WORKERS' COMPENSATION
CASE LAW UPDATE: October 2004

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CONTENTS

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

Collins v. Speedway Motor Sports Corp., ____ N.C. App. ____, 598 S.E.2d 185 (2004).

THIS IS A BIG CASE.

Mr. Collins suffered an admittedly compensable injury to his leg, and benefits were paid, pursuant to a Form 21 Agreement. After a couple of surgeries and about 17 months of treatment, during which he had moved to Ohio, Mr. Collins was found by an Ohio doctor to have reached maximum medical improvement, with significant restrictions, and a 24% rating was assigned. Nine months later, his last surgeon assigned a rating of 35% of the foot, due to lack of motion in the ankle and on-going nerve problems. Mr. Collins underwent vocational rehabilitation, and was unable to find work, either in North Carolina or Ohio. About 13 months after the MMI opinion, he found lower paying work in Ohio. Two months later, he returned to North Carolina and got a job paying about his pre-injury wage.

The defendants refused to pay the rating. The Deputy Commissioner ordered them to, awarding 50.4 weeks of compensation for the 35% rating. The Full Commission reversed, finding and concluding that since Mr. Collins had reached MMI on more than 50.4 weeks before he returned to work, his more munificent remedy was to accept the compensation that had been paid for total disability and reduced wage partial disability after MMI.

The Court of Appeals affirmed, holding that since MMI is the end of the healing period, and the healing period signals the start of compensation under N.C.G.S. § 97-31, the Commission had made the right decision. The Court cited a footnote in the Court of Appeals decision in Knight v. Wal-Mart for the proposition that "maximum medical improvement, by definition, means the employee's healing period has ended," omitting an internal quotation, and for the further proposition that "the primary significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31*." The Court held that the reference to "maximum vocational improvement" in the prior Court of Appeals decision in Walker v. Lake Rim Lawn & Garden was mere dicta and spent most of the opinion dismissing it.

Jenkins v. Easco Aluminum, 142 N.C. App. 71, 541 S.E.2d 510 (2001), ____ N.C. App. ____, 598 S.E.2d 252 (2004).

Ms. Jenkins had her fingers crushed by an unguarded machine. She was paid

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

The Court of Appeals reversed and remanded. The case turned on whether the job as an inspector was sufficient to rebut the presumption of on-going total disability, in a Saums/Peoples evaluation. The Court cited evidence that supported the Commission's decision that the defendants had satisfied their burden of proving that the job was actual employment, available in the competitive market, but remanded to consider expert testimony to the contrary that was not addressed at all in the Commission's opinion and award. Similarly, the Commission was held to have erred by failing to address Ms. Jenkins' motions to submit newly discovered evidence or her objection to the defendants' submission of new evidence at the Full Commission hearing. The denial of the 10% penalty was also remanded, both because the Commission's findings did not support its conclusions and because the Full Commission "inexplicably" failed to mention testimony from a coworker that had provided much of the basis for the Deputy Commissioner's award of the penalty. Finally, the Commission was instructed to consider the disability ratings as appropriate on remand. Interestingly, there was no mention of maximum medical improvement or any effect it might have on Ms. Jenkins' entitlement to compensation for total disability.

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

On remand, the Commission reversed itself, awarding compensation for temporary total disability from the time of the lay-off, the prosthetic fingers and a 10% increase in compensation for safety violations.

The Court of Appeals affirmed, holding that (1) the Commission did not exceed the permissible scope of the remand, which was not limited to making specific findings in accordance with prior evidence but required consideration of evidence that had been ignored in the prior proceeding, (2) the Commission did not err in finding that Ms. Jenkins would be hired in the competitive job market, when the defendants' vocational expert testified only that there was a job possibility pending and that there were similar positions open in manufacturing plants in the area, in the absence of evidence that Ms. Jenkins would be hired for any of those jobs, I light of her injury, (3) the Commission did not err in determining that the replacement job was "make-work" on the basis of conflicting testimony, which the defendants contended had shifted the burden to Ms. Jenkins to prove that it was not make-work, and (4) that the Commission did not err in finding that the injury resulted from a violation of safety regulations.

Clark v. Wal-Mart, _____ N.C. App. _____ 594 S.E.2d 433 (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 on-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.

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

Towns v. Epes Transportation, _____ N.C. App. _____, 594 S.E.2d 113 (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.

Edmonds v. Fresenius Medical Care, ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Ms. Edmonds, a director of nursing for the employer and suffered an admittedly compensable injury to her back. She underwent several unsuccessful surgeries and ended up on a morphine pump and non-steroidal anti-inflammatories. She had pre-existing problems with Type 1 diabetes and hypertension. After her injury, her urine creatine level increased from normal to an elevated level, indicating impaired kidney function. The case came for hearing on the plaintiff's claim for benefits for kidney problems and the defendant's attempt to stop compensation for refusal to accept suitable employment. The Deputy Commissioner denied both, but the Full Commission found and concluded that the plaintiff had proved the relation of the kidney problems to the compensable injury and awarded benefits accordingly.

The only issue on appeal was the award of benefits for the kidney problems. The Court of Appeals affirmed, holding that while some of the critical doctor's testimony was insufficiently certain to prove the causal connection between the use of the related non-steroidal anti-inflammatories and the kidney problems, reading other parts of the doctor's testimony indicated that such a connection was more than mere speculation. The Defendants had focused on lack of specific wording to indicate "reasonable medical certainty." The Court held that reliance thereon was misplaced.

Judge Steelman dissented, opining that the majority's rationale did not fit the thought process apparent in the Commission's decision. Judge Steelman noted that while the majority had gone through the doctor's testimony and found sufficient and sufficiently certain evidence, the Commission had not, stating instead in its opinion and award that admissible "could or might" testimony was sufficient to allow the Commission to consider other evidence that was not expert

opinion, to reach a causation decision. Judge Steelman viewed this as the Commission's having made its own medical determination, which was impermissible.

Faison v. Allen Canning Co., _____ N.C. App. _____, 594 S.E.2d 446 (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.

Moody v. Mecklenburg County, ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Mr. Moody injured his knee, shoulder back, neck and head in a car wreck. The claim was accepted and compensation was paid for about five years, for disability primarily attributed to psychiatric consequences of head injury, which included exacerbation of a pre-existing personality disorder. At the request of the defendant, a deputy commissioner ordered, about five years after the injury, that compensation be terminated, retroactively to about one and one-half years after the injury. The Full Commission reversed and awarded full benefits, through the time of Mr. Moody's death (apparently of unrelated causes).

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision. The defendant specifically challenged the purported failure of the Commission to make specific findings concerning Mr. Moody's credibility, based on inconsistent reports as to whether he had suffered a loss of consciousness at the time of the wreck. The Court held that the Commission was not required to "elaborate on why it believes one witness or piece of evidence over another."

Dunn v. Marconi Communications, Inc., 161 N.C. App. 606, 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.

Dial v. Cozy Corner Restaurant, Inc., 161 N.C. App. 694, 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.

Johnson v. Southern Tire Sales and Service, 152 N.C. App. 323, 567 S.E.2d 773 (2002), ____ N.C. ____, ____ S.E.2d ____ (2004).

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

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

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

On appeal, the Supreme Court reversed, holding first that the Commission had erred in finding that a presumption of disability was raised by the undisturbed Form 63 acceptance without prejudice, that the finding that Mr. Johnson had severe pain was not equivalent to finding that he could not work, and that the Commission had applied an incorrect legal standard to the question of whether he had refused suitable employment. The rationale is difficult to sort out, because it blends elements of refusal of suitable employment and of failure to cooperate with vocational rehabilitation, for purposes of fitting a "doctrine of constructive refusal" that is offered without citation. In so doing, the Court found that the Full Commission's finding that Mr. Johnson had not sabotaged his job search was insufficient, because there was no reference to specific facts to refute Alford's testimony about the behavior. The oddest consequence was the Court's holding that the Commission had erred in deciding that the lack of a job offer precludes a finding that there has been unjustifiable refusal. As in the dissent below, the Supreme Court focused entirely on the evidence from Dr. Gwinn and, mostly, Alford, without so much as mentioning Dr. Cook, who the Commission had specifically found to be of greater weight.

The impact of this case is difficult to predict, because it seems infected with the impression of some who have decided it that Mr. Johnson scuttled his job search and discomfort over allowing him to get away with it. It also may indicate that the Full Commission, through seeing certain witnesses and types of witnesses on a regular basis has developed an institutional understanding of their credibility that the appellate courts do not share.

3. Occupational disease

James v. Perdue Farms, Inc., 160 N.C. App. 560, 586 S.E.2d 557 (2003); 358 N.C. 234, 594 S.E.2d 191 (2004).

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, 160 N.C. App. 597, 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.

Vaughn v. Insulating Services, ____ N.C. App. ____, 598 S.E.2d 629 (2004).

Mr. Vaughn worked as an insulator, being exposed to asbestos, in the 1950's, then joined the Army. After leaving the Army in 1980, he went to work for insulation companies. He contracted asbestosis and claimed last injurious exposure with the defendant, with whom he had started working in 1983. In his early medical examinations, he either made no mention of exposure with the defendant or made vague references. The Commission denied the claim for failure to prove last injurious exposure, which is defined for asbestosis cases in N.C.G.S. § 97-57 as being a minimum of 30 days exposure within a seven month period.

The Court of Appeals affirmed, holding that while the Commission mentioned the absence of scientific or medical evidence of the claimed exposure, it did not require such evidence, that the Commission's finding that the asbestosis was caused by exposure at prior employment was not germane to the issue of last injurious exposure, and that the Commission did not err in failing to consider the presence of the asbestosis as inferring that there was injurious exposure with the defendant, when the prior exposure provided an alternative explanation as to where the disease came from. Mr. Vaughn had testified that he worked at a tank farm for "almost a month and a half" and that an asbestos abatement had occurred there later. However, the Court noted that only two out of40 tanks had been involved in the abatement, and that since Mr. Vaughn had testified that he worked four days per week during that time, a month and a half could not have exceeded 28 days of exposure.

Clark v. City of Asheville, 161 N.C. App. 717, 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, 160 N.C. App. 637, 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, 162 N.C. App. 292, 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.

Petitions for discretionary review by both parties were allowed on August 12, 2004.

Wiley v. United Parcel Service, Inc., ____ N.C. App. ____, 594 S.E.2d 809 (2004).

Mr. Wiley suffered from seizures, which ultimately resulted, after a long string of attempted accommodations, in his inability to work in several of the jobs available to him with the employer. During the process, he suffered two back strains and a shoulder injury. On August 30, 2000, he suffered a seizure, and he filed a claim for workers' compensation 11 days later, claiming that the seizure at that time had been the result of aggravation and activation of his pre-existing disorder, caused by exposure to fumes and stress at work. The employer ultimately determined that there was no work available, so Mr. Wiley remained out of work, without being formally terminated. He filed a REDA claim and, after a right to sue letter issued, he sued. The Trial Court granted summary judgment dismissing the case.

The Court of Appeals affirmed, holding that there was no evidence of retaliation, since the only action the employer had taken was to keep Mr. Wiley out of a job that he was claiming he could not do. The Court noted that unlike the Americans with Disabilities Act, REDA does not require accommodation. The employer is only prohibited from adverse employment action with respect to the employee's job. Further, there was no evidence of other jobs that were available at the time.

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); 358 N.C. 156, 592 S.E.2d 696 (2004).

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, 160 N.C. App. 697, 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. Presence or lack of an accident.

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.

Konrady v. United States Airways, Inc., ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Ms. Konrady was a flight attendant on lay-over. When the courtesy van arrived at the hotel and she exited the van, the last step was short, which compounded with the position of the van that placed the step over the curb instead of the road to make the last step off the van very short. Not expecting that, she mis-stepped and felt pain in her knee. She ultimately had arthroscopic surgery. The claim was denied, and the Commission awarded benefits.

The Court of Appeals affirmed, holding that there was evidence to support the Commissions finding that the short step constituted an interruption of the work routine. The Court rejected the defendant's attempt to couch the issue as whether she exited vans routinely, noting that the correct question was whether that specific exiting was routine. Causation was held to be adequately supported by medical opinion. The Court affirmed the refusal to apportion, based on lack of evidence of a percentage associated with Ms. Konrady's prior knee injury

Madison v. International Paper Co., ____ N.C. App. ____, 598 S.E.2d 196 (2004).

Mr. Madison was required, as part of his job, to vacuum lint filters in a pulp dryer that got very hot. The procedure took between one and one and one-half hours. After doing so one day, he was leaving work when he suffered chest pain and died of a heart attack. The medical evidence was that he had pre-existing arterial disease that made him "a heart attack waiting to happen." However, both testifying doctors opined that the extreme heat involved in vacuuming was a contributing factor in causing the heart attack. In addition, an industrial safety specialist reported that the equipment and procedures were in violation of safety regulations.

The Commission awarded death benefits. The Court of Appeals affirmed, holding that despite the pre-existing arterial disease, the evidence that the heat had contributed to the heart attack was sufficient to prove cause.

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 her 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.

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

Hodges v. Equity Group, ____ N.C. App. ____, 596 S.E.2d 31 (2004).

Mr. Hodges was walking to install a machine guard when his "feet came out from under" him and he fell. He initially shook off the injury. The following morning, he felt stiffness in his hip and numbness in his leg, so he reported the accident. He worked his full shift that day. The following day, when his pain got worse, he talked to a supervisor about seeing a doctor and was referred to company doctor Joseph Guarino. Dr. Guarino prescribed an anti-inflammatory and gave light duty restrictions. A couple of days later, on a Sunday, Mr. Hodges' pain increased, and he went to the emergency room, where he got pain medications and light duty restrictions. A couple of days later, on Tuesday, he was unable to get out of his car after work, so his wife took him to a different ER, where he was taken out of work for the rest of the week, when an MRI was scheduled. The MRI revealed a herniated disc. The following Monday, he saw Dr. Guarino again, who opined that the disc could not be causing the symptoms, because it was on the wrong side. Mr. Hodges went to his family doctor, who referred him to a neurosurgeon. Two surgeries

reduced back pain but left pain in the right hip and leg. At the time of hearing, Mr. Hodges used a cane, was limited in his activity and was on Social Security Disability. The Commission awarded compensation for on-going temporary total disability, plus $5000 in attorney's fees for the appeal, pursuant to N.C.G.S. § 97-88. The Deputy Commissioner had awarded an attorney's fee in the same amount for unreasonable defense, under § 97-88.1, on grounds that while the defendant came up with a colorable defense based on the nature of the specific traumatic incident, it had originally defended the case solely on the contention that Mr. Hodges was a fraud, which was wholly without foundation.

The Court of Appeals affirmed the award of compensation, holding that while Mr. Hodges was unable to tell exactly what caused him to fall, the fact that the fall occurred in the performance of job duties raised an inference that it had its origin in the employment, in the absence of evidence that it had been caused by an idiopathic condition. Therefore, the Commission's decision that the fall arose out of the employment was supported. The Court remanded the award of attorney's fees for findings of fact and conclusions of law to support it, noting that the fee under § 97-88 is limited to the legal work performed in the appeal. The reversal of the Deputy Commissioner's award of the fee as a sanction under § 97-88.1 was viewed as discretionary, and there was no abuse of discretion in reversing it.

As a somewhat bizarre side issue, the Commission found that Dr. Guarino had engaged in improper ex parte communications with other physicians. Apparently, at the request of the employer's HR manager, Dr. Guarino called the other doctors to try to get them to change their minds as to Mr. Hodges' inability to work. The Court held that the evidence supported the finding. Those having cases involving Dr. Guarino may want to keep this case in mind.

The Court also rejected the defendant's contention, on appeal to the Court of Appeals, that the claim should have been denied, because the plaintiff was not credible.

Stanley v. Burns International Security Services, 161 N.C. App. 722, 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.

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.

9. Misrepresentation in applying for employment

Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp. Inc., 161 N.C. App. 111, 587 S.E.2d 440 (2003), disc. rev. denied, 358 N.C. 234; 594 S.E.2d 192 (2004).

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.

Discretionary review was denied.

10. Suitable employment

Baker v. Sam's Club, 161 N.C. App. 712, 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.

Coe v. Haworth Wood Setting, ____ N.C. App. ____, ____ S.E.2d ____ (2004).

There is no adequate explanation as to why this case was appealed by the defendants. Mr. Coe suffered an admittedly compensable injury to his right shoulder, when a machine part he was changing suddenly jumped. He aborted surgery at the last moment, due to concerns about the likely result and his cardiovascular condition. He was returned to work with strict limitations on the use of his right arm, which eventually fell to not using it at all. He continued to work as a machine operator, using only his left arm, until he developed left shoulder problems, which his doctor attributed to overuse, resulting from the inability to use the right arm. The defendants refused to pay for visits with the authorized treating physician that were associated with the left arm, on grounds that those problems were unrelated to the compensable right arm injury. His restrictions were ultimately reduced to no lifting over 10 pounds and no repetitive use of either

arm. Eventually, Mr. Coe stopped working, telling the employer that he could not perform the duties of a machine operator. He was terminated and no compensation was paid.

The Commission decided that the job of machine operator was unsuitable, so refusal to take it was justified. The Commission also rejected the defendants' contention that the termination was unrelated to the injury. Separately, the Commission decided that the departure was a failed trial return to work.

On appeal, both parties agreed that trial return to work was not at issue, and the Court of Appeals agreed with the plaintiff's rationale, because benefits were not being paid at the time. The Court affirmed the Commission's decision otherwise, holding that Dr. Supple's opinion was sufficient to support the relationship between the left arm problems and the admittedly compensable injury, that the job was unsuitable, and that the evidence supported the decision that the termination was related to the injury (and not "for reasons unrelated to his compensable injury, and was for misconduct or fault for which a non-disabled employee would also have been terminated." Citing Seagraves) The Commission had cited the Dictionary of Occupational Titles in finding that the machine operator job was heavy, due to the requirement of lifting 60 pounds and that most machine operator jobs are of medium demand, when Mr. Coe was limited to light duty. The termination was related, because it resulted from the refusal to take the unsuitable job.

11. Dependents in death claims

Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 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.

12. Seagraves issues.

McRae v. Toastmaster, Inc., 158 N.C. App. 70, 579 S.E.2d 913 (2003), 358 N.C. 488; 597 S.E.2d 695 (2004).

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.

The Supreme Court reversed and remanded. The Court clearly treated this as a case with serious long-term ramifications, first stating as much and then engaging in very detailed analysis. The Court explicitly adopted the Seagraves test, holding that it created a proper balance between allowing employers to terminate employees for misconduct and protecting employees from pretextual termination. The Court then held that the Commission and Court of Appeals had misapplied the test by placing the burden on the plaintiff to prove that the termination was related to her injury, instead of requiring the employer to prove that it was unrelated. This case is worth a careful reading for all practitioners, as it explains the Seagraves test in great detail.

13. Medical treatment, including attendant care.

Palmer v. Jackson d/b/a Jackson's Farming Company, 161 N.C. App. 642, 590 S.E.2d 275, (2003), 358 N.C. 373; 595 S.E.2d 145 (2004).

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.

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

Atkins v. Kelly Springfield Tire Co., N.C. App. , 571 S.E.2d 865 (2002), _____ N.C. _____, _____ S.E.2d _____ (2004).

Ms. Atkins suffered an admittedly compensable injury in November of 1995. She was paid for a 10% rating of her arm on a Form 21 Agreement, which was approved on August 19, 1996. At the time of submission of the Form 21 to the Commission for approval, the only medical document accompanying it was a Form 25R, which stated the rating. For about three

years, she did not have significant problems with her arm. In July of 1999, she returned to her treating physician, who performed surgery. In October of 1999, she filed a Form 18. After a hearing, the Deputy Commissioner refused to set aside the Form 21. The Full Commission agreed.

The Court of Appeals reversed, holding that the Form 21 had been approved without compliance with the statutory requirement, in N.C.G.S. § 97-82(a), that complete medical records be considered with it. The Commission had acknowledged that "it substituted the Form 25R for the statutorily required 'full and complete medical reports.'" On remand, the Commission was to consider all records that existed at the time of the original submission and determine whether the Form 21 Agreement was "fair and just."

The defendants' petition for discretionary review was granted, then decided to be improvidently granted after argument.

Estate Of Apple v. Commercial Courier Express, Inc., ____ N.C. App. ____, 598 S.E.2d 623, (2004), ____ N.C. App. ____, 598 S.E.2d 625 (2004).

This is a pair of opinions heard and decided at the same time. Mr. Apple was making a delivery when he was attacked and robbed. In the course of the robbery, he was stuck in the head with a hammer and fell into a chronic vegetative state. The claim was accepted, and benefits were paid pursuant to a Form 21 Agreement that provided for compensation for "necessary weeks." The injury occurred on August 4, 1994, he reached maximum medical improvement in March of 1993, and he died from related causes in January of 2001. In March of 2000, the defendants had filed a Formm 33 Request for Hearing, trying to force a determination of permanent and total disability, because the plaintiff had refused to sign a Form 26 Agreement to that effect. A Deputy Commissioner decided in April of 2001 that Mr. Apple was permanently and totally disabled, as of March of 1995. The defendants denied death benefits, on grounds that death occurred more than six years after the injury and more than two years after the Form 21 Agreement, arguing that the Form 21 approval constituted a final determination of disability as defined in N.C.G.S. § 97-38. The Commission awarded compensation for death.

The Full Commission affirmed, holding that the Form 21 did not address the extent of Mr. Apple's permanent disability, so it was not a final determination. Since the death occurred less than two years after the April 2001 order of permanent and total disability, which was a final determination, there was no bar to the death benefits. The case was remanded, because the Commission had failed to address the plaintiff's motion for attorney's fees under § 97-88, though it had denied them under § 97-88.1.

In a separate opinion, the Court of Appeals addressed the plaintiff's contention that the Commission had erred in failing to order the defendants to pay the full amount of rehabilitation bills. Apparently, the provider of physical rehabilitation services agreed to cut its bill from $160,000 to $50,000 and to accept the reduced amount from the carrier in full payment. It is not clear why the provider did that or why the plaintiff cared. In any event, the Court of Appeals vacated the Commission's decision on grounds that the plaintiff did not even have standing to raise the issue.

Palmer v. Jackson d/b/a Jackson's Farming Company, 157 N.C. App. 625, 579 S.E.2d 901 (2003), discretionary improvidently granted, 357 N.C. 506; 587 S.E.2d 670 (2003), 358 N.C. 373; 595 S.E.2d 145 (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.

Vogler v. Branch Erections Company, Inc., ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Mr. Vogler was killed when a crane fell on him. An OSHA investigation revealed that the bolts that had failed, causing the accident, had not been inspected in two years, when applicable regulations required inspection every day. The deputy commissioner awarded benefits, including a 10% increase in compensation for violation of a safety regulation, under N.C.G.S. § 97-12. Shortly before the opinion and award was issued, Reliance Insurance was declared insolvent. The Full Commission affirmed. After the Full Commission decision was rendered, the Insurance Guaranty Association moved to be joined as a party and challenged its liability for the 10% increase, on grounds that (1) its liability was limited to the terms of the insurance contract, which excluded payment of such increases and (2) that the statutory prohibition on payment by the Guaranty Association of "punitive or exemplary damages" precluded liability for a penalty. The Full Commission refused to consider the policy issue, on grounds that no evidence about it had been presented to the deputy commissioner and found that the 10% increase was compensation, not a penalty.

The Court of Appeals reversed, on grounds that the Commission had abused its discretion by not considering the policy, implying heavily that the Guaranty Association should prevail on that issue on remand. The Court did not reach to issue of whether the 10% increase constitutes "punitive or exemplary damages."

Joyner v. Mabrey Smith Motor Co., 161 N.C. App. 125, 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.

Jackson v. Flambeau Airmold Corp., ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Mr. Jackson prevailed in a claim for the occupational disease of carpal tunnel syndrome and an accidental injury to his shoulder. His wife's employment took the two of them to Japan, with occasional visits back. Carpal tunnel release surgery was authorized by the defendants, but there were scheduling problems, until the defendants refused to provide it. Scheduling of the hearing of the dispute was a mess, with the case being continued. Plaintiff's counsel suggested that Mr. Jackson's testimony be taken by telephone, and the defendants objected. A hearing came up before Deputy Commissioner Chapman, and neither party showed up. The Deputy Commissioner then dismissed Mr. Jackson's claim with prejudice for failure to prosecute, and the Full Commission affirmed.

The Court of Appeals reversed, holding that Commission rules required notice and an opportunity to be heard before dismissal, and there had been neither. There had been no motion or any other discussion to indicate that dismissal was at issue. Furthermore, the Court cited Lee v. Roses in holding that the Commission had failed to address whether (1) plaintiff deliberately or unreasonably caused delay, (2) the amount of prejudice caused to defendant, and (3) the reasons a sanction short of dismissal would not suffice.

Lee v. Wake County, ____ N.C. App. ____, 598 S.E.2d 427 (2004).

Ms. Lee suffered an admittedly compensable injury while working for a county. Several years later, the remaining issues in her case were settled by a clincher agreement for $750,000 that was negotiated at mediation. A memorandum was prepared that contained no conditions. Thereafter, the county commissioners withdrew consent to the agreement, apparently because they thought the amount was too high. Ms. Lee moved the Commission to compel enforcement of the agreement, and Chief Deputy Commissioner Gheen did just that, ordering the defendant to

prepare a clincher. On review by the Full Commission, that order was reversed, based on an ordinance that had been enacted after the settlement and a statutory provision requiring a preaudit certificate.

The Court of Appeals reversed, noting that the ordinance could have no effect, because it was passed after the agreement was reached, even though there was reference to a resolution several years before. The county manager was held to have apparent authority, and his actions were not ultra vires, because the county had the capacity to settle for the amount in question, even if its agent did exceeded his actual authority. The preaudit certificate was not yet applicable, because the Commission had not ordered the payment of any money, only the specific performance of preparing the agreement, after which the county could review the agreement and determine whether the county had the money to undertake that obligation.

McAllister v. Wellman, Inc., 162 N.C. App. 146, 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., 162 N.C. App. 106, 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.

15. 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."

16. Standard for entitlement to future medical coverage.

Taylor v. Bridgestone/Firestone, Inc., 157 N.C. App. 453, 579 S.E.2d 413 (2003), reversed, 357 N.C. 565, 598 S.E.2d 379 (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."