WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2005

By Jay A. Gervasi, Jr.
Greensboro, NC

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

Collins v. Speedway Motor Sports Corp., 165 N.C. App. 113, 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), 165 N.C. App. 86, 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 not 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, in 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.

Segovia v. J.L. Powell & Company, ____ N.C. App. ____, 608 S.E.2d 557 (2004)

Mr. Segovia suffered a compensable injury to his back and ear. He returned first to light duty, then to regular duty. While at regular duty, he went out for a week for ear surgery. Six months later, he went out for another ear surgery. He was supposed to be out of work for a week, but he was laid off during that week, along with 11 other employees, due to economic conditions unrelated to his injury. The defendants continued to pay compensation and filed several Form 24 Applications to Stop Payment, which were denied. After an evidentiary hearing, the Deputy Commissioner denied further compensation, and the Full Commission affirmed, finding that the termination, while Mr. Segovia was able to do his regular job, along with his demonstrated lack of motivation in seeking further employment, supported the conclusion that his being out of work was not the result of his injury.

The Court of Appeals affirmed, holding that the evidence supported the findings and the findings supported the conclusion. There are a couple of twists to this case. First, the Commission had specifically mentioned that "suitable" work was available for Mr. Segovia, which included a part-time job at a grocery store and several fairly low-paying jobs. The Full Commission opinion and award shows an average weekly wage of $254.43, so there was probably no unsuitability in this case, due to wage of the substitute jobs, but it would be well for the practitioner to note that, in case this case is cited for the proposition that a job as a bus boy is suitable for a truck driver. Second, while there is discussion of Mr. Segovia's ability to do his regular job, there is no discussion of how the demands of that job compared to other jobs in the competitive market. The proper analysis as to whether economic factors are the cause of time out of work should be based on limitations of the injured worker, not whether he was able to do his regular job. For example, if the regular job was very light, so that the injured worker is able to do it, despite a 10 pound lifting restriction, then he loses that job due to a general lay-off, then he is unable to find other work within that severe restriction, then it should not be held that he is unable to work due to economic factors alone. Again, in this case, that is not a factor, because Mr. Segovia's regular job was as a laborer handling lumber. Finally, there is off-hand mention that Mr. Segovia "had no driver's license due to his illegal status," but it is not clear how much that was considered.

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

Edmonds v. Fresenius Medical Care, 165 N.C. App. 811; 600 S.E.2d 501 (2004), rev., 359 N.C. 313, 608 S.E.2d 755 (2005).

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.

The Supreme Court reversed, "[f]or the reasons stated in the dissenting opinion."

Alexander v. Wal-Mart Stores, Inc., ____ N.C. App. ____, 603 S.E.2d 552 (2004); 359 N.C. 403, 610 S.E.2d 374 (2005)

Mr. Alexander was run over by a forklift, which ran over his foot and knocked him down. The claim was accepted, and he was eventually sent to Dr. Harris, a pain management specialist. As she treated Mr. Alexander for his foot pain, she began to suspect that some of the pain was coming from disc damage in the lower back. She attempted to refer Mr. Alexander to a neurosurgeon for evaluation, but the defendants refused, instead sending him for a compulsory medical exam with a Dr. Fletcher, who opined that the back injury was not related to the accident at work. The defendants filed a Form 33 Request for Hearing, in an attempt to terminate benefits. The Commission ordered continuation of compensation, designated Dr. Harris as the authorized treating physician, and explicitly authorized referral to a neurosurgeon, if Dr. Harris saw fit.

On appeal, the majority of the Court of Appeals picked through Dr. Harris' testimony, finding excerpts that could be interpreted as casting doubt on the certainty of her opinion, then reversed, holding that the testimony was too speculative to support the Commission's decision. In dissent, Judge Hudson pointed out other evidence that indicated that Dr. Harris' opinion was that the back injury was part of the compensable injury and that the foot symptoms were related to both direct trauma to the foot and back injury at the time of the accident. She then noted that the proper standard of review requires the Court of Appeals to affirm Commission decisions that are supported by any competent evidence, not to "comb through the testimony and view it in the light most favorable to the defendant." By basing its decision on some excerpts that were speculative, instead of focusing on whether the evidence, taken as a whole, contained anything to support the Commission's decision, the Court had impermissibly weighed the evidence.

The Supreme Court reversed, per curiam, "[f]or the reasons stated in the dissenting opinion."

Adams v. Metals USA, ____ N.C. App. ____, 608 S.E.2d 357 (2005)

Mr. Adams slipped off a ladder attached to a truck and fell, skinning his arm and landing on his hip. Coworkers offered corroborating testimony. He felt pain in his legs, foot and hip at the time but continued to work. He continued to work, without going to a doctor, but the pain in his hip, leg and foot increased. More than three months after the accident, he went to a family doctor, complaining of back pain and his foot going numb, but did not recall a specific injury. After a couple of weeks out of work, he was feeling better, as long as he rested, but activity increased his pain. The employer sent him to another general practice, where he reported the fall off the ladder. An MRI performed about four months after the accident showed a large ruptured disc at L5-S1. Surgery was performed, which helped for a short time. Symptoms then increased. Surgery was not recommended, but treatment for chronic pain was. The Deputy Commissioner denied the claim, apparently accepting that there had been a compensable fall, but citing Mr. Adams' failure to mention back problems for three months in deciding that the fall did not cause the back injury. The Full Commission went the other way, finding that Mr. Adams' testimony about increasing problems associated with his ruptured disc before seeing doctors was credible and that the disc injury was caused by the fall.

On appeal, the defendants argued that the neurosurgeon's testimony was too speculative to support the causation decision. Dr. Kritzer testified that people can have ruptured discs without a specific event to cause it, but that if Mr. Adams had been asymptomatic before his fall and developed symptoms thereafter, he "would certainly believe" that the fall caused the back injury. On cross-examination, he testified that the symptoms do not necessarily appear at the time the disc herniates. He waffled some when presented with a hypothetical that implied no symptoms after the accident, but testified positively when asked to assume that Mr. Adams had experienced symptoms in his leg and foot shortly after. Dr. Kritzer expressed his understanding, in rendering his opinion, that Mr. Adams had initially experienced mild symptoms, which gradually got worse, before the first doctor's visit. The Court reviewed cases in which medical testimony had been held to be too speculative, when doctors had been unable to say more than that causation was "possible, but not likely," (Holley v. ACTS) or an injury "could possibly have been caused by" an incident (Hodgin v. Hodgin) and distinguished them with long excerpts from Dr. Kritzer's testimony, holding that that testimony, along with other facts in the case, were sufficient to support the Commission's findings and conclusion of causation. Secondarily, the Court held that the finding of ongoing disability was sufficiently supported by evidence that Mr. Adams was permanently unable to lift more than 50 pounds, had been terminated by the employer, had not been offered light duty work or vocational rehabilitation assistance, had worked as a truck loader with few transferable skills and had searched for employment unsuccessfully. The Court also noted the lack of evidence from the employer that suitable employment existed.

In dissent, Judge Tyson opined that Dr. Kritzer had based his opinion only on the temporal relationship between the fall and the injury and the history given by Mr. Adams. He considered that as no different than the opinion in Holley v. ACTS, that a causal relationship was "possible, but not likely." He also opined that the Supreme Court's decision in Holley had overruled Johnson v. Piggly Wiggly, which the majority had cited for the proposition that causation can be proved by a "qualified opinion as to causation, along with an accepted medical explanation as to how such a condition occurs, and where there is additional evidence tending to establish a causal nexus." He noted Dr. Kritzer's testimony that a ruptured disc can be caused by

various things other than a fall, without recognizing that Dr. Kritzer had testified that ther was no evidence that any of those things caused the injury in this case. The case has been appealed to the Supreme Court.

Moody v. Mecklenburg County, 165 N.C. App. 869; 600 S.E.2d 39 (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."

Bass v. Morganite, Inc., ____ N.C. App. ____, 603 S.E.2d 384 (2004)

Ms. Bass' job involved using her hands, though there was disagreement in the testimony as to how much. She noticed pain in her right hand while opening a sliding glass door away from work. Treating physicians attributed her symptoms to opening the door, but said somewhat weekly that her job "could have" been a contributing cause to her carpal tunnel syndrome and that it "seems reasonable" that work caused it. An expert hired by the defendants watched a videotape purporting to show Ms. Bass' job, only slower, and opined that the job was not a cause of the carpal tunnel syndrome. The Commission denied the claim.

The Court of Appeals, Judge Tyson writing, affirmed, noting the proper standard of review and that the hired expert's testimony was enough evidence to support the Commission's findings and conclusions. Ms. Bass argued unsuccessfully that the Commission should have given greater weight to the other doctors' testimony and should have rejected the videotape as unrepresentative of the job. It was unnecessary to get into prolonged discussion as to the sufficiency of the testimony of the doctor who said that causation "seems reasonable."

Aboagwa v. Raleigh Lions Clinic For The Blind, Inc., ____ N.C. App. ____, 607 S.E.2d 1 (2004)

Ms. Aboagwa fell at work twice within a few days. She went to a doctor the morning following the second fall, after choosing to continue working, instead of going to the plant nurse. She did not like that doctor and switched to another one. She continued to work through

complaints of pain and dizziness for another month or so. Conservative treatment was unsuccessful, so she underwent cervical fusion surgery. All doctors after the first one opined that she was unable to work and that her problems were either caused by her falls or resulted from aggravation of a pre-existing condition. Deputy Commissioner Chapman denied the claim, but the Full Commission reversed.

The Court of Appeals affirmed, finding plenty of evidence to support the Commission's decision. The defendants contended that the Commission's finding that no doctor had said that Ms. Aboagwa's problems were solely due to something other than the falls indicated that the defendants had been given an inappropriate burden of proving that the falls did not cause the injury. The Court held that the cited finding was just a comment on the lack of evidence against the plaintiff and noted that the Commission had explicitly found that she had proven the causation. The Court rejected the defendants' contention that the Commission had improperly ignored evidence, which probably explains why this case was appealed. The opinion implies that the Deputy Commissioner had denied the claim on the basis of testimony from the first doctor, the one Ms. Aboagwa did not like, because he was not a good listener and did not understand her, which contained a different story from that given to the subsequent doctors. The Commission's statement that it had considered "the totality of the medical and lay evidence" was sufficient. Finally, the Court found sufficient evidence to support the finding of disability, in the form of medical testimony that she could not work.

Lewis v. North Carolina Department Of Corrections, ____ N.C. App. ____, 606 S.E.2d 199 (2004)

This case is up on appeal for the second time. Mr. Lewis claimed an occupational disease of post-traumatic stress disorder and won. He later claimed that exacerbation of his pre-existing diabetes and associated periodontal disease were caused by his compensable PTSD, but the defendant refused to pay for that. At hearing, the Commission determined that res judicata required payment of the disputed bills. The Court of Appeals reversed, holding that the Commission was required to consider evidence on the issue. The Commission did so, found that the conditions were exacerbated by the PTSD and ordered payment.

On the defendant's appeal, the Court of Appeals affirmed, holding that there was plenty of evidence to support the findings and conclusion that the diabetes and, in turn, the periodontal disease were exacerbated by the PTSD. Even the experts hired by the defendant had acknowledged that stress can exacerbate diabetes, and the treating physicians were supportive. The defendant tried to argue that the Commission was required to give more weight to the opinions of its endocrinologist who had reviewed records, based on his specialty, but the Court held that weighing evidence is for the Commission and noted that that doctor had testified that he knew "nothing about post-traumatic stress."

Barbour v. Regis Corp., ____ N.C. App. ____, 606 S.E.2d 119 (2004)

Ms. Barbour was a hair salon manager who fell while cutting a customer's hair, landing on her left shoulder and neck. After going to the hospital the following day, she was seen by Dr.

Alioto, who is apparently an orthopedist, who diagnosed her with a shoulder strain. She reported neck pain at the hospital and continued pain and numbness in left arm to Dr. Alioto. She followed up with him a couple of times, then went back to work and did not seek medical treatment for about six months. She worked through the pain, because the salon was short-staffed. When she returned to Dr. Alioto, she complained of pain in her neck, shoulder and arm. He diagnosed shoulder problems, as well as cervical strain, and performed surgery on the shoulder. After four weeks out to recover, Ms. Barbour went back to administrative work only for a couple of months. When she tried to start cutting hair again, she felt pain in her neck shoulder and arm. Dr. Alioto noted that he suspected that she had hurt her neck in the fall and referred her to neurosurgeon. She was seen instead by orthopedist Dr. Lestini, who did some diagnostics and gave her a nerve root block in her neck. The defendants accepted the claim immediately, filing a Form 60 that described the injury as "MPRT," which apparently means multiple body parts. About 2 years after her accident, Ms. Barbour returned to work as a receptionist at a chiropractic clinic. However, she only lasted a few weeks before severe neck pain drove her out. The Deputy Commissioner decided that her neck problems were not caused or aggravated by her fall and denied additional benefits. The Full Commission reversed, with Commissioner Riggsbee dissenting.

The Court of Appeals affirmed, holding that the Form 60 for injury to multiple body parts was an acceptance of the neck condition, but declined to decide whether the defendants could later challenge that, because the Commission had affirmatively found that Ms. Barbour had proved causation. Dr. Alioto testified that his suspicions of cervical injury at the time of the fall were speculative, but Dr. Lestini had testified that the neck problems were caused or aggravated by the fall, and neurosurgeon Dr. Fulghum testified if she had not had symptoms before the fall and had them afterwards, then the fall caused to neck injury. Dr. Fulghum also testified that if she had had no complaints of neck pain for a year after the fall, then it would be ujnlikely that the fall caused the problems. The Court noted that there was plenty of evidence that Ms. Barbour had had neck problems since immediately after the accident, so there was enough foundation for the doctors' positive opinions, and there was evidence to support the Commission's award of compensation. The defendants also argued that Ms. Barbour had failed to prove on-going disability, but that argument was based on the failed contention that the neck injury was unrelated to the fall. The Court talked some about the lack of presumption of on-going disability arising from the acceptance with a Form 60, but merely cited Sims v. Charmes/Arby's Roast Beef and made some conclusory comments about the differences between a Form 21 Agreement and a Form 60.

Rogers v. Lowe's Home Improvement, ____ N.C. App. ____, ____S.E.2d ____ (2005)

Mr. Rogers worked as a merchandise receiver, which involved unloading things, including major appliances and building materials. He routinely had soreness in his lower back and left leg after work. On October 19, 2001, he was lifting carpet, when he felt a pull in his lower back and left hamstring. His diagnostic tests for back injury were negative, and he was diagnosed by a family doctor as having a pulled hamstring. In the course of treatment, the doctor mentioned the possibility that the problems were symptomatic of a back injury, but the diagnosis remained the same. On November 9, 2001, he was unloading windows when he felt a pop in his "lower left hip area." That night, he experienced radiating pain that was worse and of a different

nature than he had had before. He sought treatment, culminating in microdiskectomy. The Deputy Commissioner and the Full Commission awarded benefits based on the November 9 incident.

The Court of Appeals, Judge McCullough writing, affirmed, holding that the testimony of the treating neurosurgeon was sufficiently positive to take it outside the realm of speculation. The Court specifically rejected the argument that the symptoms reported after the October 19 incident to the family doctor had been the same as those reported by the company doctor after the November 9 incident, noting that the Commission had found Mr. Rogers' contrary testimony to be credible and that company doctor's records did not accurately reflect the type of pain Mr. Rogers was having and his lack of improvement. PrimeCare had returned him to normal work on November 20. When Mr. Rogers complained that he could not do it, he went to an orthopedist, who sent him for an MRI, and he started treatment with the neurosurgeon in January of 2002.

Gutierrez v. GDX Automotive, ____ N.C. App. ____, 609 S.E.2d 445 (2005)

Ms. Gutierrez, an undocumented Mexican who spoke no English, hurt her back lifting something at work. She was treated conservatively by company doctors and returned to regular duty after a couple of weeks. Eight months later, she was seen at the same place for an injured elbow, and six months after that, she was seen for a severe headache. She did not mention back pain during either of those visits. Roughly 18 months after the original injury, she went to a chiropractor, telling him that she had had back pain since her injury 15 months earlier. She was taken out of work, and the employer was unable to accommodate restrictions given by the chiropractor. She then saw an orthopedist, who referred her for physical therapy. The Deputy Commissioner and Full Commission awarded on-going compensation for her time out of work.

The Court of Appeals, with Judge Tyson writing and Judges McGee and Geer concurring, reversed, acknowledging that the Commission is the finder of fact, but holding that the Commission had improperly ignored competent evidence--testimony of a doctor who was not mentioned in the opinion and award, whom Ms. Gutierrez had seen and to whom she had not mentioned her back. The Court also held that there was no evidence to support a finding of causation, as the only medical testimony was that the injury was a "possible" cause of her symptoms, or disability, in that there was no evidence of an attempt to find work, and the doctor the Commission cited had actually said that she could work.

Crane v. Berry's Clean-Up & Landscaping, Inc., ____ N.C. App. ____, 610 S.E.2d 464 (2005)

Mr. Crane was working on changing a tractor tire on February 5, 1999, when a lug nut broke loose and he injured his back. He continued to work until the following week, when he was getting out of a truck and felt a pop in his back, on February 11, which was a Thursday. The employer arranged for him to see a company doctor on Monday, but he went to the emergency room on Saturday, because his pain got too severe. The company doctor took him out of work for a while, then released him to very light duty. He did not return to work, because he had too much pain, then filed a Form 18, reporting an injury on February 11 while changing a tire. His claim

was denied, so the company doctor dumped him. He went to another doctor and ultimately ended up with unsuccessful back surgery, followed by pain treatment, when he had depression added to his problems. The Deputy Commissioner found compensable injuries on both February 5 and 11 and awarded compensation from February 12 onward. The Full Commission noted that the Form 18 only mentioned a February 11 date of injury, concluded that there had been no Form 18 filed for the February 5 injury, then found that the February 11 injury had caused the injury and awarded the same things as the Deputy did.

The Court of Appeals reversed and remanded, agreeing with the defendants that there was no evidence to support the findings and conclusion that getting out of the truck on February 11 caused Mr. Crane's back injury. However, the Court also held that the Commission operated under a misapprehension of law as to the importance of the date of injury, when the Form 18 identified the injury as occurring while changing a tractor tire, so that it could decide on remand that Mr. Crane was entitled to compensation for that injury, even though the date was misstated. The Court rejected the defendant's argument that finding compensability was improper, because the evidence showed that disability was caused by Mr. Crane's depression, which had not been proved to be caused by the accident. First, the evidence did not really say that, as the testifying doctors attributed disability to pain and other dysfunction as well as depression, and second, the Court pointed out that if disability is caused by a combination of compensable and on-compensable factors, the disability is compensable.

Jarrett v. McCreary Modern, Inc., ____ N.C. App. ____, 605 S.E.2d 197 (2004)

Ms. Jarrett was a sewer who developed carpal tunnel syndrome. Her first doctor was of the opinion that her job was minimally repetitive and said only that it may have contributed to development of the CTS. Her second doctor testified that the job was highly repetitive, exposed her to increased risk "without question," that it "could or might" have caused the CTS and that the motions she performed were the worst ones for causing CTS. The Deputy Commissioner viewed the "could or might" testimony as an indication that the second doctor's opinion was speculative and denied the claim. The Full Commission awarded benefits.

The Court of Appeals affirmed, holding that the increased risk prong of the test for occupational disease under N.C.G.S. § 97-53(13) was easily satisfied and that while the second doctor did answer a "could or might" question, his other testimony indicated that he was not just speculating on the cause issue.

Craven v. VF Corp., ____ N.C. App. ____, 606 S.E.2d 160 (2004)

Ms. Craven suffered a back injury while lifting at work. She was initially sent to the company doctor, which returned her to light duty work. A few days later, she went to her family doctor, who referred her for physical therapy. She was given medicine and taken out of work. She was also seen by an orthopedist and at the hospital. The defendants sent her to another orthopedist, who diagnosed back sprain and stenosis, recommended medicine and physical therapy, and expressed irritation that the defendant paid his bill but refused to pay for the treatments he prescribed. Ms. Craven was diagnosed by the family doctor as developing

depression. The defendant finally denied the claim in its entirety. The Deputy Commissioner concluded that Ms. Craven had suffered a compensable injury and ordered payment for medical treatment, but decided that she had failed to prove disability. The Full Commission modified by awarding compensation for disability.

The Court of Appeals affirmed, holding that there was evidence to support the causal connection between the compensable injury and the depression. The Commission did not err by failing to make specific findings that the treatment rendered by the doctors chosen by Ms. Craven was necessary to effect a cure, to give relief or to lessen her period of disability, because the statute no longer requires that and because the denial of the claim deprived the defendant of any control over the choice of medical treatment.

3. Occupational disease

Vaughn v. Insulating Services, 165 N.C. App. 469; 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.

Carroll v. Town of Ayden, 160 N.C. App. 637, 586 S.E.2d 822 (2003), 359 N.C. 66; 602 S.E.2d 674 (2004).

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.

On appeal, the Supreme Court affirmed per curiam.

4. Credit issues.

Smith v. Richardson Sports Ltd. Partners, ____ N.C. App. ____, 608 S.E.2d 342 (2005)

This is a case of somewhat limited application but is very important in claims involving highly paid professional athletes. Mr. Smith is a famous football player who suffered a career-ending injury. He sought and won compensation at the maximum rate for partial disability, after going to work at a radio station for $40,000 per year. The issue is the effect of several types of money that he was paid under his contract, which was further subject to the NFL players' collective bargaining agreement, after he became unable to play. While the facts and opinion of the Court of Appeals are extremely complicated, the highlights are that large amounts of money will, absent a provision of the plan under which they are paid, be credited on a week-by-week basis, pursuant to N.C.G.S. § 97-42, instead of the dollar-for-dollar approach favored by employers and that the players' contracts cannot, under North Carolina law, affect the application of the Workers' Compensation Act. The Commission's decision that the defendants were entitled to credit for only 14 weeks of Mr. Smith's 300 weeks of partial disability compensation, even though millions of dollars were paid, and that certain of the amounts were due and payable when paid, so as not to be eligible to be used as credit were mostly affirmed. However, the Court held that the Commission had failed to receive sufficient evidence to decide the status of some of the payments, so the case was remanded. The Court also emphasized that awarding of the credit was discretionary with the Commission, while also citing appellate cases that held some credits to be mandatory.

Swift v. Richardson Sports, Ltd., ____ N.C. App. ____, ____, ____S.E.2d ____ (2005)

This is a case involving a professional football player who suffered a career-ending injury. It is somewhat simpler than Smith v. Richardson Sports, Ltd., which is also reported in this

manuscript, because Mr. Swift was not as prominent and had less complicated contractual arrangements. He was paid $325,000 for the season, in 17 weekly installments. As he was rushing from the outside, in attempt to block an extra point, the play broke down, people started scrambling around, and one or two other players landed on his leg, breaking the fibula and tearing ankle ligaments. He received a check for the following week, under an injury protection provision in his contract. He was then paid $30,000 in severance pay. The following season, he was able to catch on with the Jacksonville Jaguars and play one game, for which he received a single check for $22,647, which was slightly more than he received fro the Panthers. Unfortunately, the Jaguars also decided that he was unable to perform due to his injury and cut him. He then worked at a series of jobs, with the most lucrative paying $40,000 per year. His average weekly wage was $6476.90, and the Industrial Commission awarded compensation at the maximum rate of $560 for partial disability, under N.C.G.S. § 97-30, with credit for the one week he was paid for playing for Jacksonville, plus attorney's fees.

The Court of Appeals mostly affirmed, but remanded for findings and conclusions concerning the attorney's fees, to include reference as to whether they were to be a sanction under § 97-88.1 or for an appeal result under § 97-88. The defendants argued that there was no accident, but the Court held that there was evidence to support the Commission's finding and conclusion that having another player fall on him so as to break his leg was unexpected and unusual. The payments made by the employer, under the collective bargaining agreement and Mr. Swift's contract, were not creditable, apparently because they were due and payable when paid, which rendered the discussion as to whether credit would be dollar-for-dollar (which it is not) or week-by-week (which it is). The only "credit" allowed was the absence of the one week of disability, when Mr. Swift played for the Jaguars and made more than his average weekly wage, which does not raise any of the usual "credit" issues. **Bonus practice nugget:** The defendants challenged as hearsay Mr. Swift's testimony as to why he was released by the Jaguars. The Court held that the Commission correctly admitted the testimony, because it was a declaration made at trial or hearing by the declarant, which was based on his personal knowledge as to why he was cut. This decision can be applied to a broad range of cases, in which the injured worker must prove why he was not offered jobs during a search.

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

Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416 (2004), disc. review improvidently granted, 359 N.C. 317, 608 S.E.2d 755 (2005)

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, but the Supreme Court subsequently decided that they were improvidently granted.

Walker v. Penn National Security Insurance Company, ____ N.C. App. ____, 608 S.E.2d 107 (2005)

This case is an attempt to explain the operation of N.C.G.S. § 20-279.21(e), which governs credits against payments by uninsured/underinsured motorist coverage, when workers' compensation benefits have been paid. The negligent driver had $30,000 in liability coverage, and there was a $1,000,000 limit on applicable UIM coverage. An arbitrator awarded $126,874. The comp carrier asserted a lien of $81,948.37, of which $6198.95 was payments to a rehab nurse. As part of a clincher agreement, the lien was set at $35,000. Mr. Walker filed a declaratory judgment action to establish how much the UIM carrier was to pay. The words in the opinion are difficult to sort out. The bottom line is that a two step process was executed. First, the limit of available coverage was calculated by subtracting the liability limits from the UIM limits, which yielded a maximum of $970,000. Then the amount due was calculated by subtracting the amount of the comp benefits paid over and above the lien—in this case $40,749,42, which was the total of $75,749.42, minus the $35,000 lien set in the clincher, then subtracting the amount paid by the liability carrier—in this case, $30,000. The result was $56,789.68, plus interest. An additional important point was that the trial court, affirmed by the Court of Appeals, deducted the cost of the rehab nurse from the lien consideration, because there was no evidence that medical management was of any benefit to the plaintiff.

Wiley v. United Parcel Service, Inc., 164 N.C. App. 183; 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.

Wilkerson v. Norfork Southern Railway Company, ____ N.C. App. ____, 606 S.E.2d 187 (2004)

Plaintiff's decedent was killed, when the cement truck he was driving was struck by a train. The wrongful death claim was settled for $400,000, contingent on extinguishment of the workers' compensation lien. The Superior Court in Durham County extinguished the lien, on motion of the plaintiff. The workers' compensation carrier appealed.

The Court of Appeals vacated the order extinguishing the lien, holding that the settlement, because it contained the condition precedent of lien extinguishment, was not final at the time the judge decided the motion, and finality is a jurisdictional pre-requisite to modification of the lien, pursuant to N.C.G.S. § 97-10.2(j). The Court editorialized that the finality requirement, announced in Ales v. T.A. Loving Co., might create a statutory conflict, because § 97-10.2(h) requires consent of the comp defendant to a settlement before it can be finalized, so that no settlement to which the comp carrier did not agree could ever be addressed under § 97-10.2(j). There is no discussion of the first part of subsection (j), which states that it applies "[n]otwithstanding any other subsection of this section…in the event that a settlement has been agreed upon by the employee and the third party.." It also appears that there was no issue raised as to choice of law issues, when the workers' compensation benefits were paid under Virginia law.

Schenk v. HNA Holdings, Inc.; Bell v. HNA Holdings, Inc., ____ N.C. App. ____, 604 S.E.2d 689 (2004)

This is a third party case, in which workers sued the owners of the premises where they had been exposed to asbestos. Most of the case is about the availability of punitive damages,

which is outside the scope of this paper. However, there is a detail that concerns workers' compensation. After the jury rendered a verdict for the plaintiff, the trial judge convened a hearing to give a 100% set-off against the verdict for all recoveries the plaintiff's had achieved through settlement with other parties, including workers' compensation. The plaintiffs argued that the comp recoveries were separately for recovery of lost wages, which was different from the recovery in the third party case. In affirming, the Court of Appeals cited cases about preventing double recovery. Notably absent is any discussion of statutory authority for the set-off. N.C.G.S. § 97-10.2 provides that credit can be given against third party recovery for comp benefits paid by a negligent employer, but there must be negligence of the employer found by the jury in order to allow that. The alternative is that the comp defendants are reimbursed, subject to modification of the lien. It is possible that there was a jury verdict about negligence of the employer, but it does not appear in the opinion. If there was none, then the Court created something new.

7. Presence or lack of an accident.

Konrady v. United States Airways, Inc., 165 N.C. App. 620; 599 S.E.2d 593 (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., 165 N.C. App. 144; 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.

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

Hodges v. Equity Group, 164 N.C. App. 339; 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.

Sisk v. Tar Heel Capital Group, ____ N.C. App. ____, ____ S.E.2d ____ (2004).

Ms. Sisk was sexually harassed by her boss at work. She failed to follow procedure for reporting it, due to reluctance to discuss it. However, as soon as she went out of work with psychological problems associated with the harassment and notified the employer, a very quick investigation was done, and the offending supervisor was terminated. She was given some paid leave, then unpaid leave and finally was terminated. The Deputy Commissioner awarded benefits. The Full Commission found the same facts as the Deputy, which were all favorable to Ms. Sisk, but concluded that while she had sustained an injury by accident in the course of her employment, the accident did not arise out of the employment, because sexual harassment is not a natural incident to employment.

The Court of Appeals affirmed, citing the seminal tort case on sexual harassment, Hogan v. Forsyth County Country Club, for the proposition that emotional injuries resulting from sexual harassment are not compensable. The Court also analyzed the harassment as an assault claim, holding that there was no evidence of a connection between the assault and the work.

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, including constructive refusal thereof and cooperation issues.

Johnson v. Southern Tire Sales and Service, 152 N.C. App. 323, 567 S.E.2d 773 (2002), 358 N.C. 701; 599 S.E.2d 508 (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.

Brooks v. Capstar Corp., ____ N.C. App. ____, 606 S.E.2d 696 (2005)

Ms. Brooks suffered an admittedly compensable injury to her elbow which became chronic. She also had a disc herniation, apparently in her neck and related to a prior car wreck. She was released to light duty work, though Dr. Dunaway mentioned that her motivation to return to work was low. She went to Dr. Pearce for pain management, and he signed a Form 28U, which the defendants ignored, on grounds that they had not authorized him. The Commission ordered that Dr. Pearce was the authorized physician and reinstatement of compensation, conditioned on cooperation with vocational rehabilitation. A few months later, the defendants filed a Form 24 Application to Stop Compensation, on grounds of failure to cooperate, which was approved.

After more than a year had passed, a Deputy Commissioner rescinded the approval of the Form 24. The Full Commission concluded that Ms. Brooks had complied with voc and that the Form 24 had been improvidently approved. The defendants appealed.

The Court of Appeals affirmed, noting testimony from the vocational rehabilitation specialist that while Ms. Brooks had discussed her limitations in a couple of job interviews in a way that was less than optimal, and the manager of a Cracker Barrel had said that he felt that Ms. Brooks did not want to work, she had generally cooperated, had done everything she was asked to do and had not intentionally done "anything to mess anything up." It appears that in her testimony, the voc person backed off some of the inflammatory statements in her reports, essentially acknowledging that it is not improper to fail to sugar-coat physical restrictions when being interviewed by potential employers. There had been discussion about work restrictions, in which the voc person told Ms. Brooks that her restrictions from Dr. Pearce were not valid, because he was no longer her treating physician. One of the two jobs at issue, one as a security guard, was filled before approval, due to delay in getting review of a job description by Dr. Carlton. In short, the voc situation was fairly typical, and the Court of Appeals held that there was evidence to support the Commission's findings and conclusion that Ms. Brooks had cooperated sufficiently. The Court explicitly distinguished Johnson v. Southern Tire Sales and Service, in which there were 12 suitable jobs presented to the plaintiff, he failed to show up for some interviews and had "balky behavior" at others, and the Supreme Court had held that there was no evidence to support the Commission's findings and conclusions that the plaintiff had not failed to cooperate. The Court separately affirmed the award of compensation for on-going total disability, noting that the claim was accepted, a Form 60 was filed, the parties stipulated to a compensable injury, and the From 24 noted an admission of the employee's right to compensation. The Commission had noted properly that the only issue for hearing was failure to cooperate.

In dissent, Judge Tyson opined that the Johnson case controlled and required a finding of constructive refusal of employment. He noted evidence that he felt the Commission had improperly ignored and emphasized that Ms. Brooks had a negative attitude. Judge Tyson stated that under Johnson, plaintiffs have an affirmative duty to seek employment "diligently," which Ms. Brooks failed to do. His list of factors that he found "compelling" includes that Ms. Brooks had been out of work for several years, that she had only attended two interviews, that she had "admitted" that she had only done "whatever [the voc person] was telling me to do," that there was evidence of her ability to perform beyond her restrictions, that she failed to contact Dr. Carlton to ask about the delay in approval of the job description for the security guard job, and that the Form 24 had originally been approved.

A brief editorial comment: Experienced practitioners should be concerned over the lack of understanding of the system that can lead to such views. In this case, a vocational specialist who was willing to send Ms. Brooks to jobs as a security guard, was only able to find two places that would even give her an interview, over the course of several months. Far from being an indication that Ms. Brooks was not trying, that shows the difficulty she will have in finding a job. Suggesting that the injured worker has a duty to chase her doctor, who has typically been chosen by the employer, to hurry him in generating approval of a security job, is backwards. Most startling is the idea that only cooperating fully with the vocational rehabilitation specialist, which the voc person agreed that Ms. Brooks had done, is insufficiently "pro-active." We in the field

recognize that the voc people are assigned to cases to push our clients, sometimes brutally, to either get jobs or, if that is difficult, to break down and fail to cooperate, so that compensation can be suspended when the injured worker is unable to work. In this case, the only two jobs for which the voc person was even able to wrangle an interview were of the sort that are found at the bottom of the vocational barrel. It is unclear why the one employer was so eager to employ Ms. Brooks as a security guard, even offering to have someone read things to her (which probably renders the job "make-work" anyway), when there were apparently others available to snap up the job. The voc person, supposedly an expert at finding people jobs, had obviously searched exhaustively and had only been able to come up with two, low-paying jobs. If the voc person admitted that Ms. Brooks had generally cooperated in a process that went that far, most practitioners, like the Commission in this case, would consider that sufficient. It is important to recognize that most appellate judges have never practiced workers' compensation law "in the trenches" and do not have the underlying feel for the landscape that experienced comp lawyers have. Therefore, it is imperative that we not assume otherwise and that we back up a step in our arguments to explain some of the practicalities.

Briefs have been filed in the Supreme Court, and the Academy has appeared amicus curiae.

Lowery v. Duke University, ____ N.C. App. ____, 609 S.E.2d 780 (2005)

Mr. Lowery was a janitorial worker with pre-existing health problems, including a childhood knee injury that left his right leg shorter than his left. He had worked for Duke for 30 years, when he fell down some steps and ruptured his right quadriceps tendon. He underwent surgery and physical therapy, and his surgeon released him to full duty. When he returned to work, with restrictions, he tried to work with a cane, but the employer would not let him. He tried without a cane, but was unsuccessful. After more treatment, directed by a doctor at the employer's Employee Occupational Health and Wellness Services, that doctor returned him to work with very restrictive limitations, with the provision that he could take his cane to work but could not use it there. The doctor opined that it would be very difficult for Mr. Lowery to get a job if Duke's was not available and noted that she had refused to consider his diabetes, because she viewed her role as to assess the injury and generate limitations based only on that injury. An orthopedist examined Mr. Lowery for a Social Security application and opined, among other things, that use of a cane was appropriate at the workplace. Mr. Lowery testified that it was very difficult to do his job without the cane, because he had to hang off walls and such to support himself. He and his supervisor testified that he could not work with a cane, because his work required both hands. The issue for the Commission was whether Mr. Lowery had constructively refused employment by refusing to do it without the cane. The Deputy Commissioner decided that he had, but the Full Commission reversed.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's finding that suitable work was not offered, as even aside from the cane issue, his job required cleaning bathrooms, which could not be performed without prohibited squatting or kneeling. The argument that Mr. Lowery could have done the job with his cane was undercut by the supervisor's testimony that he could not. In the course of the opinion, the Court mentioned evidence that was not tied directly to the legal analysis, in a way that indicated that it considered

fairly obvious that Mr. Lowery could not function in his job in his condition. There also appeared to be allowance for the fact that Mr. Lowery was a somewhat inarticulate witness who did not understand some of the specifics of the restrictions he had been given. There is a hint of stepping back away from the fancy legal arguments and noticing, as a matter of common sense, that it would be ridiculous to suggest that this man could really do his job.

Coe v. Haworth Wood Seating, 166 N.C. App. 251; 603 S.E.2d 549 (2004).

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. 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.

White v. Weyerhaeuser Co., ____ N.C. App. ____, 606 S.E.2d 389 (2005)

This is one of those cases in which there is a perception that the Court was offended by the defendant's behavior. Mr. White fell off a ladder and landed badly, sustaining a bad cut on his thumb and a torn rotator cuff. It was third shift, so the plant nurse was not there, so the shift supervisor wrapped the thumb in an attempt to stop the bleeding and had Mr. White sit in the office for almost four hours, until the shift was over. He refused to take Mr. White to a doctor. After he went home and slept, Mr. White's thumb was still bleeding and his shoulder was sore, so he went to the company doctor, where he received stitches. The same day, he received a Group II reprimand for going to the company doctor without seeing the plant nurse first and did not report the injury to one of two designees. The employer had two classes of disciplinary violation: Group I, which led to a multistep procedure and Group II, the more severe violations that could lead to suspension and discharge on the first offense. Mr. White underwent surgery, then returned to

light duty work. The next Group II reprimand came a couple of months later and was purportedly for failing to speak in person with the supervisor before going to his father's funeral. Mr. White testified that he thought it was sufficient to speak with his unit leader and get approval, which he thought he had gotten. There was no evidence presented to indicate that he was incorrect. He had already been approved to take a week off as his father was dying, and he thought he had procured an extension. When he returned, he brought his father's obituary to the supervisor to prove that he was out for a funeral, but the #!&*@ made him bring in medical records, in order to be paid for the leave. After another month or so, Mr. White was able to return to his regular duties, thought the employer provided him with a helper for tasks he could not perform. The third Group II reprimand came about a month after the second. He and two other maintenance employees were working on a machine and had placed all of their personal padlocks on the power control, pursuant to lock-out safety procedures. When they were finished, a lead person asked them to remove the locks. Mr. White and one of the others removed theirs. While they were waiting for the other worker to come to remove her lock, the same supervisor who had been giving him so much trouble came by and asked how tight the chain was. Mr. White reached into the machine and shook the chain to demonstrate. An hour later, the supervisor informed Mr. White that he was to be reprimanded for a lock-out violation. At that point, Mr. White filed a grievance with his union. The next day, the union president and shop steward informed Mr. White that the employer was about to terminate him and recommended that he resign instead, so that his work record would look better. He resigned the same day. He looked for work unsuccessfully for five months and testified that some potential employers had refused to hire him due to his restrictions. He was found to have reached maximum medical improvement with a 5% rating of the arm and none of the thumb. A couple of months later, he was able to find a temporary job as a laborer for $8.00 per hour, then moved to a permanent job for the same wage. The defendant refused to pay compensation after his departure, claiming that he had voluntarily left available, suitable employment. Deputy Commissioner Chapman denied the claim, but the Full Commission awarded compensation for total and partial disability (under N.C.G.S. § 97-30 based on wage loss).

The Court of Appeals affirmed. The Court first held that the defendant had failed to follow appellate rules governing assigning of error, so that appeal as to the sufficiency of the evidence to support the findings of fact was abandoned, and the findings were deemed to be true. The Court then analyzed the case under the rubric announced in Seagraves v. Austin Co. of Greensboro, under which the defendant has the burden of proving that an involuntary termination was independent of the work-related injury and that other employees would have been terminated under the same circumstances. First, however, the Court held that while the Seagraves analysis does not apply if the termination is voluntary, the Commission could, under the facts presented, find and conclude that a supposedly voluntary resignation was in fact a constructive termination that was involuntary. The employer bore the burden of proving the voluntary resignation, as part of proving a refusal of suitable employment under N.C.G.S. § 97-32. The Commission was allowed to decide that Mr. White actually was going to be terminated shortly, based on the statements of the union officials and the fact that an employee who had been reprimanded once in twelve years of employment had been given reprimands that could lead to termination three times within seven months of his injury. The Court also held that Mr. White's decision to try to salvage his employment record by resigning under the threat of imminent firing did not deprive him of compensation.

12. Employment status.

Hughart v. Dasco Transportation, Inc., ____ N.C. App. ____, 606 S.E.2d 379 (2005)

Dasco was a furniture delivery business. They had an arrangement with SOI, under which some of the truck drivers and helpers that did the delivering were made SOI employees, for purposes of administrative things, like handling payroll and having workers' compensation coverage. Mr. Hughart was brought in by Dasco to substitute for a sick helper. He was not processed through SOI. He went on a couple of trips, dying in a wreck on the second one. The Commission decided that Mr. Hughart was an employee of both Dasco and SOI, based in part on the contract between those two companies.

The Court of Appeals conducted a de novo review of the evidence, because the issue of employment status is jurisdictional, and held that while Mr, Hughart had been an employee of Dasco, he was not an employee of SOI. The Court noted that the employment relationship is contractual and that there was no indication that SOI was ever aware that Mr. Hughart had been hired. Estoppel did not bar SOI's defense, because it never received any premiums for coverage of him. There was no evidence that the Dasco supervisor who hired Mr. Hughart was clothed with authority to hire for SOI, and it was not enough that the person he was helping was one of the SOI "assigned employees." Dasco's argument that Mr. Hughart was an independent contractor was rejected, through application of the factors in Hayes v. Bd. Of Trustees of Elon College.

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

Atkins v. Kelly Springfield Tire Co., N.C. App. , 571 S.E.2d 865 (2002), 358 N.C. 540; 597 S.E.2d 128 (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.

Clawson v. Phil Cline Trucking, Inc., ____ N.C. App. ____, 606 S.E.2d 715 (2005)

Mr. Clawson was a truck driver who slipped and fell. His claim was accepted on a Form 21 Agreement, and he was paid compensation. He retuned to work at a reduced wage for a while, then went back out, and compensation for total disability was resumed. He was subjected to vocational rehabilitation services, which were unsuccessful. When Lou Drumm closed his file, he sent it to the defendant's lawyers. Shortly thereafter, compensation was stopped without a Form 24 Application to Stop Payment. The Key Risk adjuster testified that compensation stopped due to a computer error. Mr. Clawson filed a Form 33 Request for Hearing. The same adjuster testified that she did not know compensation had stopped, until she received the Form 33. However, she said that her superiors instructed her to send the Form 33 to their lawyers and not to resume compensation. A couple of years later, Mr. Clawson and Key Risk signed a Form 26 Agreement, for compensation for a 10% rating of his back, which was submitted to the Commission with only one, one-paragraph note from a neurologist. The Commission approved the agreement, and the compensation was paid. Three months after the Form 26 was filed, presumably shortly after hiring a lawyer, Mr. Clawson filed a motion to set aside the Form 26, on grounds that large piles of existing medical records had not been filed with the Agreement. The Deputy Commissioner found the Form 26 to be null and void, due to failure to submit the "full and complete medical report" required by N.C.G.S. § 97-82(a) and separately due to "fraud and/or misrepresentation on the Commission" and "undue influence over the plaintiff." The Deputy also apparently ordered sanctions, to include attorney's fees under § 97-88.1, for unreasonable defense. The Full Commission also voided the Form 26, but only on grounds of failure to submit the required medical report, ordered a 10% late payment penalty and deleted the sanction. Both parties appealed.

The Court of Appeals affirmed most of it, noting that there were 140 pages of medical records and 127 pages of vocational reports, apparently including records of on-going treatment at a pain clinic, which was referred to in the single paragraph that was submitted. The Court cited § 97-82(a) and Atkins v. Kelly Springfield Tire Co, in holding that the evidence supported the Commission's decision that a full report had not been submitted and rejected the defendant's argument that submission of those records was the plaintiff's responsibility, noting first that Commission rules place that responsibility on defendants and second that it does not matter, as long as the report is not there. Addressing the issue of change of condition under § 97-47 was not necessary, in light of the decision to void the Form 26. On Mr. Clawson's appeal, the Court first declined to address whether the evidence supported findings of fraud and the like, because the voiding under § 97-82(a) was sufficient. However, the Court remanded, holding that the Commission had failed to address with findings of fact and conclusions of law the issue of sanctions under § 97-88.1 or fees under § 97-88, which it was required to do, once moved.

Smythe v. Waffle House, ____ N.C. App. ____, ____, ____S.E.2d ____ (2005)

Mona Lisa Smythe hurt her knee at the Waffle House. She had a couple of surgeries, but her surgeon opined that she would need an ACL reconstruction. In the absence of that procedure, he said she had reached maximum medical improvement and rendered a rating of 29% impairment of her leg. She eventually was scheduled for the ACL reconstruction, but was told after admission to the hospital that the self-insured employer had denied authorization. The surgery was rescheduled twice and was never performed, due to the same lack of authorization. There was no evidence that Ms. Smythe worked after her second surgery. She fired her lawyer after refusal of her surgery and immediately negotiated settlement with the defendant, for $24,000. She cashed the check after approval of the agreement. The clincher was revised at the request of her Social Security lawyer, to include offset language. She filed her Form 33 Request for Hearing, seeking to have her agreement set aside, while she was still pro se. Deputy Commissioner Garner set aside the agreement for misrepresentation, but the Full Commission reversed.

Ms. Smythe had a good lawyer (Tom Ramer) on appeal to the Court of Appeals, where the Commission's decision was reversed. A motion to dismiss the appeal for failure to provide all necessary documents in the record on appeal was denied before the case was assigned to the panel and the denial was binding on it. The Court held that aside from any issues of fraud or misrepresentation, the Commission had failed to review the clincher for fairness, as required by N.C.G.S. § 97-17 (citing Vernon v. MabeBuilders). In addition, there was no evidence that a full medical report had been submitted as required by N.C.G.S. § 97-82 (citing Atkins v. Kelly Springfield Tire Co.), and the face of the agreement made it clear that the information required by Industrial Commission Rule 502(2)(h), when an unrepresented worker has not returned to work, was not present. Accord and satisfaction did not bar the attempt to set aside, because there had been no legally final agreement when Ms. Smythe negotiated the check. The Court did not address whether the defendant was entitled to credit for the money paid under the clincher.

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 Form 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.

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."

Brown v. Kroger Co., ____ N.C. App. ____, 610 S.E.2d 447 (2005)

Ms. Brown tripped over an extension cord and hurt her knee and shoulder. She refused treatment initially, but went to the doctor two days later, eventually coming under the care of orthopedist Dr. Smith. She worked some reduced hours and was written out of work for some other periods. She did not get better, so an MRI was done. Six days after the MRI, she fell at home, suffering injuries to her ankle and the other knee. She saw a different doctor for that and was taken out of work. She returned to work shortly before her hearing, took some vacation time,

then was written out of work for a month. At her request, the N.C. Dept. of Labor, Div. of Occupational Safety and Health, investigated and found four non-serious violations, including stretching an extension cord across an aisle or passageway. The claim was apparently denied in its entirety. Deputy Commissioner Garner found for Ms. Brown, also ordering the defendants to pay for the testimony of the OSHA person, but limited compensation to the time before the fall at home, rejecting her account of the injury as not credible. The Full Commission found credibility and awarded compensation, but only through the date of hearing, explicitly reserving decision on disability thereafter, due to lack of evidence. It also awarded a 10% penalty, under N.C.G.S. § 97-12, for willful violation of a safety statute. The defendants appealed.

The Court of Appeals affirmed, for the most part, remanding only for elimination of the reimbursement for the OSHA witness, with Ms. Brown's approval. The defendants argued that OSHA violations are not violations of safety statutes, because no statute explicitly mentions extension cords. The Court rejected that, holding that regulations promulgated under federal statute, which is adopted by North Carolina statute, are statutory regulations. Discussion of whether the violation was "willful" was limited to the argument that the statute did not explicitly prohibit running extension cords across passageways, which the Court rejected. The Court also rejected the argument that § 97-12 is unconstitutionally vague, because it does not warn employers that they can be penalized for running the extension cord. The Court held that the Commission had authority to reserved decision on disability after the hearing, to allow it to collect more evidence. The Court appeared to recognize that the defendants were trying to arrange for a denial of compensation, due to an absence of evidence that could not have been produced at the time of hearing. The defendants asserted that the Full Commission was required to defer to the Deputy Commissioner's credibility assessment, which the Court rejected as directly contrary to law established in Adams v. AVX Corp. Finally, the defendants argued that an award of on-going medical treatment was impermissible, because it did not comply with the time limitations in N.C.G.S. § 97-25.1. The Court held that those limitations are "inherent in the Full Commission's award."

Allen v. SouthAg Mfg., ____ N.C. App. ____, 605 S.E.2d 209 (2004)

A piece of steel fell on Mr. Allen's foot and broke his toes. He developed RSD/CRPS and received a lot of unsuccessful treatment. Doctors testified that the condition was permanent and would require long-term care, and one doctor said that Mr. Allen would probably be unable to concentrate and keep regular hours, even in a sedentary job. He continued to work for the employer for about a year, but missed much time and took extra breaks when he was there. Two co-employees testified that Mr. Allen had told them that he was leaving the employer to go to another job, and there were references in the medical records to work that Mr. Allen was doing or attempting. The Deputy Commissioner found Mr. Allen not to be credible, decided that he had voluntarily left his job and awarded only four weeks of compensation for temporary total disability, plus on-going medical expenses. The Full Commission reversed, awarding on-going compensation, until further order, as well as a sanction for unreasonable defense in the total amount of the contingent attorney's fee, both with respect to accrued benefits and future compensation.

The Court of Appeals affirmed, citing the standard of review and noting plenty of

evidence to support the Commission's decision. The reason for the appeal may have been a challenge to the sanction. The Court noted that the Commission had found that the defendants had failed to properly investigate the claim, denied on unreasonable grounds, and failed to comply with Commission rules regarding payment and filing of documents. The Court mentioned that the defendants had refused to pay anything, despite Mr. Allen's obvious injury, failed to send him a Form 19 and refused medical treatment, then held that the Commission had not abused its discretion in awarding the sanction.

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.

Ward v. Wake County Board of Education, ____ N.C. App. ____, 603 S.E.2d 896 (2004)

Mr. Ward suffered a compensable injury while working for Sunrock. He suffered a subsequent injury while working for the schools. The subsequent claim was denied. When it came up for hearing, the Deputy Commissioner ruled that Sunrock should be there, too, as an alternative defendant. Sunrock appeared. Long after hearing, and after proposed opinions and awards had been filed, Mr. Ward was ordered to serve medical, rehabilitation and employment records in his possession, which he failed to do. The defendants moved to dismiss, and the Deputy granted the motion. After he got a new lawyer, Mr. Ward filed a new Form 33 Request for Hearing. When the case came up on a docket, the same Deputy ordered it removed, because the claim had previously been dismissed. Mr. Ward appealed and moved the Commission to either vacate the order of dismissal or interpret it as having been entered without prejudice. The Commission ordered that the previous order was modified, so as to be without prejudice.

The defendants appealed, and Mr. Ward moved the Court of Appeals to dismiss the appeal as interlocutory. The Court held that the prior order was not res judicata, because the Commission has inherent authority to modify its own orders, which it did in this case, and dismissed the appeal as interlocutory.

Ray v. Pet Parlor, ____ N.C. App. ____, 609 S.E.2d 256 (2005)

Ms. Ray was bitten on the face by a dog, resulting in a scar on her upper lip. The Deputy Commissioner awarded $1450 for the scarring. She appealed to the Full Commission. When the case came up for argument, Ms. Ray did not show up, due to "miscommunication by the plaintiff's attorney." A viewing was rescheduled for several months later, but neither Ms. Ray nor her lawyer was there, due to transportation problems. The Full Commission went ahead and used photos of her face and the Deputy's verbal description to make the same award as the Deputy Commissioner had made.

The Court of Appeals remanded, noting that the Commission had violated its own Rule 701(9), which requires personal appearance by a plaintiff appealing a disfigurement award and mentioning that the pictures that the Commission used had been excluded from evidence by the Deputy Commissioner.

Adams v. M.A. Hanna, ____ N.C. App. ____, 603 S.E.2d 402 (2004)

This case involves claims of asbestos-related occupational diseases by a large number of injured workers against three related employers. It was referred to Deputy Commissioner Berger for hearing en masse. He ordered certain discovery-related procedures, which were allegedly violated by a defendant. Specifically, defendant Dayco failed to provide photographs that were to form part of the foundation of the testimony of one of its non-medical expert witnesses until the deposition of that witness. Deputy Commissioner Berger ordered a sanction against Dayco's lawyers of $10,000, payable immediately, and certified it for interlocutory appeal. Chairman Lattimore referred the appeal to "the administrative panel of the Full Commission for expedited hearing." Without allowing briefs, the Full Commission affirmed the Deputy Commissioner's order within about 10 weeks and increased the sanction to $20,000. Dayco's motion to reconsider was denied.

The Court of Appeals, with Judge Hudson writing and judges Geer and Thornburg concurring, vacated and remanded, holding that the Commission had failed to follow the Act and its own appeal rules by not giving Dayco an opportunity to file a brief and failing to make findings of fact and conclusions of law.

Vereen v. North Carolina Department of Corrections, ____ N.C. App. ____, 608 S.E.2d 412 (2005)

Mr. Vereen slipped on cleaning solvent and fell, suffering serious back and knee injuries, while working as an inmate in a prison clothing warehouse, for which he was paid $1.00 per day. He brought a tort claim, pro se, which the defendant successfully defended on grounds that workers' compensation was the exclusive remedy for his injury. The Commission's decision to that effect was affirmed by the Court of Appeals. However, the Commission went on to order the Department of Correction to file a Form 19, Employer's Report of Injury, from which order the Department appealed. The Court of Appeals held that the Commission was without jurisdiction to order the filing of the Form 19, because N.C.G.S. § 97-13(c) provides that an injured inmate

can only file a claim after he or she is discharged, if the effects of the injury are still present.

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.

14. Proof of disability and other disability issues.

Weatherford v. American National Can Co., ____ N.C. App. ____, 607 S.E.2d 348 (2005)

Mr. Weatherford was 60years old and had worked for a long time with machines that printed labels onto beer cans. The job involved a lot of standing, walking climbing steps and kneeling on concrete and metal surfaces. He developed problems with his left knee first, for which he had surgery, then his right knee, for which he also had surgery. After each surgery, he missed some time, then returned to work for several months. During his second period back at work, he started having more problems with the right knee, for which he was treated non-surgically. He was authorized to stay out of all work by his doctor until July 1. On July 2, he retired, due to his knee pain. He received some group disability benefits during his time out. He filed claims for both knees, both of which were denied. After the hearing of lay testimony and doctor's deposition, the parties stipulated that he had suffered compensable occupational disease to both knees and that his compensation rate was $532 for the left knee and $560 for the right. They also sorted out the credit issues. The remaining issue was Mr. Weatherford's disability after he retired. The Commission awarded compensation for on-going total disability after the "retirement."

The Court of Appeals affirmed. The Court agreed with the defendant that no presumption

of on-going disability had been established, but held that there was evidence to support the Commission's decision that Mr. Weatherford had proved disability via both the first and third prongs of the test announced in Russell v. Lowes Product Distribution. He satisfied the first prong—the production of medical evidence that he was totally disabled—by testifying to pain, which was corroborated by his doctor, describing an age of 61 years at the time of hearing with prior work only in physically demanding fields, presenting medical testimony doubting his ability to work and establishing very limiting restrictions on his physical capabilities, and by showing evidence that he had tried to return to work on several occasions and had been forced by aggravation of his knee condition to leave. The Court also saw significance in the fact that he was unable to return to his regular job with the defendant. The third prong—the production of evidence that job search would be futile—was satisfied with much the same evidence.

Hensley v. Industrial Maintenance Overflow, ____ N.C. App. ____, 601 S.E.2d 893 (2004)

Mr. Hensley suffered severe injuries to both knees in an admittedly compensable accident. He underwent repair of a torn ACL on one and torn meniscus on the other. He returned to light duty work, then resigned after being accused of stealing by improperly filling out time cards. He went to work somewhere else, but his knees continued to give him trouble, and he underwent replacement of hi right knee, about 15 months after his accident. His treating physician, apparently prompted by a rehab nurse, returned him to full duty about a year after the replacement (retroactive to six months after the surgery), with a 30% rating and a restriction of no climbing. There was mention in the notes that Mr. Hensley had resigned from his job and was running a mobile home park. A second opinion orthopedist agreed with the 30% rating of the right leg, but added a 40% rating of the left and imposed sedentary work restrictions. Mr. Hensley engaged in unsuccessful vocational activity with someone assigned by the defendants, in addition to searching on his own. He hired a vocational expert, who testified that Mr. Hensley was unable to work and that his activity owning a trailer park, which consisted mostly of collecting rent, did not confer any transferable skills. The Commission found him totally disable and awarded benefits.

The Court of Appeals affirmed, holding that there was evidence to support the findings and that the Commission had applied the correct legal framework by citing Lanning v. Fieldcrest-Cannon, Inc. for the test that self-employment demonstrates wage-earning capacity if the employee is (a) actively involved in operation of the business and (b) the skills used in the business are marketable in the competitive job market. The Court held that evidence supported findings and conclusions that rental income from ownership of a tobacco allotment did not require active involvement and that the skills used in owning the trailer park were not transferable to jobs in the competitive market. The defendants wanted to make the Commission explain why it had decided to give greater weight to the evidence from the second opinion doctor than to the treating surgeon and why it was not compelled by surveillance videotape. The Court rejected that, holding that the record adequately indicated that the evidence in question had been considered, and that the Commission is not required to comment on every piece of evidence.

15. Jurisdiction.

Davis v. Great Coastal Express, ____ N.C. App. ____, 610 S.E.2d 276 (2005)

Mr. Davis, a truck driver, was injured in an accident in South Carolina. He lived in North Carolina, and his employer was headquartered in Virginia. A Deputy Commissioner decided that the North Carolina Industrial Commission had jurisdiction over the claim, and a subsequent Deputy awarded benefits. The Full Commission decided that there was no jurisdiction.

The Court of Appeals affirmed after conducting a de novo evidentiary review. Since the accident took place outside North Carolina and it was agreed that the contract of employment was not made in North Carolina and that the employer's principle place of business was Virginia, the only question under N.C.G.S. § 97-36 was whether Mr. Davis' principle place of business was North Carolina. The Court distinguished the Perkins v. Arkansas Trucking Services, Inc. case by noting that Mr. Perkins had done more of his work in North Carolina than anywhere else, while Mr. Davis did about 10% in North Carolina and 18% in Virginia. The employer had a terminal in Charlotte, but Mr. Davis was dispatched through a QualCom computer on the truck, from which he would receive instructions while he was on the road, not at his home, so most of those dispatches were received outside North Carolina. He kept the truck at a rest stop near his home on the two days he had off each two weeks, but it was often fully or partially loaded, and the stops at home would tend to be in the middle of trips. Thus, while his trips would be scheduled to get him near home every two weeks, they were not designed to begin and end at his home. The Court, particularly in the very precise analysis the percentage of work done in different states, approached the issue as looking for the one state with the most significant contacts to Mr. Davis and his work, instead of deciding whether North Carolina had sufficient contacts, independently of the contacts with other states. While the Court mentioned several factors, it did not state clearly how much weight is to be given to each. For example, if the truck had been kept at home, dispatches always came there and all trips were oriented around home, it is not clear whether those factors would be enough, if Mr. Davis still did 18% of his work in Virginia and 10% in North Carolina.

16. Causation issues.

Cooper v. Cooper Enterprises, Inc., ____ N.C. App. ____, 608 S.E.2d 104 (2005)

Mr. Cooper suffered a compensable crush injury to his right shoulder, which left him, after five surgeries, with a 50% rating of his right arm and 100% impairment of the shoulder. Almost five years after the accident, the treating doctor noted that Mr. Cooper had "done quite well," that his shoulder "has not been bothering him" and that he did not need any more treatment. Five months after that, he had a single car accident, in which his car flipped, causing serious hip and leg injuries. He claimed that he lost control of the car on some gravel, then over-corrected, sending the car off the road—and that his inability to regain control of the car was due to his limitations on use of his arm. The Deputy Commissioner awarded compensation, but the

Full Commission reversed, finding and concluding that Mr. Cooper had failed to present sufficient evidence that the wreck was "a direct and natural result of Cooper's prior compensable injury."

The Court of Appeals affirmed, finding evidence to support the Commission's decision, including that the only expert testimony presented in support of the claim was the treating doctor's comment that, while he was not an expert in driving with impaired extremities, he could "conjecture" that it might have been a factor. The Court also pointed to the same doctor's notes about how well Mr. Cooper had been doing before the wreck. The Court distinguished other cases in which subsequent accidents had injured still-damaged body parts or in which the evidence showed more clearly that the subsequent accident had resulted from the compensable condition. The Court noted that it was not precluding a finding that Mr. Cooper was entitled to continuing benefits for the arm injury.

Bondurant v. Estes Express Lines, Inc., ____ N.C. App. ____, 606 S.E.2d 345 (2004)

Mr. Bondurant suffered two admittedly compensable hernias. Thereafter, he suffered a few more, in the same area as the compensable ones, but in incidents away from work. The Commission denied the claims based on the new hernias, on grounds that they were not related to the compensable ones.

The Court of Appeals affirmed. The treating physicians agreed that the earlier hernias predisposed Mr. Bondurant to having later hernias at the same site, but the evidence was that the repairs were successful and the later hernias had not arisen spontaneously, each having followed some incident. The Court also reviewed the special statutory requirements for hernias, under N.C.G.S. § 97-2(18) and held that the later hernias did not fit, because they did not "immediately follow an accident" at the employer.