a dumpster, the dumpster became detached from the mechanical arm and swung down, crushing the decedent to death. The company's investigation revealed a defective latch. OSHA found five "serious" violations, including failure to train, supervise or inspect and operation of unsafe equipment in an unsafe manner. The plaintiffs filed a Woodson suit. The Superior Court judge compared the forecast of evidence to other post-Woodson appellate cases and dismissed.

The Court of Appeals reversed, citing particularly conflicting evidence as to whether supervisory personnel had been advised of the defect weeks before the accident and failed to

address it. The Court cited Wiggins v. Pelikan, Inc, 132 N.C. App. 752, 513 S.E.2d 829 (1999), which "analyzed the cases following Woodson and created a list of six factors to use when defining substantial certainty," then held that summary judgment is generally inappropriate when a case requires balancing of factors.

The Supreme Court granted discretionary review and reversed, explicitly overruling Wiggins test, because it "misapprehends the narrowness of the substantial certainty standard set forth in Woodson v. Rowland." The Court went on to emphasize the narrowness of Woodson, holding that there is a requirement of substantial certainty of death or serious injury that exceeds even a probability. The Court stated that the "facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct." It also seemed important to the Court that in Woodson, the president of the employer was on site and made the direct decision to put the decedent in an obviously dangerous trench, whereas no supervisory employees were on site at the time of Mr. Whitaker's fatal accident, that the Town did not have an extensive history of prior violations, as Rowland did, and that the facts of Woodson had offended the Court. In sum, the Supreme Court opinion is apparently intended, beyond deciding on the facts of this case, to advise that Woodson will be extremely narrowly interpreted.

Cameron v. Merisel, Inc., _____ N.C. App. _____, 593 S.E.2d 416 (2004)

Mr. Cameron alleged that his employer, the director of security for his employer (Goldsworthy) and the related property ownership corporation that leased the premises to the employer knew of toxic mold in the workplace and failed to notify him or correct the mold problem, so that Mr. Cameron suffered severe injury. His wife claimed loss of consortium. All claims were dismissed by the trial court.

The Court of Appeals affirmed the dismissal of the Woodson claim against the employer, focusing on the required pleading that the employer deliberately engaged in conduct substantially certain to result in serious injury or death and holding that conclusory allegations in the complaint that other employees had suffered "serious" illnesses were insufficient. The Court required specific allegations as to the types of symptoms and illnesses and that those suffered by other employees were similar to those suffered by the plaintiff. However, the Court reversed the dismissal of other claims, first holding that the Woodson and Pleasant claims were not barred by the statute of limitations, because the Woodson claim falls under the "catch-all" three-year period in N.C.G.S. § 1-52(5) and the Pleasant claim is a common law action for willful negligence, subject to the three-year period for that. The allegations that Goldsworthy knew about the mold and failed to take action to remove it were sufficient to state a Pleasant claim. The claim for premises liability based on negligence, against the property owning corporation was sufficiently stated, and the exclusive remedy of Workers' Compensation did not apply, because the corporation, while related to the employer, was a separate entity. The punitive damages and loss of consortium claim were reinstated as to Goldsworthy, on the Pleasant claim, but only the consortium claim was attached to the claim for premises liability against the property ownership corporation, because the underlying claim was for negligence.

6. Third party lien related issues.

Childress v. Fluor Daniel. Inc., _____ N.C. App. _____, 590 S.E.2d 893 (2004).

Mr. Childress was exposed to asbestos while working for the employer. He claimed damage due to asbestosis and colon cancer and was awarded compensation under N.C.G.S. § 97-31(24), in the amounts of $20,000 for each lung and $20,000 for the colon.

On appeal, the Court of Appeals affirmed, citing Aderholt v. A.M. Castle Co. as an example of a case in which each lung was considered a separate organ, based on evidence that each one was significant "to the body's general health and well-being," and opining that the Commission did not abuse its discretion in the amount of the award. The Court rejected the defendants' contention that an award under § 97-31(24) required a demonstration of lost earning capacity, distinguishing dicta drawn out of context from Wilkins v. J.P. Stevens & Co. The Court also rejected the defendants' argument that the Commission had erred by not awarding a credit for recoveries from third parties and denying the defendants' motion to require that those recoveries be disclosed. The Court held that the Commission only acquires jurisdiction over the subrogation lien upon a final award of the Commission, which had not previously occurred in this case, due to the defendants' appeal. The Court did not forecast whether the Commission could award a credit, upon defendants' motion after the award becomes final. It would be wise for the practitioner, if there is a desire to have the lien adjusted under § 97-10.2(j), to file a petition before a Superior Court Judge before the Commission issues a final decision in a case, in order to preclude the Commission's assumption of jurisdiction, which can only result in full honoring of the lien.

Sherman v. Home Depot U.S.A., Inc., 160 N.C. App. 404, 588 S.E.2d 478 (2003).

Ms. Sherman suffered severe injuries when a flatbed trailer became disconnected from another vehicle and crashed into her car. The injury was compensable, and she had been paid a lot of compensation. She settled her third party claim against the driver of the other vehicle for $500,000 (apparently policy limits), then filed suit against Home Depot, claiming improper loading of the trailer. That action was settled for $1.3 million. Ms. Sherman moved the Superior Court to reduce and determine the workers' compensation lien, under N.C.G.S. § 97-10.2(j). At the time, the workers' compensation carrier had laid out about $168,000, with benefits on-going. The judge set the lien at $55,667, or about 1/3 of the lien at the time, and ordered the comp carrier to pay $56,602 as its share of the cost of litigation. The comp carrier appealed.

The Court of Appeals affirmed, holding that the discretionary decision as to the adjustment of the lien was sufficiently supported, as settlement totaled $1.8 million, while a life care plan showed future expenses in excess of $1.5 million, along with lost wages of more than $500,000, before taking into account that Ms. Sherman suffered disfigurement, scarring, partial loss of use of one eye and damage to her spine and brain. The Court noted that the Superior Court had properly considered the factors laid out in § 97-10.2(j). The comp carrier also claimed that the award of a share of costs was an impermissible award of attorney's fees. The Court rejected that argument, pointing out that while the Superior Court had stated the payment as a share of "litigation expenses and attorney's fees," other parts of the order indicated clearly that the amount

was determined as 1/3 of the amount of the litigation costs in the third party claim and did not include fees.

Wood v. Weldon, _____ N.C. App. _____, 586 S.E.2d 801 (2003).

Mr. Wood was killed by an uninsured, drunk driver while working as a tow truck driver and assisting a motorist. The workers compensation claim was accepted. Mr. Wood's widow and child were paid death benefits that were expected to total $118,432. His estate settled his wrongful death case with the employer's uninsured motorist carrier for $305,000, then moved for default judgment against the drunk driver defendant. Judgment was entered in the amounts of $1.5 million in compensatory damages and $200,000 in punitives. On the plaintiff's motion pursuant to N.C.G.S. § 97-10.2(j), the trial court reduced the lien from $78,955 (the total lien, less pro rata attorney fees and litigation cost) to $20,000, noting that the total recovered from workers' compensation and the uninsured motorist carrier was substantially less than the amount of the damages awarded in default judgment. Both parties appealed.

The Court of Appeals affirmed, rejecting the comp carrier's argument that the Superior Court had exceeded its authority in reducing the lien, due to the facts that there was a judgment in excess of the lien and that Mr. Wood had had his fatal accident before the effective date of the amendment to § 97-10.2(j) that allowed judges to reduce liens in such cases. The Court held that the comp carrier had failed to make the argument before the Superior Court, so that it was not preserved for appellate review, and that in any event, the amendment was effective before the judgment and settlement were reached and applied, by its terms, to judgments and settlements entered on or after the effective date. The plaintiff's cross-appeal, in which it argued that the trial court had abused its discretion by not extinguishing the lien in its entirety, was also rejected, on the holding that the evidence was sufficient for the Superior Court's decision to be "'a reasoned choice, a judicial value judgment, which is factually supported'" (citing Allen v. Rupard) and that the Court of Appeals could not say that it "was manifestly unsupported by reason or so arbitrary that it could not possibly have been the result of a rational decision."

7. Employment status, including subcontractor issues and coverage.

Robertson, v. Hagood Homes, Inc., 160 N.C. App. 137, 584 S.E.2d 871 (2003).

Hagood Homes was the general contractor for several houses in the same subdivision. Hagood subcontracted the framing to Schuette, who subcontracted it to McGirt. McGirt hired Mr. Robertson, who was injured in a fall from a ladder. When Hagood contracted with Schuette regarding the first house that fell under the arrangement, Hagood asked for and received a certificate of insurance. On subsequent houses, including the one at which Mr. Robertson was hurt, Hagood did not ask separately for certificates. In the meantime, Schuette was withholding $1,000.00 from McGirt, supposedly to pay for workers' compensation insurance. However, Schuette allowed his policy to lapse for nonpayment of premiums. The Commission awarded compensation from all defendants and ordered Hagood's carrier to pay.

The Court of Appeals affirmed, with a concurrence. Hagood contended that the provisions of N.C.G.S. § 97-19 apply only when the target employer has a direct subcontract with the employer of the injured worker. The Court cited several provisions that would make no sense, if the General Assembly had intended that result. Hagood also claimed workers' compensation liability for it would be unjust when it was subject to third party liability. The Court responded that statutory employer status would include exclusive remedy protection. The Court further held that the protection of a certificate of insurance must be obtained for each separate subcontract, even if they are connected like the ones in this case were. If several houses were to be built under a single contract, then one certificate would cover them all. But when there is a separate contract for each house, the upstream contractor is only safe with a certificate of insurance for each house.

Judge Tyson concurred, generally agreeing with the majority, but taking issue with the use of out-of-state statutes and case law.

Smith v. First Choice Services, 158 N.C. App. 244, 580 S.E.2d 743 (2003).

Mr. Smith was an officer of a small, family owned insurance restoration company. While trying to reach some boxes, he fell from a ladder and broke his wrist and femur. His claim was denied on grounds that he had been excluded from the employer's policy. Mr. Smith's wife testified that officers had been excluded from coverage to save money, but that she had spoken with the State Farm agent about including the officers. The agent did not have any recollection of the conversation, but his hard copy and computer information for the period during which the accident occurred both indicated that officers were included, and premiums had increased by more than 50% for that year. State Farm's information also indicated that officers were included, but they claimed it was a clerical error. The Commission awarded compensation.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision not to reform the policy based on mutual mistake, particularly when there was plenty of evidence of unilateral mistake. The Commission was not required to make detailed findings about every document involved in the insurance application and policy. The Court also affirmed denial of credit for money that was paid by the employer, both because the payments were payable, in that the employer had accepted the claim as compensable and, somewhat surprisingly, because N.C.G.S. 97-42 allows the employer, and not the carrier, to receive credit for payments made by the employer.

8. Presence or lack of an accident.

Griggs v. Eastern Omni Constructors, 158 N.C. App. 480, 581 S.E.2d 138 (2003).

Mr. Griggs, an electrician for 22 years, was sent with one other employee to remove wire from a piece of machinery without damaging it, so that it could be reinstalled. He told the employer that the time frame demanded would require more employees. The employer was unable to provide any help, because it was "very short on personnel." In testimony, Mr. Griggs described standing awkwardly and feeding the removed wire into conduit. He also mentioned that

running removed wire was generally not necessary, as the wire being removed could simply be cut off. He also said that he had not had to perform the procedure he did, in the way he did, in his 22-year career. At some point, he felt a pop in his right shoulder required surgery to fix the rotator cuff, remove a bone chip and repair ligaments. The employer presented witnesses who testified generally that Mr. Griggs' job normally required pulling wires in awkward positions and that there was nothing unusual about the activity in which Mr. Griggs was engaged at the time if• his injury, though they admitted that they were not present. The Commission denied benefits on grounds that there was no accident, stating that pulling wire was a normal part of the job, as was working in awkward positions. Commissioner Mavretic dissented.

The Court of Appeals, Judge Tyson writing, remanded for further findings, holding that the Commission had not gone deeply enough into the analysis of whether the specific activity in which Mr. Griggs was engaged at the time of his injury was outside the work routine. The Court pointed out that Mr. Griggs had not testified simply that he was pulling wire in an awkward position. He had said that "he was pulling old wire, under an accelerated time frame, without additional help, twenty-five feet above the ground, and attempting to salvage the wire to reuse." The Court noted that there was no contrary evidence presented on those specifics. The Court's decision invited the Commission to take additional evidence, if necessary, as to whether "under the totality of the circumstances, plaintiff was performing 'usual tasks in the usual way'."

Moose v. Hexcel-Schwebel, _____ N.C. App. _____, 592 S.E.2d 615 (2004).

Ms. Moose worked as a smash-hand technician for the employer fiberglass manufacturer. That job required very little lifting. While she worked other jobs when required to fill in, there was still usually very little lifting. One weekend, another employee was on vacation, and Ms. Moose was asked to operate a loom. On the third day, she was lifting a bobbin that weighed about 20 pounds, when she injured her elbow. After surgery, she was released to sedentary work, with a 10% rating of the arm. The Commission awarded compensation for a finite period, followed by 24 weeks of compensation for the rating. Both parties appealed.

The Court of Appeals affirmed the Commission's decision in its entirety. As to the defendants' appeal, the Court held that the evidence, including testimony from both Ms. Moose and her supervisor, supported the Commission's decision that lifting the relatively heavy bobbins was outside her work routine as a smash-hand technician and that the lifting had not become part of her work routine. The Court noted that Ms. Moose had testified that that's particular job was the heaviest one at the plant, that she tried to stay away from it and that she had worked that job "maybe a couple of times." Ms. Moose had appealed the Commission's failure to award on-going compensation, the compensation rate (maybe), the lack of an award of attorney's fees (though it is difficult to determine whether the reference is to typical fees or sanctions), the Commission's refusal to order vocational rehabilitation services and something about "an election of remedies to her post-injury wage than her pre-injury wage." None of the asserted errors were addressed by the Court, because the brief contained no arguments in support of the assignments of error, being instead more of a response to the defendants' arguments. Therefore, all assignments of error were deemed abandoned.

Knight v. Abbott Labs., 160 N.C. App. 542, 586 S.E.2d 544 (2003).

Ms. Knight was denied a vacation day, which was given to another employee with less seniority. She confronted her supervisor, a large man, who became angry with her and raised his voice, waved his hands and stuck his finger in Ms. Knight's face. She also raised her voice. The argument ended abruptly, and she returned to her desk in tears. The supervisor later approached har and let her have the vacation day, but she was till upset, breaking out in hives, seeking medical attention and claiming total disability from that time forward. Her treating psychologist testified that she had pre-existing depression, which was aggravated by the incident, and that she suffered Post-Traumatic Stress Disorder. Dr. Gualtieri examined her at the request of the defendant and opined that she did not have PTSD, based on his conclusion that the argument was not a "credibly traumatic event," that she had other stressors, and that she could have any number of other psychiatric disorders, including head injury from a car wreck the year before the accident. The Commission assigned greater weight to Dr. Gualtieri's testimony and denied the claim, concluding both that the incident did not cause the problems and that the incident did not constitute an accident..

The Court of Appeals affirmed as to most of the Commission's decision, holding that the Commission properly found that meetings and confrontations with supervisors were not departures from the work routine, and citing Woody v. Thomasville Upholstery, Inc. for the proposition that even problems with really nasty bosses were within the work routine. There is mention of the fact that Ms. Knight initiated the meeting, but the significance of that is murky, other than some reference that that fact may have rendered the confrontation less "unexpected" in defining whether it was an accident. The Court rejected the argument that the Commission erred by finding that the greater weight of the evidence showed lack of causation, citing the sufficiency of Dr. Gualtieri's testimony. There was also a somewhat mysterious rejection of the argument that the Commission had erred in failing to make certain findings, which omitted findings are not mentioned in the opinion. Finally, the Court remanded the case to the Commission, because it had failed to address the occupational disease claim.

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

McGrady v. Olsten Corp., 159 N.C. App. 643, 583 S.E.2d 371 (2003).

Ms. McGrady was a nursing assistant, caring for an elderly woman in the woman's home. She helped with meals, bathing, housekeeping, shopping, driving and the like. One day, she took the lady's dog out to walk and noticed that a pear tree had borne fruit. In the process of climbing the tree in an attempt to get the pear, so that she and her patient could share it, Ms. McGrady fell, injuring her back to the extent that she will never be able to work, even at light duty. The defendants denied the claim on grounds that the injury did not arise out of and in the course of he employment. The deputy commissioner denied, but the Full Commission awarded compensation, with a dissent, concluding that the attempt to get the pear was within Ms. McGrady's job duties, or was at most not a serious deviation.

The Court of Appeals affirmed, holding that the liberal construction intended to be given

to the Workers' Compensation Act requires the injured worker to be given the benefit of the doubt, so that compensation will be awarded for injuries that are fairly traceable to the employment as a contributing cause or if any reasonable relationship to employment exists. Since the unchallenged findings of fact included that Ms. McGrady regularly served fruit to her patient and that she intended the pear for both her and the patient, trying to get the pear was in the course of employment.

Stanley v. Burns International Security Services, _____ N.C. App. _____, 589 S.E.2d 176 (2003).

Patricia Stanley worked for the employer as a security guard, about 30 miles from her home. After Hurricane Floyd on September 16, 1999, she did not work her usual shift for a few days. After the waters had receded some, she went to work for her usual shift, on September 21, 22, 23, 24 and 25. On the way home, shortly after the midnight end of her September 25 shift, she died in a car wreck. The Commission found and concluded that the death was not compensable, because Ms. Stanley had been coming home from work and her commute was not subject to any of the exceptions to the general rule that injuries while coming to or going from work are not within the "course of employment."

The Court of Appeals affirmed, holding that the Commission's findings of fact supported the conclusions of law, in that the accident did not occur (1) on the employer's premises (the "premises exception"), (2) while performing a mission or errand for the employment (the "special errand exception"), (3) to an employee who has no definite time or place of employment, which requires travel to do the job (the "traveling salesman exception"), or (4) when an employer contractually provides transportation or reimbursement therefore (the "contractual duty exception"). The Court noted that Ms. Stanley's daughter's testimony that her mother had been threatened with termination, if she did not report to work, despite the dangerous driving conditions, could have brought the case within the "special errand" analysis, but the Commission had rejected that testimony as not credible, in light of testimony from supervisors that she was permitted, and even encouraged, to stay home for a few days after the storm and had worked her regular shift for several days before her accident. Further, the plaintiffs had not appealed on grounds that the findings were not supported by the evidence, relying instead on an argument that the findings did not support the conclusions.

Deseth v. LensCrafters, Inc., 160 N.C. App. 180, 585 S.E.2d 264 (2003).

Mr. Deseth was crossing a mall parking lot, near the employer's store, on his way into work, when he was struck by a vehicle driven by a co-employee and killed. The Industrial Commission denied compensation, and the Court of Appeals affirmed.

The Court held that the case was governed by the general rule that employees "coming and going" to or from work are not in the course of employment, relying on the string of cases that have held that the exception for injuries occurring on the employer's premises does not apply when the parking lot is a common area shared by more than one business. Such shared lots are viewed as not being sufficiently under the employer's control as to be part of the workplace. The

plaintiff, represented by defense lawyer Clay Custer, made several interesting arguments, contending that the decedent had already started work off-site by carrying work-related materials required to open the store, that he was on a special errand, that he should be treated as a traveling employee and that his employment placed him at an increased risk of being injured, because the empty condition of the lot made it more dangerous, the employer failed to instruct or require the other employee to park away from the store, and the employer condoned horseplay that resulted in the accident. The Court was unimpressed.

Dodson v. Dubose Steel, Inc., 159 N.C. App. 1, 582 S.E.2d 389 (2003), 358 N.C. 129; 591 S.E.2d 548 (2004).

Mr. Dodson was driving a truck for the employer. As he approached a disabled vehicle that occluded his lane, he pulled into the lane to his left, forcing one Campbell into a left turn lane. Campbell responded by blowing his horn repeatedly, and the two men exchanged words and gestures. At the next traffic light, Mr. Dodson got out of his truck and approached Campbell's car, striking the hood with his fist and inviting Campbell to get out of his car. Campbell started forward and struck Dodson, knocking him to the ground. Mr. Dodson died of the resulting head injury. The Commission awarded compensation.

The Court of Appeals affirmed, with Judge Steelman dissenting. The majority analyzed the case like a workplace assault, holding that the injury was compensable, because the root cause of the altercation was a dispute over how Mr. Dodson was driving his truck, which was work-related activity. The evidence was sufficient to support the Commission's decision that the defendants had failed to prove that his death resulted from his "willful intention to injure or kill himself or another," which is a bar to compensation under N.C.G.S. § 97-12(3).

In dissent, Judge Steelman opined that he workplace assault cases did not apply, because the assault was by a non-employee and did not occur in the workplace. The cases cited, though involving non-employee assailants, all involved personal disputes that were unrelated to work. There was no explanation as to why the identity of the assailant should be a distinguishing characteristic of the case, when the origin of the altercation was work-related activity. Judge Steelman also rejected the argument that Mr. Dodson's employment placed him at an increased risk of such traffic disputes, viewing the job instead as merely providing "a convenient opportunity" for exposure to "road rage." After discarding the workplace assault analysis and viewing the "increased risk" argument as nothing more than "positional risk," Judge Steelman opined that the case should be denied, because the activity of getting out of the truck and confronting another driver was not an authorized activity that was calculated to further the employer's business. Judge Steelman agreed that the evidence was insufficient to require the Commission to find and conclude that the case was barred on grounds of willful intention to injure or kill oneself or another.

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

10. Misrepresentation in applying for employment

Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp. Inc., _____ N.C. App. _____, 587 S.E.2d 440 (2003).

Ms. Hooker suffered injuries to her ankle and back when she fell from her truck, while working at a previous job as a truck driver. The back problem resolved sufficiently for her to return to work, but the ankle injury prevented her from returning to truck driving. She took a class to become a certified nursing assistant, then applied for a job with the defendant. During the interview process, she told the unit manager about her prior accident. She was hired and worked for about two years, at which time she injured her back lifting a patient. She had surgery and was released to return to work with lifting restrictions and a 12.5% rating. She was out of work from December 4, 1998 through May 7, 2002, with the exception of an interim period of limited hours from February 20 to April 29, 1999. She applied for and received unemployment benefits beginning August 22, 1999. The Deputy Commissioner denied the claim, but the Full Commission awarded compensation for on-going total disability, subject to credit for unemployment benefits and the reduced amount for temporary partial disability for the period of limited hours in 1999.

The Court of Appeals affirmed, rejecting the defendant's argument that the claim should have been denied for misrepresentation during the interview process. The Court noted that the Commission had found, with supporting evidence, that Ms. Hooker had told the defendant about the injury at the prior employment. The defendant contended that the disclosure was insufficient, because Ms. Hooker apparently made no reference to her back injury, and the defendant's representatives testified that she would not have been hired, if they had known about the back injury. The Court mentioned that Ms. Hooker had testified that she did not mention the back injury, because her back was no longer bothering her, when she applied with the defendant. In any event, the Court noted that the adoption of a misrepresentation defense would have to be by the General Assembly, as the Supreme Court had warned against "judicial legislation."

The Court also rejected the defendant's argument that Ms. Hooker had failed to prove her entitlement to on-going compensation for total disability, noting first that the assertion that temporary total disability ends at maximum medical improvement had been erased by the Court's holding (affirmed by the Supreme Court) in Knight v. Wal-Mart. The initial burden of proving disability had been met by showing that Ms. Hooker had been under medical care from the time of her accident to the time of the Commission decision, that her release to return to work had been with restrictions (without specifically mentioning that the defendant had dumped her at the end of her leave of absence, on June 11, 1999) and that her receipt of unemployment benefits required at least two, in-person contacts with different employers each week. The Court mentioned that Ms. Hooker had also testified to additional efforts to obtain employment, all of which was sufficient to support the Commission's decision that she had made reasonable, unsuccessful efforts to return to work, which is one way of proving disability, under the rubric laid out in Russell v. Lowes Product Distribution.

11. Suitable employment

Baker v. Sam's Club, _____ N.C. App. _____, 589 S.E.2d 387 (2003).

Ms. Baker suffered admittedly compensable injuries to her knee, arm, shoulder and neck when she fell at work. About 16 months later, she returned to a sit-down job, which was within her restrictions. Unfortunately, the employer eliminated that position nationally after Ms. Baker had been doing it for about three months. She was transferred to a job demonstrating food and products. About a month later, her knee collapsed when she stooped, after which she was transferred to another job that did not require cooking, but still required standing, reaching and lifting. She was offered help doing the physical aspects of the job and was paid a couple of dollars more than the usual wage for the job, both of which she found embarrassing. She continued to complain of pain, and her doctor told her that she would either have to work in pain or quit her job. To complicate matters, she was diagnosed with carpal tunnel syndrome and a shoulder impingement. Her doctor removed her from work, until those problems could be treated surgically.

The Deputy Commissioner and Full Commission found and concluded that the arm and shoulder problems were unrelated to the compensable accident and awarded compensation only for the 7% rating of Ms. Baker's leg (in addition to the compensation for total disability that had been paid voluntarily). The Court of Appeals affirmed the denial of the claim for the arm and shoulder injuries, holding that testimony from a doctor chosen by the Commission that neck and shoulder problems were not related was sufficient to support the finding, but remanded for specific findings on whether the jobs to which Ms. Baker returned were suitable. The sales manager who prepared the job descriptions that the treating physician had approved testified that they were inaccurate, in that they did not mention the lifting, squatting, kneeling and prolonged standing required in the demonstrator jobs. Further, the Commission did not address the evidence that the offered jobs paid more than was normal for such jobs or that the employer had offered assistance in performing the physical aspects. The Court cited Saums v. Raleigh Community Hospital and Peoples v. Cone Mills in holding that the willingness of the employer to provide a position was insufficient to prove the availability of suitable employment, in the absence of evidence that such a position was available in the competitive labor market.

12. Dependents in death claims

Goodrich v. R.L. Dresser, Inc., _____ N.C. App. _____, 588 S.E.2d 511 (2003).

Compensability of the decedent's death was admitted, and litigation was for determination of the proper beneficiaries. At the time of death, Goodrich was married to, but separated from the wife, and was step-father of her three minor children, and all of the biological fathers were dead. The other litigants were the decedent's parents. The wife had combined income for the two years before the death of about $2400. She also received about $764 per month in Social Security benefits to her children, on account of the deaths of their fathers. Total household expenses for

the wife and step-children were about $31,000 per year. After separating from the wife, the decedent was paying about $1900 per month for the children's recurring expenses, plus contributing to incidental expenses and paying credit card and furniture loan bills. The Commission decided that the step-children were "substantially dependent" on the decedent under N.C.G.S. § 97-2(12), and thus conclusively presumed to be wholly dependent, under § 97-39, and thus eligible for death benefits, to the exclusion of others, under § 97-38(1). The wife was found not to be a "widow" under N.C.G.S. § 97-2(14), because she was not living with the decedent, was not living apart for justifiable cause (she had cheated on him) and she was not dependent on him.

The Court of Appeals reversed and remanded as to the wife, holding that the evidence supported the Commission's discretionary decision that, at the levels of money the children received from other sources compared to the amount they needed and received from the decedent, they were substantially dependent upon him, but that the evidence did not support opposite conclusion that was reached, on the same numbers, as to the wife. The Court noted that the three conditions mentioned in § 97-2(14)—living with the decedent, living apart for just cause, and being dependent—are alternative grounds for finding widowhood, each sufficient in the absence of the others, so that separation without justifiable cause does not exclude a dependent widow. The Court also held that there was no evidence to support the Commission's finding that the wife was not a responsible person and not competent to mange money, as the only evidence was that she had done that appropriately, both before and after the decedent's death.

13. Seagraves issues.

McRae v. Toastmaster, Inc., 158 N.C. App. 70, 579 S.E.2d 913 (2003).

Ms. McRae, who carriers an IQ of 59 and functions at a fourth grade level, started work for he employer sticking TJPC codes to boxes. After about six months, she started assembling clocks. Over the course of a year, she developed carpal tunnel syndrome. Her claim was accepted. She was released to return to work with restrictions that the employer promptly violated. On her subsequent attempt to return to work, she was placed back on the label sticking job. The employer scrutinized her performance, found that she had missed some of the boxes, wrote her up and fired her. The Commission treated her failure as misconduct under the Seagraves analysis and decided that she had constructively quit suitable employment. Her inability to work was due to refusal of employment, not her compensable injury. Commissioner Bolch dissented, finding that the inability to do the job resulted from her carpal tunnel syndrome.

The Court of Appeals affirmed, with a dissent. The Court of Appeals actually went a little farther than the Commission, in holding that failure to perform the labeling, which was not related to her compensable injury, was in itself misconduct that permitted termination without resumption of compensation. The Court stated, without record reference, that "A worker's failure to perform required tasks for employer results in reprimands and eventual termination. There is no indication that employer treated plaintiff' s misconduct differently than that of other employees in deciding to terminate her employment." The Court thereby 1) indicated that an employee on a light duty job, that she simply lacks the skills to do, can be terminated and 2) overruled the part of the Seagraves that imposed upon the employer the burden of proving that

other employees would have been terminated.

In dissent, Judge Wynn opined that the majority had erroneously expanded Seagraves to apply to cases of negligent failure to perform substitute employment.

14. Medical treatment, including attendant care.

Palmer v. Jackson d/b/a Jackson's Farming Company, _____ N.C. App. _____, 590 S.E.2d 275, (2003*).*

This is an appeal of this case on an issue separate from the issue as to whether medical bills can form the basis for a percentage attorney's fee sanction.

Carmen Fuentes suffered a compensable heat stroke that left him in a persistent vegetative state. He moved back to Mexico, where his father and sister provided 24-hour home attendant care at an intensive level, including feeding, changing diapers, cleaning a feeding tube, administered medication, etc. The quality of care was "superb," prompting the defendants' rehabilitation person to testify that he was surprised and that the care exceeded the quality that could be expected in some facilities in the United States. According to a doctor in Mexico and other testimony, the cost of a nurse to provide such services would be at least $7 per hour, though the evidence was that it would be difficult to get a nurse to go to a location so remote and to work under the conditions present in the home, which included lack of a bathroom and a concrete floor. The defendants had paid the father $4000 total, for at least 11,000 hours of care and had paid the sister nothing for the other 11,000 hours. The Commission awarded payment at the rate of $7 per hour, along with interest from the date of the original hearing and attorney's fees of 25% of the retroactive payments. The Commission Opinion and Award dictated that if the defendants appealed, they were to pay both providers at least the $3 per hour that was undisputed, though it is not clear whether they did so. Both parties appealed.

The Court of Appeals affirmed as to all issues, holding that the evidence was sufficient to support the hourly rate to be paid to the family members, in light of the testimony as to the quality of care and the difficulty of obtaining nursing care under the circumstances, even at the $7 rate. The Court cited Childress v. Trion, Inc. as a case in which the Court had previously interpreted N.C.G.S. § 97-86.2 to apply to outstanding medical expenses and found no distinction between amounts paid to doctors under that case, to injured workers in the more obvious case, and to family members in the instant case. The plaintiff appealed the Commission's failure to find that the case had been defended unreasonably. The Court held that the contention was "unfounded," ion that the Commission had apparently considered the issue and ordered fees.

15. Procedural issues, including sanctions and processing of agreements.

Palmer v. Jackson d/b/a Jackson's Farming Company, 157 N.C. App. 625, 579 S.E.2d 901 (2003), discretionary improvidently granted, _____ N.C. ____, _____ S.E.2d (2004).

Mr. Fuentes suffered a heat stroke and ended up in a persistent vegetative state. The case was denied, and Mr. Fuentes prevailed, apparently over tremendous obstacles. His accrued wage compensation was about $24,000, but his medical bills were over $400,000. The Commission awarded a fee in the amount of 25% of wage compensation, to be paid by the defendants as a sanction for unreasonable defense, under N.C.G.S. § 97-88.1. Plaintiff's counsel, recognizing that the fee was inadequate for the huge amount of work required, appealed the fee to Superior Court. The Superior Court, impressed that the medical providers were going to get an enormous windfall of money that they never expected to see, owing to the unusual efforts expended by the plaintiff's lawyers, ordered that Mr. Fuentes' lawyers would get 25% of the medical bills, deducted from the amount paid to the medical providers.

The Court of Appeals reversed, holding that the medical bills could not be reduced for attorneys' fees and citing statutory authority for full payment that distinguished this case from those in which credit for non-workers' compensation disability benefits is reduced to give lawyers more incentive to handle small cases. The Superior Court's order also impermissibly invaded the province of the Commission, which had already decided, in its opinion and award, that the medical providers would be paid. However, the Court did state that on remand to the Superior Court, the judge could continue consideration of the penalty fee under N.C.G.S. § 97-88.1 and could base the fee assessed against the defendants on the medical benefit.

The defendants' petition for discretionary review was first allowed, then found to have been improvidently allowed.

Roberts v. Century Contractors, Inc., _____ N.C. App. _____, 592 S.E.2d 215 (2004).

Mr. Roberts suffered an admittedly compensable injury to his neck, which resulted in four levels of fusion. Despite some lines on post-recovery x-rays, the operating doctor opined that the fusion seemed to be taking nicely, declared that Mr. Roberts had reached maximum medical improvement and turned treatment over to a physician's assistant. Mr. Roberts continued to have pain and, on April 3, 1998, requested a second opinion with Dr. Allen Friedman. On May 13, 1998, the parties reached a mediated settlement agreement for $125,000, but left scheduled the appointment with Dr. Friedman. On June 2, 1998, Dr. Friedman opined that there was some lucency below the C5-6 graft in a previous x-ray and recommended a new x-ray, to be sure the fusion was solid. The defendants refused to pay for the new x-ray. On or about June 10, 1998, Mr. Roberts executed the clincher, which was approved by the Commission on June 25, 1998. Thereafter, Mr. Roberts filed a motion to set aside the settlement, on grounds of mutual mistake as to whether he had reached MMI. Both Dr. Friedman and the treating surgeon testified that he had not, with the treating surgeon's stating that advising Mr. Roberts that he had reached MMI was a mistake. The Commission set aside the agreement and awarded benefits, by Opinion and Award of September 18, 2002, which was appealed by the defendants on October 8, 2002. The

Commission then entered another Opinion and Award, to the same effect, on March 10, 2003.

The Court of Appeals affirmed the setting aside, holding that the evidence supported the Commission's decision that the fact of MMI had been shared by both parties, that it was material to Mr. Roberts' decision to enter into the clincher agreement, that the agreement did not assign the risk of mistake to Mr. Roberts, and that Dr. Friedman's doubts as to whether he had reached MMI were not confirmed or investigated "due to circumstances which may not necessarily be attributed to the plaintiff." It is not clear how important it was that the defendants had refused to authorize the x-ray that might have allowed Dr. Friedman to confirm his suspicions. The second Opinion and Award was vacated, since it was entered after the defendants had appealed to the Court of Appeals, at which point the Commission was divested of jurisdiction.

Hunt v. North Carolina State University, 159 N.C. App. 111, 582 S.E.2d 380 (2003).

Ms. Hunt suffered a compensable injury and attempted to prove permanent, total disability. After the hearing of lay testimony before the deputy commissioner, but before briefs were filed before the Full Commission, Ms. Hunt's condition apparently deteriorated, and she was approved for long-term disability benefits by the State Treasury Department.

The Full Commission found and concluded, as had the deputy, that Ms. Hunt had failed to prove permanent and total disability. Ms. Hunt appealed, contending that she had met her initial burden of proving permanent, total disability and that the Commission had erred by refusing to accept additional evidence that would have proved permanent and total disability.

The Court of Appeals affirmed, with a dissent. The Court held that the evidence of permanent total disability was weak, with one doctor giving an equivocal opinion and Ms. Hunt continuing to work at her regular job. The Court also rejected the contention that the Commission erred in refusing the new evidence, characterizing it as equivalent to forcing the Commission to accept any new evidence that is submitted between the hearing before the deputy commissioner and the hearing before the Full Commission. The Court acknowledged the plaintiff's concern that since the evidence indicated that there had been a change of condition during that period, and additional benefits can only be claimed for changes of condition after the Commission's final award, she may be practically precluded from pursuing those additional benefits. However, having acknowledged that concern, the majority did not present any way to deal with it.

Judge Wynn, in dissent, opined that the Commission had operated under a misapprehension of law, when it decided not to accept the new evidence on grounds that the issue of change of condition was not properly before the Commission. Judge Wynn viewed the decision on accepting the evidence as within the discretion of the Commission and thought that the Commission had not recognized that it had that discretion.

Joyner v. Mabrey Smith Motor Co., _____ N.C. App. _____, 587 S.E.2d 451 (2003).

The defendant was uninsured. Mr. Joyner was injured when he was rear-ended while test-

driving a car he had repaired. He received treatment for a neck injury and missed days of work for about two years, at which time he was terminated for having his wife call in, instead of doing it himself. The claim was filed timely. Thereafter, interrogatories were served, which were ignored. Plaintiff's counsel sent letters asking politely for answers. A hearing scheduled for about three months after service of the interrogatories was converted into a pre-trial conference, during which there was stipulation as to the employer-employee relationship, the date of injury, the lack of insurance and the average weekly wage. There was also an order that answers be served to the interrogatories within two weeks, after which there would be sanctions. There were no answers served. Plaintiff's counsel wrote again, threatening sanctions, if the answers were not served within yet another week. There was no response. A few months later, at hearing, the Deputy Commissioner struck the defendant's defenses as a sanction for the failure to obey the previous order, awarded on-going compensation from the time of termination at the maximum rate for a 1998 injury (which was much greater than the amount that would have been yielded by the stipulated average weekly wage), medical expenses and sanctions of costs and attorney's fees. The Full Commission affirmed as to all.

The Court of Appeals affirmed, holding that the Commission had not abused its discretion in excluding the defenses, which is a sanction explicitly provided by I.C. Rules 605 and 802, and by their reference to Rule 37 of the N.C. Rules of Civil Procedure. Most of the rest of the defendant's argument was rejected for being based on the defenses that had been properly struck. The Court addressed that defendant's contention that the Commission had erred in determining the start of the period of disability, based on its allegation that Mr. Joyner had come to work on the day stated as the first day out and that the timeout of work was caused by misconduct in having the wife call in. The Court rejected both, noting as to the claimed misconduct that there was evidence of medical inability to work that was sufficient to support the Commission's findings, independently of any claimed misconduct. Argument as to the sufficiency of the evidence to support the award of medical expenses was slapped down, and assignments of error as to the sanctions for unreasonable defense were held to have been abandoned.

Lakey v. U.S. Airways, Inc., 155 N.C. App. 169, 573 S.E.2d 703 (2002), disc. rev. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Ms. Lakey was a flight attendant for the employer. She suffered an admittedly compensable back injury, was treated by physicians chosen by the defendants and was paid appropriate compensation. The doctor authorized by the defendants gradually returned her to full time work. Shortly thereafter, she suffered additional back pain, when she was thrown around in turbulence. At some point, she switched to her own doctors. The defendants started paying compensation, but at the relatively low rate applicable to her original, 1992 injury. The Commission found a new injury and awarded compensation at a higher rate, based on her wages at the time of the second injury, and approved the treatment from her chosen doctors.

The Court of Appeals affirmed, holding that there was evidence to support the finding of a new injury, instead of the change of condition urged by the defendants, and that approval of the plaintiff's chosen doctors was a valid exercise of the Commission's discretion, particularly in light of the defendants' doctor's statement that he had exhausted his treatment options. The defendants argued that Ms. Lakey had failed to give proper notice. The Court rejected that

argument, holding that the record showed that the employer had actual notice of the injury and supported the Commission's decision that the defendants were unable to show any prejudice arising from the failure to give written notice within 30 days. The Court did not require a separate showing of a good excuse from the plaintiff as to why she did not give the written notice, when there was actual notice and no prejudice.

McAllister v. Wellman, Inc., _____ N.C. App. _____, 590 S.E.2d 311 (2004).

Mr. McAllister suffered an admittedly compensable back injury in June of 1991. He had a fainting episode a couple of weeks later and won compensation. In June of 1999, he attempted to obtain additional benefits for head and psychological injuries, which were denied. In rejecting the additional claims, the Commission stated that the claim for additional benefits was barred by *res judicata*, in that the alleged disability had been in existence at the time of the hearing on the fainting claim (and had apparently not been pursued). In February of 2001, Mr. McAllister sought additional medical benefits, under the availability announced in Hyler v. GTE Products Co. The defendant moved the Commission to dismiss the claim as barred by *res judicata*. The Commission denied the motion to dismiss and awarded medical benefits.

The Court of Appeals affirmed, holding that since the issue of Hyler-type medical benefits for the back injury suffered in the first accident was not at issue in the previous hearing, the doctrine of *res judicata* did not apply.

Cornell v. Western & Southern Life Ins. Co., _____ N.C. App. _____, 590 S.E.2d 294 (2004).

Mr. Cornell won his denied case of back injury before Deputy Commissioner Richard Ford. The Opinion and Award was faxed to Womble Carlyle Sandridge & Rice, the defendant's law firm, on November 29, 2001. Laura Wolfe, who had handled the case, had left the firm. The mail room at Womble tried to forward the O&A to Wolfe at her new office. In the meantime, Clay Custer, the head of Womble's workers' compensation practice, had relocated to the firm's Greenville, South Carolina office. The O&A was ultimately forwarded to Custer, who received it on December 3, 2001. Custer sent notice of appeal to the Full Commission dated December 17, 2001, which was not received by the Commission until December 27. Mr. Cornell moved the Commission to dismiss the appeal, by motion to the Chairman. That motion was denied, as was the motion to reconsider. The case proceeded to Full Commission decision, at which time the appeal was dismissed as having been untimely filed.

The Court of Appeals affirmed, agreeing with the Commission that notice of the O&A was received by the defendant when it was received by the law firm, and not when it was received by the individual within the firm who was assigned to the case. Therefore, the notice of appeal had not been filed within 15 days of receipt of the O&A, as required by N.C.G.S. § 97-85. The defendant's argument that the Commission erred by not finding excusable neglect was rejected, both because it had not been preserved on appeal and because the attorney's misapprehension f law did not constitute excusable neglect. The defendant tried to contend that the Commission had lacked authority to overturn the Chairman's decision, analogizing to the rule prohibiting a

superior court judge from altering a decision of a prior judge in the same case, but the Court pointed out that the Commission is a "quasi-judicial administrative board" and that Commission rules provide both that such motions are to be directed to the Chairman for summary disposition and that decisions on such motions can be reviewed in later proceedings.

16. Average weekly wage

Boney v. Winn Dixie, Inc., _____ N.C. App. _____, 593 S.E.2d 93 (2004).

Mr. Boney was killed at work, and compensation was awarded to his widow for 400 weeks, in addition to related medical expenses, burial expenses and costs, including attorney's fees. Ms. Boney appealed the decision that the average weekly wage was $194.88, resulting in a compensation rate of $129.93. Mr. Boney had worked full time for the employer until retirement in 1988. Thereafter, he filled in for vacationing or absent employees, leading to a fluctuating work schedule. The Commission simply divided the wages he earned in the 52 weeks prior to his accident by 52 to arrive at the average weekly wage, despite the fact that the work was part-time, so that the Form 22 Wage Chart contained several periods of missed work in excess of seven days. On appeal, Ms. Boney contended that the average weekly wage should have been calculated by using the second method provided in N.C.G.S. § 97-2(5), which requires dropping the periods in excess of seven days out of the calculation.

The Court of Appeals reversed and remanded for recalculation of the average weekly wage, but not for the result sought by Ms. Boney. The Court first noted that it was not possible to tell which method the Commission had used, because it made no specific findings to indicate that. The Opinion and Award implied that the first method had been used, which the Court held would be error, because the employment was part-time. On the other hand, the Court cited Joyner v. A.J. Carey Oil Co. in holding that the calculation of the average weekly wage must not turn part-time employment into full-time or continuous employment, so the method urged by Ms. Boney was also not proper. The Court held that on remand, the Commission must make findings and conclusions as to the proper method to use, which the Court heavily implied would have to be the fifth method, in which failure of the other listed methods to yield a fair result requires the Commission to choose a calculation that will "most nearly approximate the amount which the injured employee would be earning were it not for the injury."

17. Salaam issues.

Terry v. PPG Industries, Inc., 156 N.C. App. 512, 577 S.E.2d 326 (2003), disc. rev. denied, 357 N.C. 256, 583 S.E.2d 290 (2003).

Ms. Terry suffered an admittedly compensable injury to her Achilles tendon and was paid compensation for periods out of work. She eventually ended up in a light duty job on a long term basis. She then saw a psychologist, who diagnosed her with depression and took her out of work. The deputy commissioner decided that Ms. Terry was entitled only to a 1 0% rating of the foot and that the defendants were not required to pay for the psychologist. The Full Commission

decided that she was entitled to on-going compensation for total disability and approved the psychologist as an authorized medical provider.

The Court of Appeals affirmed. The defendants argued that the Commission improperly excluded certain testimony and records of a company doctor, after that doctor had improper ex parte communication with the employer's safety manager to discuss surveillance videotape that showed Ms. Terry walking in a way that was allegedly inconsistent with her reports to the company doctor. The defendants contended that the usual Salaam restrictions did not apply, because the doctor was not a treating physician and the person who made contact was not an attorney. The Court rejected both arguments, noting that the doctor had seen Ms. Terry more than 20 times for her condition and had a practice outside the company. The Commission's exclusion of the videotape from evidence was proper, because of the improper use and the Commission's finding that the tape was misleading. The Court also held that the psychologist was competent to testify about the psychological problems, though the defendants contended that his testimony should be given no weight, because he was not the authorized treating physician at the time of the testimony. The causal connection between the injury and the depression was held to be supported by the psychologist's testimony and testimony from the company doctor that chronic pain like that suffered by Ms. Terry tended to cause depression. The defendants' contended that she had become depressed due to harassment by co-workers and managers while she was on light duty, suggesting that she was faking her injury. Approval of the psychologist as a treating physician was within the Commission's discretion, especially when the only authorized doctor was the company doctor, whose treatment had proved ineffective.

18. Standard for entitlement to future medical coverage.

Taylor v. Bridgestone/Firestone, mc, 157 N.C. App. 453, 579 S.E.2d 413 (2003), reversed, 357 N.C. 565, _____ S.E.2d _____ (2003).

Mr. Taylor suffered an admittedly compensable shoulder injury, had surgery, and was returned to work with permanent restrictions. Over the next couple of years, he went back to the surgeon a couple of times for examination and anti-inflammatory medication. Mr. Taylor filed a Form 18M, seeking an order of future medical coverage. The Form 18M contained the doctor's certification that Mr. Taylor had a substantial risk of requiring future medical treatment for his injury. The defendant resisted the Form 18M. In deposition, the doctor expressed some misunderstanding of Mr. Taylor's current job duties and waffled about how certain the need for future treatment was, noting that the likelihood would vary, depending on what Mr. Taylor did with the shoulder. He was going to have a "moderate" risk, unless he was made completely sedentary. The Commission refused to grant the order for future medical coverage. The rationale is a bit confusing, but it appears that the Commission was operating on the theory that Mr. Walker would be unable to prove that future medical treatment would be related to the original injury, when the doctor opined that the magnitude of the risk would depend upon the level of his activity.

A majority of the Court of Appeals reversed, holding that the Commission had committed an error of law, by failing to apply the Parsons presumption that treatment was related to the compensable injury, which can be rebutted. According to the Court, the Commission should have expressed a two-part inquiry, deciding first whether there is a substantial risk of future treatment

and then whether the defendant can prove that the treatment is not related. The Commission erred by blending the two parts, then placing the burden on the plaintiff as to both.

Judge Hunter dissented, opining that there was evidence to support what he perceived to be the Commission's decision that there was not a substantial risk, so that the issue of causation was never reached, and the issue of presumptions did not arise.

The Supreme Court reversed *per curiam*, "for the reasons stated in the dissenting opinion."