WORKERS' COMPENSATION
CASE LAW UPDATE: OCTOBER 2008

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1. Disability, including presumption of on-going and proof.

Outerbridge v. Perdue Farms, Inc. , 181 N.C. App. 50, 638 S.E.2d 564 (2007); 361 N.C. 583; 650 S.E.2d 594 (2007)

Mr. Outerbridge suffered a back injury when he slipped and fell at work. His claim was accepted, and he was paid salary continuation for about six months, at which point he was determined to be at maximum medical improvement, with sedentary restrictions. He did not return to work. Though his employer offered some light duty work within the first couple of months, when he was being treated by other doctors, there was no evidence of an offer after the permanent restrictions were assigned. When he sought additional compensation for total disability, the Commission awarded it only for the time during which he was paid the salary continuation, plus additional compensation for a five percent permanent partial disability of the back.

The Court of Appeals, Judge Stephens writing, remanded for additional findings, holding that the Commission had erred in failing to make specific findings concerning Mr. Outerbridge's actual disability after the release to sedentary work. The opinion contains an excellent, efficient recital of the analytical framework for proving disability, including the lack of effect of MMI thereon. The Court noted that it was not dictating a result of the inquiry, as Mr. Outerbridge had only sought employment at two stores as a bag boy, had not filled out any applications, and had asked people about employment who refused to give him an application when he told them about the drugs he was taking for pain. However, he was a 47-year old with a tenth grade education who had done work outside his permanent restrictions at least for the 16 years he worked for the employer. The defendant's attempt to cross-assign error to the Commission's award of compensation during the initial period, based on the contention that the treating physicians at that time had opined that Mr. Outerbridge could perform the light duty offered by the employer, was rejected. The Court held that cross-appeals are appropriate when a trial court had failed to provide an alternative basis in law for a result favorable to the cross-appellant, but a regular appeal was required in situations like this, in which there is a contention that an unfavorable decision was made.

Judge Levinson dissented, agreeing with the majority as to rejection of the cross-appeal, but opining that Mr. Outerbridge had failed to preserve the important issue on appeal, because he made specific reference in his brief only to one assignment of error, which Judge Levinson interpreted as addressing a contention that the Commission should have awarded more compensation for permanent partial disability, based on a slightly larger rating. The dissent did not view that assignment as necessarily implying an argument concerning total disability issues.

The Supreme Court affirmed per curiam.

Roset-Eredia v. F.W. Dellinger, Inc., _____ N.C. App _____, 660 S.E.2d 592 (2008)

Mr. Roset-Eredia suffered a severe leg injury while working as a sheetrock hanger, requiring nine surgeries and resulting in a 35% rating and permanent restrictions against any climbing, squatting, standing for more than an hour or lifting over 35 pounds. He was literate in Spanish but not in English. Due to his immigration status, he was unable to provide an I-9 form.

The defendants assigned a vocational rehabilitation specialist, who performed a labor market survey without actually discussing any jobs with employers. The opinion does not indicate how the claim got o the Industrial Commission hearing stage, but the ultimate result was a decision that Mr. Roset-Eredia was entitled to compensation for on-going temporary total disability. The defendants were also required to replace the voc person with Steve Carpenter, who testified at the hearing that Mr. Roset-Eredia was, as a practical matter, unable to work until he gained proficiency in English.

The Court of Appeals, with Judge Steelman writing and Judges McCullough and Geer concurring, affirmed, holding that while the Commission did not explicit state that its decision was based on the third (futility) prong of the test in Russell v. Lowes Prod. Dist., its findings of fact amounted to a decision that Mr. Roset-Eredia, due to a combination of his injury and other vocational factors, particularly his inability to speak English and history of work that was limited to jobs he was unable to do after his injury, would not b e able to obtain a job if he had tried. The Court also held that such findings were supported by Carpenter's testimony and other evidence. The Commission was permitted to accord little weight to the labor market survey performed by the defendants' voc person, especially in light of the failure to contact the potential employers, which rendered the survey unable to provide any useful information as to the actual requirements of the job, both physical and otherwise. Thus, while the survey might be evidence of the availability of jobs in general (which Carpenter supported in his testimony), it was not evidence of Mr. Roset-Eredia's ability to obtain or keep a job. As the Court couched the analysis as the employee's having met his burden of producing evidence of disability and the Commission's having properly determined that the defendants had then failed to produce evidence to rebut that, it is not clear what would have happened if the labor market survey had contained information from specific employers about the vocational requirements of the jobs and the Commission had still decided not to accord it weight. It is also not clear whether the Commission could have made the opposite decision based on the survey it had, though the language of the Court of Appeals' decision provides ammunition to argue for reversal in that circumstance, on grounds that any survey that does not contain detailed information of the actual requirements of specific jobs is insufficient as evidence of ability of a specific injured worker to obtain employment.

The Court also affirmed the Commission's conclusion that Salaam violations had been committed by the vocational person, even though the communications in question (in which a voc person nagged a doctor's staff *ex parte* to order a functional capacity evaluation) were committed by a different person at the same rehab company, and the Commission misidentified the offender. The refusal of the Commission to order an FCE was affirmed, when the treating doctor refused to order it. Mr. Roset-Eredia's cross-appeals were moot, though the Court did consider—and reject in its discretion—the plaintiff's request for an order of attorneys' fees under N.C.G.S. § 97-88, the statutory section that allows such an award without regard to the reasonableness of defense, when an appeal by an insurer results in an award to an injured worker. Underlying that, but not mentioned in the decision, was likely an argument by the "insurer" in question, the N.C. Insurance Guaranty Association, that it is exempt from the provision of § 97-88.

Graham v. Masonry Reinforcing Corp. of America, _____ N.C. App _____, 656 S.E.2d 676 (2008)

Mr. Graham was a cost accountant for the employer, which required him to go out into manufacturing areas. In February of 2001, he tripped over a forklift barrier and had immediate, intense pain in his hip, buttock, leg and lower back. He went to the VA hospital, where he was diagnosed with avascular necrosis of the hip. In August of 2001, he slipped in oil, exacerbating the hip, leg and back pain. A few weeks later, he was terminated, ostensibly for poor job performance. He was paid until October 15 and had had hip replacement the following day. His post-surgical restrictions were no lifting over 10 pounds, no bending and no stooping. On December 17, 2001, he started looking for jobs, which he continued to do until October of 2004, when he was approved for Social Security Disability. Deputy Commissioner Holmes awarded compensation through December 17, 2001, presumably because that was when the doctor released Mr. Graham to return to work with restrictions. The Full Commission awarded compensation through October of 2004.

The Court of Appeals, Judge Stroud writing with Judges Tyson and Jackson concurring, affirmed mostly, rejecting the defendants' argument that the time out of work after the acute recovery phase ended in December of 2001 was due to economic conditions that resulted in Mr. Graham's termination and not to his injury, and that the termination for alleged misconduct relieved them of liability for compensation after that same time. The Court distinguished (isolated?) Segovia v. J.L. Powell & Co., holding that termination due to economic conditions does not preclude a finding of disability, when it is proved by other evidence. In this case, Mr. Graham was able to show that he had applied for more than 100 jobs, had gotten three interviews and no offers. The Commission's finding that the defendants had failed to prove that the termination was for misconduct was supported by evidence that Mr. Graham's job performance had been satisfactory, that he had received positive feedback from supervisors and that the employer was aware of his workers' compensation claim when he was terminated. The Court remanded for findings of fact as to the cause of the back problems, which had not been specifically addressed by the Commission before it awarded benefits for that separate condition. It is not clear why there was no award of compensation after Mr. Graham gave up on his job search.

Hunter v. Apac/Barrus Constr. Co., _____ N.C. App _____, 656 S.E.2d 652 (2008)

Mr. Hunter was working as a heavy equipment operator for the employer, who also operated a hog farm with his brother, when he was hit in the head by a sign. He required immediate surgery for an epidural hematoma and was left with on-going symptoms of head injury. Compensation for total disability was paid pursuant to a Form 21 Agreement. About six years after the accident, the defendants attempted to have compensation stopped on grounds that Mr. Hunter's activities on the farm indicated wage earning capacity and that he had failed to cooperate with vocational rehabilitation. The Commission awarded compensation for permanent and total disability.

The Court of Appeals, Judge Geer writing, with Judges Calabria and Jackson concurring, affirmed, holding that there was evidence to support the Commission's finding that Mr. Hunter

was not involved in the day to day operations of the self-employment, so that it was unnecessary to address whether the activity was something for which he would be hired in the open job market. There was testimony that Mr. Hunter's son had started doing most of the work when his father was injured and that Mr. Hunter only signed things because the son was a minor. The Court held that the Commission had properly considered the testimony of the defendants' expert when, when the Commission had decided to give it no weight. The decision that he had not failed to cooperate with vocational rehabilitation was affirmed, on evidence that Mr. Hunter had started a tour of a sheltered workshop and was reasonable in leaving after a few minutes, when he was intimidated by the atmosphere, especially when the voc specialist testified that the sheltered workshop was "a wasted cause," even though there had been a previous Executive Secretary's order to comply. The defendants had abandoned their argument that the Form 21 only raised a presumption of *temporary* total disability that was inapplicable to the claim for *permanent* total disability.

Cross v. Falk Integrated Techs., Inc., _____ N.C. App _____, 661 S.E.2d 249 (2008)

Ms. Cross was a full-time student working as an office assistant at an apartment complex when she was injured in a car wreck. Her claim was accepted, and she was paid compensation for a few years. She suffered a head injury, for which a neurologist assessed a two percent permanent impairment and underwent surgery to repair her fractured femur. She was released by her treating orthopedist with no work restrictions on March 19, 2002. Two Form 24 Applications to Stop Payment were denied. There was contradictory evidence concerning her motivation to return to work, with reported statements that she preferred school and could not work due to her school schedule and taking care of her young child. In May of 2004, she obtained an internship paying more than her average weekly wage, and compensation was stopped. She worked part-time through the rest of school and then graduated with a degree in Industrial Engineering, got a full-time job and continued her studies. At hearing, the Commission decided that the Form 24 filed in September of 202 had been improvidently denied, that disability ended upon her release by then orthopedist and that the defendants were entitled to credit for the total disability compensation paid after March 19, 2002. The Commission did not address the permanent damage to the brain.

The Court of Appeals, Judge Stephens writing, affirmed, mostly, on grounds that the Commission had correctly decided that Ms. Cross had failed to meet her burden of proving disability after the time that she was kept out of work completely by her doctors. Ms. Cross contended that she had met prong two of the Russell v. Lowes Product Distribution case by evidence that her continued educational pursuit was a reasonable way to seek employment. The Court distinguished the cases in which similar claims had been allowed, noting that unlike in this case, Form 21 agreements had been entered into, which placed the burden on the defendants to prove the end of disability, and the injured workers in those cases had been released with significant restrictions that prevented their return to their pre-injury employment. The Court implied that educational efforts would only be considered reasonable job search after proof that the injured worker could not return to suitable employment without them. The good news is that the Court mentioned favorably the consideration of the wage of replacement employment in determining suitability. Also, in considering whether compensation for total disability could be ended due to inability to prove actual disability before maximum medical improvement, the

Court opined that MMI was not material to the decision, which may be useful in repelling odious contentions that suitability of employment, and especially whether the Peoples/Saums analysis applies to that, is somehow different before MMI. The case was remanded for the Commission to address the claim of compensation for permanent partial disability for the injury to Ms. Cross' brain, with the Court noting that while the Commission was not required to ward compensation for organ damage, it was required to indicate that it had been considered.

Hogan v. Terminal Trucking Co., _____ N.C. App _____, 660 S.E.2d 911 (2008)

Mr. Hogan rolled his employer's truck and was fired, pursuant to a policy that allowed termination of any employee causing more than $5000 in damage by a preventable accident. At the time, he did not claim any injury. A couple of days later, he went to a doctor and was then referred to Dr. Brigham, who ordered a CT scan that showed relatively routine degenerative changes in the spine, ordered some physical therapy, then fairly quickly released Mr. Hogan to return to work with no permanent disability. He did not seek any employment and returned to Dr. Brigham later and got the same opinion. Mr. Hogan went to another doctor who listened to his complaints of pain, diagnosed aggravation of pre-existing degenerative disc disease and assigned a rating of 6%. The defendants accepted the claim. A Form 24 was approved, effective October 18, 2004, the date of Mr. Hogan's last visit to Dr. Brigham. Mr. Hogan appealed and a deputy commissioner, then the Full Commission, decided that payment should have been terminated retroactive to August 12, 2004, when Dr. Brigham released him the first time. A 3% permanent partial disability of the back was awarded, subject to a credit for the overpayment from August 12 to October 18.

The Court of Appeals affirmed, which makes sense under the evidence, but there are some uncomfortable details in the holding. The Court held that the stipulation that Mr. Hogan had been terminated pursuant to company policy for causing the damage was sufficient to support a finding that the firing had been independent of the compensable injury. The findings as to the severity of the injury and the ability to return to work on August 12, 2004 were supported by Dr. Brigham's testimony. An attempt to invoke the "best evidence rule" when the issue was not the content of a writing was rejected. There is a strange discussion of the role of maximum medical improvement, with the Court's holding that MMI establishes the end of temporary total disability—in cases in which the plaintiff has not established disability by evidence applied to the test in Russell v. Lowes Product Dist. Finally, the Court held that while there was no medical testimony that Mr. Hogan had a 3% permanency, the evidence of zero and 6% was sufficient to allow the Commission to find and conclude that the extent of permanent partial disability was between those figures.

2. Standard of review of Commission decisions and the quality of evidence, with emphasis on speculativeness.

Davis v. City Of New Bern, _____ N.C. App _____, 659 S.E.2d 53 (2008)

Mr. Davis fell twice while working for the defendant. He complained of various symptoms of pain in the back and down his legs, at different times. MRI's did not show much.

Both claims were accepted, and he apparently returned to work between the first and second accidents. After the second injury, he returned to work at light duty. When the several doctors had trouble finding the cause of his on-going symptoms, the employer withdrew light duty employment, and Mr. Davis went out of work. The Commission awarded on-going compensation, in the process excluding testimony from Dr. Kasselt, an orthopedist who discussed surveillance ex parte with the adjuster from Crawford and Company.

The Court of Appeals, Judge Hunter writing, reversed in part, holding that the medical evidence had been too speculative to prove causation, as the testifying doctors gave only "could or might" type of testimony, and there was other evidence that showed speculativeness. The way the opinion is written seems to suggest that "could or might" evidence may be enough to support a cause decision, in the absence of other evidence that indicates speculativeness. The Court affirmed the decision to exclude D. Kasselt's testimony, rejecting the defendant's argument that the adjuster had only listened during the ex parte conversations with the doctor and his staff, without soliciting information or making any suggestions. The Court cited evidence to support the Commission's findings that the conversations had been two-way. It is not clear whether the Court would have reversed the Commission's decision if there had not been evidence that the defendant was lying about the nature of the communication.

Raper v. Mansfield Systems, Inc., _____ N.C. App _____, 657 S.E.2d 899 (2008)

Mr. Raper drove a gasoline tanker for the employer. After filling a tank, he reached down to pull out the hose and felt a snapping sensation in his shoulder area. Because he was afraid of dropping the hose and not being able to pick it up, Mr. Raper threw it into its trough, instead of placing it there in the usual manner. Symptoms in his neck, shoulder, trapezius and numbness and tingling in his right fingers were eventually diagnosed as a cervical and trapezius strain, carpal tunnel syndrome and a rotator cuff injury. The Industrial Commission awarded compensation for the carpal tunnel syndrome, on grounds that it had been caused or aggravated by throwing the hose, but denied compensation for the shoulder injury, which was determined to have occurred while lifting the hose in the usual way, so that there was no accident.

The Court of Appeals, Judge Jackson writing with Judges Tyson and Arrowood concurring, affirmed for the most part, holding that the medical testimony was not too speculative or based on a *post hoc ergo propter hoc* fallacy. Mr. Raper's appeal of the denial of benefits for the shoulder injury was rejected, as there was evidence to support the Commission's finding and conclusion that it was caused by ordinary, non-accidental activity. The case was remanded, at Mr. Raper's request, for specific findings regarding proof of disability, as the Commission had stated an ending date without any discussion of the evidence or making findings explaining it. The Court rejected Mr. Raper's argument that the Commission was required to assess sanctions for unreasonable defense, as that decision was discretionary and there was evidence to support the Commission's decision that defense had not been unreasonable, despite the Deputy Commissioner's decision to the contrary. There was a little weirdness. It appears that the wrong employer and carrier originally accepted the claim and started paying compensation. The real defendants denied the claim and asserted that the wrong defendants were estopped to deny liability. Mr. Raper settled his claim against the wrong defendants for $8000, apparently in addition to what they had previously paid, and proceeded

against the defendants in this opinion. None of that seems to have affected the case.

Kashino v. Carolina Veterinary Specialists Med. Servs., _____ N.C. App _____, 650 S.E.2d 839 (2007)

Ms. Kashino worked at a veterinary clinic where she was frequently exposed to ticks, often getting them on her. She remembered one episode in which her husband had removed two small ones. Sometime later, she developed Lyme disease. Deputy Commissioner Glenn and the Full Commission denied the claim, on grounds that Ms. Kashino had failed to prove the causal connection between her job and the disease.

The Court of Appeals, Judge Geer writing, affirmed holding that under either an accident theory or an occupational disease theory, the plaintiff must prove cause, and there was evidence to support the Commission's finding that Ms. Kashino had failed to do so, when medical evidence was equivocal. The Court distinguished cases in which purportedly similar evidence had been sufficient to prove cause by pointing out the crucial difference that the Court in those other cases had been reviewing decisions in which the Commission had found cause, and that in those cases as well as this one, the Court had been affirming decisions that were supported by evidence, when there was other evidence that could have produced an opposite result.

Matthews v. Wake Forest Univ., _____ N.C. App _____, 653 S.E.2d 557 (2007), disc. rev. denied, 362 N.C. 360; 662 S.E.2d 908 (2008)

Ms. Matthews had significant problems with depression before her compensable injuries. In June of 1999, she tripped over a planter at work and injured her right knee, left wrist and right foot. She was treated but missed no work. In January of 2000, she again tripped over a planter, injuring her right knee and right shoulder. After the second injury, she had increased difficulties in handling her physical limitations, her chronic pain and her medication, as well as increased emotional problems and dealing with work. She was eventually taken out of work, mostly due to psychological problems. At hearing, Deputy Commissioner Dollar denied the claim, finding no evidence to support Ms. Matthews' contention that her emotional problems had been aggravated by her compensable accidents and specifically finding that her history to her doctors had been inaccurate and affected by "tampering" by plaintiff's counsel, who allegedly instructed Ms. Matthews to make sure that her psychiatrist and therapist noted chronic pain as a source of her depression. The Full Commission disregarded the Deputy Commissioner's decision and awarded benefits, finding and concluding that the psychological problems had been aggravated by the physical injuries.

The Court of Appeals affirmed, holding that there was evidence, in the form of testimony from the psychiatrist and therapist, that the psychological problems had been aggravated by the compensable accidents and pointing out that any issues of credibility arising from the supposed "tampering" were within the power of the Commission to resolve, without any requirement that the Deputy's decision be given weight. The Commission's failure to address a report from another psychiatrist was not error, as he was not a treating physician, merely performed an examination to determine eligibility for disability benefits and did not address the critical issue of the causal connection between the compensable accidents and the disabling psychological

problems.

Discretionary review was denied.

3. Occupational disease, including apportionment.

Bolick v. Freight Systems, Inc., _____ N.C. App _____, 654 S.E.2d 793 (2008); _____ 362 N.C. 355, 661 S.E.2d 242 (2008)

Mr. Bolick delivered products containing asbestos for about 30 years and smoked for 42. His date of disability is unclear, as the opinion states that he retired from work for lung problems in 1987, but the Commission found disability in 1996. At the first hearing of his case in 1996, he was awarded 104 weeks of compensation, based on his diagnosis of asbestosis (before the Austin v. Continental General Tire case, which held that such compensation required removal from employment). In April of 2002, he filed a motion for immediate reimbursement of out-of-pocket medical expenses, which was granted by a Special Deputy Commissioner and then ignored by the defendant. Mr. Bolick then requested a hearing, after which the Commission found and concluded that he was entitled to an unapportioned award of compensation and payment of medical expenses, including for medications. The Commission did not address Mr. Bolick's claim for payment of the previously ordered out-of-pocket medical expenses or contention that the defendant should be held in contempt for ignoring that order. Both parties appealed.

The Court of Appeals mostly affirmed, holding that the Industrial Commission had the authority to give greater weight to the testimony of Dr. Allen Hayes that there is no generally acceptable way to apportion the cause of lung conditions like that suffered by Mr. Bolick due to a combination of smoking and asbestosis than to other doctors, who apparently testified otherwise. Award of the medications that would tend to give relief was affirmed, even though Dr. Hayes testified that there were no FDA approved drugs for asbestosis, because he also testified that those drugs seem to help. The case was remanded for explicit addressing of Mr. Bolick's claim for the out-of-pocket medical expenses, though the Court noted that the Commission may have intended to deny that implicitly, by ordering payment of such expenses when "timely submitted." The contempt issue was within the discretion of the Commission, which was not required to find contempt, even when evidentiary grounds for it were undisputed.

A petition for discretionary review was denied.

Johnson v. City of Winston-Salem, _____ N.C. App _____, 656 S.E.2d 608 (2008); 362 N.C. 359,_____ S.E.2d _____ (2008)

Mr. Johnson was a custodian for the defendant for about 15 years. He had lots of medical problems, including gout and arthritis in his hands and arms. He developed carpal tunnel syndrome in both wrists and had surgery in the left one. As of the time of hearing, he was waiting on additional treatment. The Commission decided that the carpal tunnel syndrome was a

compensable occupational disease and awarded benefits, including on-going compensation for total disability.

The Court of Appeals, Judge Stephens writing, affirmed, holding that the medical testimony was sufficient to prove the occupational disease, when the doctor cited Mr. Johnson's use of vibrating cleaning and floor stripping machines as increasing risk. The Court rejected the defendant's argument that Mr. Johnson was required to prove that carpal tunnel syndrome was peculiar to the job of being a custodian, noting that the 1983 case relied on by the defendant (Keller v. City of Wilmington Police Dept.) had been explicitly disavowed in 1986 (Lumley v. Dancy Constr. Co.) as being contrary to Supreme Court authority. The Court held that the decision that Mr. Johnson was totally disabled was supported by evidence, but opined that the Commission had inaccurately cited the first prong of the Russell v. Lowes Prod. Distr. Case (medical testimony of total disability) when it should have used the third prong (futility of job search, in light of the compensable injury combined with other conditions). The doctor's testimony that someone with Mr. Johnson's carpal tunnel problems might be able to work as a security guard was properly disregarded by the Commission, because it was nom more than "an oblique generality which sheds no light on plaintiff's capacity to earn wages," which requires consideration of other vocational factors. Apportionment was not supported by medical testimony of relative percentages of compensable and non-compensable causes, despite discussion of relative percentages of impairment rating to the arms, because there was no evidence of the relative contribution to Mr. Johnson's inability to earn wages, particularly when the evidence was that he had been working with all of the other health problems, until he developed carpal tunnel syndrome that knocked him out of work. The defendant's contention that Mr. Johnson had reached maximum medical improvement by "voluntarily" ceasing medical treatment was rejected, in light of evidence that his treatment was delayed by inability to pay for it.

Judge Arrowood dissented as to the apportionment issue, opining that the evidence required a remand to the Commission to find facts as to the percentage of disability that was due to the compensable injury, since the Commission had found that the employment did not contribute significantly to the gout or arthritis. He concurred otherwise.

Fu v. UNC Chapel Hill, _____ N.C. App _____, 655 S.E.2d 907 (2008)

Dr. Fu came from China to do medical research on HIV at UNC. As a condition of that employment, she was required to be inoculated with the Venezuelan Equine Encephalitis virus. After the first shot of live virus, she showed significant side effects. After the booster of dead virus, her side effects were worse and longer lasting, with symptoms that were not typical, including some that were essentially psychological. By the time she was well enough to start work, the job was not available. She found another job about a year after her problems started. The Deputy Commission denied her claim for occupational disease, and the Full Commission awarded benefits.

The Court of Appeals affirmed, holding that the problems qualified as an occupational disease, because the requirement of the vaccination exposed Dr. Fu to a greater risk of developing the side effects than the risk experienced by the general public. The Court also held

that the Commission's decision on causation was supported by competent evidence, despite the presence of other medical testimony to the contrary.

Strezinski v. City of Greensboro, _____ N.C. App _____, 654 S.E.2d 263 (2007)

Ms. Strezinski was a 911 dispatcher who claimed that loud noises in her headset had caused hearing loss. She had had chronic ear infections when she was younger, but surgery had corrected hearing loss associated with that. The Deputy Commissioner awarded benefits, but the Full Commission reversed.

The Court of Appeals affirmed, holding that the Commission did not err by failing to require the defendant to prove that Ms. Strezinski was not exposed to noise in excess of 90 decibels, because there was no evidence to prove cause of the hearing loss in the first place, thereby rejecting her argument that she had only to show bilateral hearing loss to create a presumption of compensability. The Full Commission was not bound by the Deputy's findings. The Court dismissed the defendant's appeal of the Commission's refusal to award sanctions for unreasonable prosecution of the claim, on grounds that the appeal was filed too late. It appears that the defendant might have claimed that the appeal was filed within 30 days of its receipt of the Full Commission decision, but the Court noted that there was n o evidence in the record to show when it was received, so the filing date of the decision controlled.

Hassell v. Onslow County Board of Education , 182 N.C. App. 1, 641 S.E.2d 324 (2007); 362 N.C. 299, 661 S.E.2d 709 (2008)

Ms. Hassell was an elementary school teacher for the defendant for about ten years, then moved to teach sixth graders in middle school. She was unable to maintain classroom discipline, and her students openly insulted, disrespected and physically assaulted her. She apparently was having a hard time with academic things, too. Her referrals of students to the principal for discipline were far in excess of the other teachers', who did not have the same problems controlling the kids as Ms. Hassell did. As things got worse, her principle subjected her to "action plans," in which Ms. Hassell was required to show progress toward improvement in specific teaching areas. Eventually, she broke down, suffering disabling anxiety. The Commission denied the occupational disease claim, on grounds that the evidence did not show that there were characteristics of her job that placed her at a greater risk of contracting an anxiety disorder than the risk on those not so employed.

The Court of Appeals affirmed, emphasizing that the problem was not Ms. Hassell's job, but her inadequacies in performing it.

Judge Wynn dissented, opining that the question was not one of apportioning blame for the conditions under which Ms. Hassell worked, but whether those conditions were more hazardous than those experienced by other people. Judge Wynn noted that all the evidence indicated that other teachers did not work in the same conditions as she did.

The Supreme Court, Justice Hudson writing, affirmed, essentially agreeing with Judge Wynn that fault had nothing to do with the analysis, but holding that the Commission's findings and conclusions that Ms. Hassell had failed to prove causation and increased risk were properly

supported, as the Commission had considered her medical expert's testimony and had explicitly given it little weight.

Justice Timmons-Goodson dissented, opining that while the majority had disavowed "language from the Commission premising compensability on the absence of fault," it had failed to consider the impact that "erroneous standard" may have had on the Commission's consideration of the issue upon which the majority allowed the Commission to base its decision.

4. Third party lien related issues.

Estate Of Bullock v. C.C. Mangum Company, _____ N.C. App _____, 655 S.E.2d 869 (2008)

Mr. Bullock was killed on the job, allegedly due to the negligence of an employee of a different employer. At the time of his death, he was unmarried but lived with Ms. Davis and her two minor nephews. Workers' compensation death benefits were paid to the nephews, because they were found to be wholly dependent on Mr. Bullock. With medical and funeral expenses, the workers' compensation lien totaled about $125,000. The third party case was settled, without notice to the workers' compensation defendants, for $95,000. Ms. Davis was the administrator of Mr. Bullock's estate, and his sister was the only beneficiary thereof. The settlement proceeds were paid to the sister. The third party settlement document provided that the proceeds were being delivered "in trust," not to be disbursed until all liens were resolved. The workers' compensation defendants found out about the settlement about nine months later and demanded reimbursement of the lien from the third party. The third party petitioned the Superior Court to approve the settlement and set aside any lien, and the comp defendants responded by moving that the settlement be set aside and declare that they had lien. The Court denied the motion to set aside the lien, concluded that the comp defendants did not have a valid lien and ordered that, in the alternative, if a lien existed, that it was struck.

The Court of Appeals reversed. The problem in this case is that the recipients of the workers' compensation benefits and the wrongful death proceeds are different people, so that the lien cannot follow the comp benefits. The Court of Appeals held that N.C.G.S. § 97-10.2 requires that the lien exists against the proceeds of the third party claim, regardless of who receives the proceeds, focusing on concerns that a contrary holding would deprive employers of the ability to be reimbursed. The Court did not mention the problem that the estate and the sister could be completely deprived of their right to recover for wrongful death, while the nephews might be unjustly enriched by not having to worry about a lien. The Superior Court's order striking the lien was remanded, as it was not properly supported by findings of fact regarding statutory factors. The Court of Appeals did not dictate a result of that remand, and it will be interesting to see what happens if the case comes up on appeal again, after the Superior Court judge makes a discretionary decision to strike the lien to avoid unfairness to the sister.

Outlaw v. Johnson, _____ N.C. App _____, 660 S.E.2d 550 (2008)

This is a third party claim that involves several issues that do not arise from workers'

compensation, along with a couple that do.

Mr. Outlaw was driving a steamroller down U.S. 70 when Johnson ran into him from the rear with a tractor-trailer, causing serious injury to both. After Johnson and his employer filed an answer asserting Mr. Outlaw's employer's negligence as a credit against liability and Mr. Outlaw's contributory negligence, Mr. Outlaw replied with an allegation of last clear chance, and the employer asserted a "cross claim" for property damage to the steamroller. The jury found everybody negligent and that Johnson had the last clear chance to avoid the accident. Mr. Outlaw was awarded $450,000, and the judge reduced that by the $117,000 that the employer had paid in workers' compensation benefits and barred the employer's recovery of its lien. The judge also dismissed the property damage claim.

The Court of Appeals affirmed everything. The important holding under the Workers' Compensation Act is that the employer cannot assert the injured worker's contention of last clear chance to overcome the employer's negligence and allow recovery of its lien.

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

Billings v. General Parts, Inc., _____ N.C. App _____, 654 S.E.2d 254 (2007), disc. review denied, 362 N.C. 233, _____ S.E.2d _____ (2008)

Mr. Billings delivered parts for the employer and suffered an idiopathic blackout while driving back to the store after a delivery. He hit his head in the resulting crash. Radiography shortly after the wreck was inconclusive, with some findings suggesting a stroke and/or possible, small damage to the brain from impact. In the couple of months after the wreck, he developed symptoms that turned out to be related to significant subdural hematomas, which were treated surgically. During recovery from the surgery, he suffered strokes that caused further, permanently and totally disabling problems. The Commission awarded benefits for all of the problems.

The Court of Appeals affirmed, holding that when an idiopathic condition combines with a risk of the employment—in this case, vehicular accidents from required driving—the resulting injury arises out of the employment. The Court distinguished cases involving "positional risk" analysis, which is not the accepted legal standard, and "increased risk" analysis, which is, on grounds that the question does not arise, when one of the causes of an injury is clearly related to a required feature of the employment. On the issue of the cause of Mr. Billings' brain problems, the Court held that the medical testimony was not merely speculative, because, unlike cases in which doctors have testified that the cause of fibromyalgia is not well understood, the mechanism of physical injury to the brain that results in a slow leak that develops over time into the subdural hematomas that occurred in this case is understood, and the doctors' testimony relating the accident to the condition was sufficiently certain. The same was true of the linkage between the subdural hematomas and the later, profoundly disabling strokes.

Discretionary review was denied.

6. Liability for medical expenses.

Scarboro v. Emery Worldwide Freight Corp., _____ N.C. App _____, _____ S.E.2d ____ (2008)

Mr. Scarboro suffered an admittedly compensable injury (though there was apparently some need for a hearing over causation issues, which were resolved in favor of Mr. Scarboro), which resulted in a chronic pain disorder and permanent restrictions sufficient to generate a medical opinion that he likely would never return to gainful employment. He had a life care plan prepared, which included recommendations for home modifications and that he be provided lawn care services. The life care plan was presented to his treating physician, who agreed that the recommendations were medically necessary. After a hearing before Deputy Commissioner Houser, the full Industrial Commission ordered Botox injections that had been recommended by the treating doctor and the recommended home guard rails, but concluded that there was insufficient evidence as to the lawn care. Mr. Scarboro then filed a motion with the Executive Secretary for reimbursement of the $4700.58 cost of the preparation of the life care plan, which was denied by Special Deputy Commissioner Henderson. Deputy Commissioner Rowell awarded the cost of the life care plan and the lawn care. The Full Commission ordered reimbursement for the life care plan, but denied payment for the lawn care, on grounds that it was not "other treatment" as provided by N.C.G.S. § 97-25 but an ordinary expense to be paid for with wage compensation. Both parties appealed.

The Court of Appeals affirmed, holding that 1) the conclusion of law that the lawn care was an "ordinary expense of life" was supported by the findings of fact, despite findings that Mr. Scarboro had previously done his own lawn work and failure to maintain his lawn would subject him to fines form his home owners association and 2) the conclusion that the life care plan was a covered "rehabilitation service," because the treating physician had based recommendations on it. The Court's opinions as to both issues were couched in such a way that it is possible that opposite decisions of the Commission on both would also have been affirmed as supported by the findings of fact.

Winders v. Edgecombe County Home Health Care, _____ N.C. App _____ 653 S.E.2d 575 (2007)

Ms. Winders suffered an admittedly compensable back injury that did not heal well, despite two-level fusion, narcotic pain drugs and implantation of a spinal cord stimulator. Pool therapy provided some temporary relief. After attending such therapy for three months at the Y, the defendant stopped paying for it, and Ms. Winders and her husband paid. Along the way, her father installed a pool at his house that Ms. Winders would visit for therapy. Later, she and her husband bought the house, and she continued pool therapy, keeping the pool unusually hot to avoid back spasms. She testified that she felt great relief form her pain while she was in her pool, which gradually worsened after she got out, until it reached "normal" levels after a few hours. She requested a hearing, seeking reimbursement for pool therapy, including part of the cost of maintaining her pool at home. The Commission ordered that she be provided pool therapy, at least fives days per week, and that when she was unable to use a pool outside her home, she was to be reimbursed $6.85 per day.

The Court of Appeals reversed, holding that while there was evidence to support the medical necessity of pool therapy, there was no evidence that it was required at least five days per week, and the award of daily reimbursement was inconsistent with the Commission's conclusion that she had not proved that she was entitled to maintenance of her personal pool. The Commission had also not given any guidance as to what "valid reasons" would justify payment for use of the home pool.

7. Procedural issues, including sanctions, filing and notice.

Gore v. Myrtle/Mueller, 178 N.C. App. 561, 631 S.E.2d 892 (2006); 362 N.C. 27; 653 S.E.2d 400 (2007)

Ms. Gore slipped in the parking lot in January of 2000. She apparently sought little or no medical treatment and did not miss work. In March of 2000, she was pulling a desk when she felt a catch in her back. A couple of weeks later, she went to a doctor, who took her out of work. She saw several doctors after that, each of which diagnosed her with some type of degenerative condition of her lower back. Sometime after the second accident, she met with the human resources person and filled out, among other things, a Form 18 for the second injury. The HR woman testified that she had told Ms. Gore that she would see that the Form 18 got where it was supposed to go. It was never filed with the Industrial Commission, and the HR woman testified that she did not remember what she did with it. The defendants formally denied the January injury but never said anything about the March one. The filings are confusing, but the defendants took the position that something was filed about the January accident about 2 weeks after two years had expired and that the first notice to the Commission of the March injury was in the pre-trial agreement filed in October of 2003. The Deputy Commissioner denied the claim(s) on grounds that they had been filed too late, but the Full Commission applied estoppel principles to allow the claims to go forward, then awarded benefits.

In an unpublished opinion, the Court of Appeals, Judge Jackson writing, held that Ms. Gore had filed the March claim on time by filing of a Form 33 Request for Hearing, but that she had failed to file the January claim, baldly rejecting the estoppel argument completely, without any citation, as inapplicable to the condition precedent of filing a claim. The Court also stated that since the issue of filing was jurisdictional, the appellate court was free to make its own findings of fact. The Court then went on to hold that the medical testimony regarding cause was too speculative to be competent evidence.

The Supreme Court reversed, in a four to three decision. The majority, written by Justice Timmons-Goodson, held that estoppel can apply to the issue of timely filing and that there is no need to show deliberate conduct by the defendant. The Court also opined that designation of such issues as "jurisdictional," so as to allow latitude to appellate courts to ignore evidentiarily supported findings of fact by the Commission, is archaic. The Court then reversed the Court of Appeals' evaluation of the evidence, pointing out that the lower Court had focused exclusively on the medical testimony, without considering medical records that were more certain as to

cause.

Chief Justice Parker, joined by Justices Brady and Newby, dissented, opining that estoppel is inapplicable to the issue of timely filing, citing cases from the 1940's and 1930's. The dissent parted ways with the Court of Appeals in opining that the filing of the Form 33 within two years of the second injury was sufficient to confer jurisdiction for that one and that the medical testimony was sufficient to prove causation.

Richardson v. Maxim Healthcare/ Allegis Group, _____ N.C. App _____, 657 S.E.2d 34 (2008)

Ms. Richardson, a nursing assistant, was injured in a car wreck on the way to get food to take to a patient's home. She was generally knocked around in her car, sustaining injuries to her knee, head, face, and breast implants. She called her boss within 30 minutes of the wreck to report it. The negligent third party left the scene, so the applicable uninsured motorist carrier started paying for things. After they stopped, about a year after the accident, Ms. Richardson filed her Form 18. The defendants denied the claim, but the Commission awarded benefits, including on-going compensation for disability.

The Court of Appeals, Judge Jackson writing, affirmed in part and reversed and remanded in part. The finally published opinion followed a petition to reconsider by Ms. Richardson and is a significant improvement, as to some of the issues. The first, and probably most important, issue was raised by the defendants' notice defense, the ground for denying the claim in its entirety. The Court held that actual notice was sufficient to meet the employee's burden of showing a reasonable excuse for not giving notice in writing as soon as practicable and at least within 30 days, as required by N.C.G.S. § 97-22, but that the Commission had failed to make specific findings as to whether the defendants had met their burden of proving that they were prejudiced by the delay in filing, which would bar the claim despite the reasonable excuse. That required remand, though there was no mention of any evidence of prejudice that was presented by the defendants. As to the issue of medical causation, the Court held that almost all of the Commission's findings were supported by competent evidence, except for the decision that replacement of both of Ms. Richardson's breast implants was compensable, when only one was damaged by the wreck and the Commission's theory as to the other one was that replacement was necessary to maintain symmetry. The defendants were required to pay only for the one that was damaged. The biggest difference between the original opinion and the eventual one was treatment of the lien on the third party recovery. The original opinion had reversed the Commission's decision that the lien should be held outstanding until one of the parties requested determination by a Superior Court judge of the amount to be repaid, holding that the defendants were entitled to credit for the amount paid by the third party—which included amounts paid for property damage. The eventual opinion held that the lien existed, but that either party could move for adjustment of the amount to be reimbursed. Finally, the Court affirmed the Commission's award of compensation for on-going total disability, citing evidence of time periods she was kept out of work by various doctors, that Ms. Richardson had repeatedly requested light duty work from the employer and had only been allowed it for a few days over the years, and referring to her significant physical limitations. Interestingly, the Court was not particularly explicit as to analysis of the Russell v. Lowes Product Distribution prongs.

Judge Wynn dissented, opining that N.C.G.S. § 97-22 only requires the Commission to be satisfied that there has been no prejudice to the defendants on account of late notice, so that there is no requirement for any findings of fact other that there was no prejudice. He also disagreed with the majority as to replacement of the other breast implant, opining that the purpose of medical treatment in workers' compensation is to restore injured workers to the extent possible to their pre-injury condition, which could require breast symmetry in this case. He also thought that the Commission's finding and conclusion as to the lien was correct and required no remand.

The case is pending appeal to the Supreme Court.

Gregory v. W.A. Brown & Sons, _____ N.C. App _____, 664 S.E.2d 589 (2008)

Ms. Gregory alleged a back injury caused by a specific traumatic incident at work. Deputy Commissioner Chapman found that there had been a compensable specific traumatic incident, but denied the claim on grounds that Ms. Gregory had failed to give written notice within 30 days, as required by N.C.G.S. § 97-22. On appeal, the Full Commission reversed the denial and remanded to a deputy commissioner for further proceedings as might be necessary to make findings on the extent of disability and the benefits to be paid. Deputy Commissioner DeLuca awarded compensation for a period of total disability and medical benefits.

On the second time up, the Full Commission essentially adopted Deputy Commissioner DeLuca's decision, except that the Full Commission excluded medical treatment for left hip and leg pain, on grounds that there was insufficient evidence of causation, and reserved decision on total disability after a certain date, due to insufficiency of the evidence concerning disability after that date. The defendants appealed with a blizzard of arguments.

The Court of Appeals affirmed, holding that: 1) the lack of a specific date of injury, which resulted from confusion in the evidence, was not fatal, if there was evidence to support the finding that there had been one (citing Fish v. Steelcase, Inc.); 2) an argument as to cause based on the same lack of a specific date was rejected; 3) there was evidence to support the Commission's findings that the employer had actual notice of the injury, which satisfied the exception to the written notice requirement in § 97-22, by proving both notice and lack of prejudice to the employer (citing Chilton v. School of Medicine); 4) the order of on-going medical treatment for related conditions was not too broad; 5) the Commission had discretion to refuse credit for group disability benefits paid during the pendency of the denied claim, because the group plan was partially funded by the employee; 6) Ms. Gregory's failure to serve a subpoena on a witness in a legally valid manner was an "unusual circumstance" justifying Deputy Commissioner Chapman's decision to allow a post-hearing deposition of that witness, under I.C. Rule 612(3) (there was no mention of the Commission's authority under the same rules to waive rules in its discretion); and 7) the Commission did not commit reversible error by remanding to Deputy Commissioner DeLuca, instead of making its own findings.

Judge Jackson dissented, opining that the Commission erred by failing to make specific findings and conclusions as to whether the lack of written notice prejudiced the defendants.

Polk v. Nationwide Recyclers, Inc., _____ N.C. App _____, 664 S.E.2d 619 (2008)

This case has implications beyond its own facts, which the Court of Appeals mayor may not have recognized.

Ms. Polk suffered an admittedly compensable elbow injury on July 3, 2000, a month after taking her job. She was treated and released to return to light duty work on May 7, 2001. Her treating doctor announced maximum medical improvement on July 1, 2002 and assigned a 12% rating of permanent partial disability. She was terminated on July 3, 2002, because the employer was unable to accommodate her restrictions. She took a job with another employer on April 23, 2003. It is not clear from the opinion whether she worked for the defendant employer between the time of injury and the return to work in April 23, 2003, though it appears that she was paid compensation until that date. Apparently, Ms. Polk refused to accept the compensation for her rating, and the defendants filed for a hearing. The deputy commissioner decided that Ms. Polk was entitled to compensation for both "constructive" total and permanent partial disability and that she was not required to make an election between them. The Full Commission reversed, awarding compensation only for the PPD.

The Court of Appeals affirmed. The Court first rejected Ms. Polk's argument that the Commission had erred in failing to find that the employment with the second employer was make-work, which would not be evidence of wage-earning capacity. She argued that even though she was making at least as much money in the second job, the job was so modified that it failed the Peoples/Saums test and that the Commission had misapprehended the law in concluding that that test did not apply to employment that was not proffered by the employer of injury. The second part of that, which is much more interesting than the first, was talked about by the Court, which noted that the job was, in fact, procured on the open market, but the Court did not specifically endorse the Commission's position that the Peoples/Saums only applies to jobs offered by the original employer. The evidence was independently sufficient to support the finding and conclusion that the second job simply was not make-work.

The big part: The Court then held that the Commission did not err in essentially forcing Ms. Polk to accept the compensation for her rating, opining that language from Knight v. Wal-Mart Stores, Inc. that "MMI represents the first point in time at which the employee may elect, *if the employee so chooses*, to receive" compensation for PPD under N.C.G.S. § 97-31 did not prevent the employer from forcing an election in this case, apparently because Ms. Polk had no other remedy from which to choose (I think). Noticeably missing is any discussion of the important implication of such a holding—its affect on the ability of an employer to force an employee into the position of having to prove a change of condition to receive additional benefits and control of the end point of the period for making that claim, under § 97-47.

The Court then held that the Full Commission had not failed to consider all the evidence, because in affirming the deputy commissioner's opinion and award "with modifications" (which modifications were to reverse all the important parts of that opinion and award), the Full Commission adopted the deputy commissioner's findings of fact that did indicate consideration of that evidence. Finally, the Court remanded to the Full Commission to consider Ms. Polk's

contention that the average weekly wage was incorrect, which it had failed to do.

Kyle v. Holston Group, _____ N.C. App _____, 656 S.E.2d 667 (2008), disc. rev. denied, 362 N.C. 359, 662 S.E.2d 905 (2008)

Mr. Kyle was a truck driver when he hurt his back. He underwent fusion surgery and was eventually restricted to light work, with no lifting over 20 pounds, no squatting or kneeling and modification of shifts. In addition, he was taking narcotic pain medication. After he was assigned a 25% rating of permanent partial disability, the Liberty Mutual adjuster initiated settlement negotiations that eventually resulted in a $60,000 clincher. In the process, the adjuster pointed out to Mr. Kyle that he was limited to 300 weeks of compensation, of which 140 weeks were left. When the clincher was sent to the Industrial Commission for approval, Special Deputy Commissioner Maddox sent a memo to the parties, asking for information about Mr. Kyle's vocational status, including vocational rehabilitation reports, and to ask for an addendum concerning Social Security Disability offset. Defense counsel replied that Mr. Kyle was not currently working and that there had been no voc rehab, because he had "decided to settle his claim and pursue future job placement on his own when he feels ready to do so." There is no evidence that Mr. Kyle received the note from defense counsel. Defense counsel prepared the Social Security offset addendum and had Mr. Kyle sign it, after which she sent it to SDC Maddox and the clincher was approved. Mr. Kyle then went to a lawyer for assistance with his Social Security claim, at which time the workers' compensation situation was discovered. Mr. Kyle filed for a hearing before the Industrial Commission, seeking to set aside the clincher approval. The Deputy Commissioner and the Full Commission denied that relief.

The Court of Appeals, Judge Stephens writing, reversed, holding that the Commission had impermissibly approved the agreement without the language required by I.C. Rule 502(2)(h), about vocational factors and the plaintiff's representation that he is not claiming compensation for total wage loss. The Court pointed out that it is not sufficient to simply inform the Commission of that information, as another purpose of the rule is to alert unrepresented claimants that there may be benefits of which they are unaware. The Commission also failed to make sufficient investigation of the circumstances of the settlement, opining that while insurance adjusters are not required to explain the law to an "unwitting claimant," the Commission is supposed to assure fair dealing. The Court also held that there was evidence to prove Mr. Kyle's total disability, based on his restrictions and the limitations imposed by his medication, the treating physician's opinion that he could not return to his former job and his limited vocational background. The Court mentioned that a Liberty Mutual field investigator, sent out to spy on Mr. Kyle under the pretense of just checking to make sure he was alive, reported that Mr. Kyle appeared impaired and no "red flag indicators" were found. It may be important that the Court was not reviewing whether there was evidence sufficient to meet the burden of proving disability, as the only issue was whether the clincher approval should have been set aside. The Court remanded to the Full Commission with instructions to vacate the order.

Discretionary review was denied.

Kelly v. Duke Univ., _____ N.C. App _____, 661 S.E.2d 745 (2008)

Ms. Kelly was a secretary for a particularly abusive doctor. In 1997, her vision began to deteriorate due to exacerbation of her pre-existing diabetes. She continued to work until April of 1999, when she became disabled. In December of 2000, Deputy Commissioner Jones found and concluded, in accordance with medical evidence, that Ms. Kelly's diabetes was aggravated by her stressful work environment such that it became a compensable occupational disease. She was paid compensation for total disability. In 2003, her blood sugar rose significantly. On January 7, 2004, she called her doctor's office with an apparent respiratory infection and was prescribed an antibiotic. Three days later, she died. While no autopsy was performed, the treating doctor opined that the death was, more likely than not, the result of a cardiovascular event related to the diabetes. The Commission awarded compensation for death, plus 240 weeks of compensation for total loss of use of both eyes.

The Court of Appeals mostly affirmed, holding that the time limitation for valid death claims in N.C.G.S. § 97-38—the later of six years after the compensable occupational disease or two years after a final determination of disability—did not bar the claim, because despite a stipulation that the "date of injury" was April of 1997 when Ms. Kelly's vision began to deteriorate, the occupational disease did not occur until disablement, which was in April of 1999. The Court further held that the uncontradicted evidence from Mr. Kelly's treating doctor was sufficient to support the decision that the death was caused by the occupational disease. The award of compensation for permanency of the eyes under § 97-31 was reversed, because it constituted a double recovery of compensation during a time Ms. Kelly was also receiving compensation for total disability under § 97-29. The Court exercised its discretion in granting the plaintiff's request for attorney's fees under § 97-88, because an insurer had appealed and payments had been ordered, and remanded to the Commission to determine the amount of the fee.

Egen v. Excalibur Resort Prof'l, _____ N.C. App _____, 663 S.E.2d 914 (2008)

Mr. Egen lost at the Deputy Commissioner level and appealed the decision to the Full Commission. The appeal was dismissed as not timely filed. Plaintiff's counsel produced an affidavit of his paralegal indicating that the Deputy's decision had been sent by e-mail to her, but that she had not passed it on to her boss, because she did not realize that it had not been sent separately to him. She was confused in part because she was accustomed to receiving decisions by mail, and the Commission had changed procedures.

The Court of Appeals reversed. The majority held that the Industrial Commission did not err in serving the Deputy's opinion and award by e-mail addressed only to a legal assistant, but also held that the Commission had erred by failing to find excusable neglect. The majority did "strongly encourage the Commission to establish rules for the use of e-mail." Judge Hunter, writing separately, concurred in the result, but opined that notice of the Deputy's decision had not been properly served, as the Commission had failed to promulgate a rule allowing service by e-mail could not, in the absence of such a rule, simply send time-sensitive information by any method it chose.

Estate of Vogler v. Branch Erections, Co., Inc. , 166 N.C. App. 169, 601 S.E.2d 273 (2004); 181 N.C. App. 457, 640 S.E.2d 419 (2007); 362 N.C. 77; 653 S.E.2d 142 (2007)

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 the issue of whether the 10% increase constitutes "punitive or exemplary damages."

On remand, the Commission evaluated the policy between the employer and Reliance, which provided that the employer was "responsible for any payments in excess of the benefits regularly provided... including those required because: 1. Of your serious and willful misconduct;... 3. You fail to comply with a health or safety law or regulation." However, the Commission opined that the 10% penalty was compensation that fell within what the Guaranty Association was obligated to pay and that the effect of the exclusionary policy language was to give the Association a cause of action against the employer for reimbursement.

On appeal after remand, the Court of Appeals affirmed, citing a Kentucky case that was very similar. While it is not quite explicit, there was also an undertone that the exclusion was contrary to statute and, therefore, was deemed modified to comply with the statutory requirements. The Court also affirmed the Commission's opinion as to the right of the Guaranty Association to sue the employer, under the policy contract between the Employer and the insolvent carrier.

Judge Tyson dissented, opining that the exclusionary policy language placed liability for the penalty on the employer directly.

The practical difference between the majority and the dissent, of course, is who bears the risk, as between the employee and the Guaranty Association, of the employer's inability or refusal to pay the penalty, with Judge Tyson choosing to make that the employee's problem. There was also no discussion of the Commission's authority, or lack thereof, to make a decision as to the right of the Guaranty Association to sue the employer under a contract, which decision may have been *ultra vires.*

On appeal, the Supreme Court was equally divided, with Justice Timmons-Goodson not participating, so the Court of Appeals decision stands but is without precedential value. The opinion is per curiam, and there is no mention of which Justices took which side, but it is hoped Judge Timmons-Goodson would favor a meaningful recovery for the injured worker, instead of assigning liability to a party that is insolvent. However, she was not the author of the opinion from which the appeal was taken, but rather of the first one, which required the Commission to consider the insurance policy.

Swift v. Richardson Sports, Ltd., _____ N.C. App _____, 658 S.E.2d 674 (2008)

The messiness in this case never ends. Mr. Swift was a football player for the Carolina Panthers, who suffered an injury that prevented him from returning to playing. The Industrial Commission awarded 299 weeks of compensation for partial disability, under N.C.G.S. § 97-30, which would be at the maximum compensation rate. On appeal, the defendants were successful in arguing for a dollar-for-dollar credit against compensation for other benefits paid to Mr. Swift. The Commission originally awarded sanctions of attorney's fees under N.C.G.S. § 97-88.1. On remand, fees were awarded pursuant to § 97-88, which provides that an "insurer" can be made to pay costs of appeals that it brings, when the ultimate result of the appeal is an award of benefits. While all this was going on, the original insurance carrier became insolvent, and Mr. Swift reached settlement in an arbitration procedure against the Tennessee Insurance Guaranty Association. The defendants appealed, arguing that the Commission's order required payment by the insolvent insurer, in violation of a stay, that the employer could not be liable because it was not an "insurer" within the meaning of § 97-88, and that TIGA could not be a defendant in the case under Tennessee law.

The Court of Appeals, with Judge Arrowood writing and Judges Tyson and Jackson concurring, remanded to the Commission for more specific findings, noting that the order of fees was against "the defendants," without specifying which one or ones, when the insolvent insurer clearly could not be ordered to pay and the Commission needed to address the defendants' arguments concerning the statutory authority for liability of the employer and TIGA. The Court opined fairly extensively as to its view of those issues, noting that employers are generally primarily liable for payments under the Act and that the Tennessee statute purporting to prohibit TIGA from being a "named party" in litigation may not mean that it cannot end up liable for the payment of costs.

Wade v. Carolina Brush Mfg. Co., _____ N.C. App _____, 652 S.E.2d 713 (2007)

Ms. Wade hurt her hand at work in 1999. In 2003, her neck started to hurt, and she received treatment while continuing to work. She went on medical leave to have surgery, then returned to work fairly quickly. Her claim was denied by Chief Deputy Commissioner Gheen, despite medical testimony that while the 1999 accident did not cause Ms. Wade's degenerative disc disease, it could have aggravated it. Ms. Wade's lawyer withdrew, and she filed her own appeal to the Full Commission. However, she failed to file a brief or a Form 44. The Full Commission decided the case without oral argument, awarding compensation and waiving pursuant to Industrial Commission Rule 801 the requirements of Rules 701(2) and (3), that a Form 44 and brief be filed, specifying grounds for appeal.

The Court of Appeals reversed, holding that the Commission had abused its discretion in waiving the rules, because the interests of justice could not be served, despite Ms. Wade's *pro se* status, by a procedure that failed to advise the defendants of the grounds for appeal to the Full Commission until they received the Full Commission opinion and award. The Court mentioned that it was troubled by the appearance that the Commission had taken the role of advocate for the injured worker. (The case seems harsh for the unrepresented claimant at first, until the details are revealed, which indicate that the process really was unfair to the defendants.)

Baxter v. Danny Nicholson, Inc., _____ N.C. App _____, 661 S.E.2d 892 (2008)

Mr. Baxter was awarded compensation for total disability after a trial return to work, plus late payment penalties and sanctions, by Deputy Commissioner Rowell, which was modified and affirmed by the Full Commission. The Full Commission decision was written by Commissioner Balance, with Commissioner Bolch concurring. Then-Chairman Lattimore dissented.

The Court of Appeals vacated the Full Commission decision. On the day that Commissioner Bolch signed the Full Commission opinion and award, the Governor issued a letter informing Commissioner Bolch, who had been holding over as a commissioner after the expiration of his term, that his term was over and that a successor had been appointed. The opinion and award, though signed when Commissioner Bolch was still a commissioner, was not filed until a few days later. The Court held that while commissioners holding over remained qualified to make decisions, they are not qualified as to decisions filed after they have been replaced. Since Commissioner Bolch's vote was necessary to having a majority for the Full Commission's decision, and he was not qualified at the time the decision was filed, the opinion and award had to be vacated.

8. Suspension of compensation for refusal of suitable employment.

Plott v. Bojangles's Restaurants, Inc. , 181 N.C. App. 61, 638 S.E.2d 571 (2007); 361 N.C. 577; 652 S.E.2d 920 (2007)

Mr. Plott suffered a back injury, reporting it immediately. He worked the rest of that day and the next, then sought treatment at Primecare, which released him to sedentary work. The employer contended that it had offered work that would fit the restrictions, but Mr. Plott did not return. About a week later, Mr. Plott went to his primary care doctor, who took him out of work for a couple of weeks. He then saw an orthopedist who said he could return to light duty. Shortly thereafter, he went to a neurosurgeon who took him out of work for epidural steroid injections and released him to return to work with restrictions a couple of months later. The employer admitted that it could not accommodate the neurosurgeon's restrictions during the time he was treating Mr. Plott. The neurosurgeon ultimately wrote him out of work indefinitely. Mr. Plott did not seek work after his injury, because of his pain and limitations. At deposition, the neurosurgeon testified that he thought Mr. Plott could do some sort of work, with sufficient restrictions, and recommended that he get a different kind of job. The claim was denied. The Deputy Commissioner awarded indefinite compensation for total disability. The Full Commission

modified, finding that Mr. Plott had refused suitable employment and had not looked for work, so compensation was limited to the time ending when he was released with sedentary restrictions by the neurosurgeon, about three months after the accident.

The Court of Appeals, Judge Hudson writing, reversed and remanded, holding first that N.C.G.S. § 97-32 cannot logically provide for suspension of compensation, and that it would be impossible also for Mr. Plott to get his benefits resumed by accepting the employment, when the claim is denied and no compensation is being paid. The case was remanded for the Commission to make specific findings of fact regarding whether Mr. Plott had met his burden of proving disability, as he Commission apparently only mentioned facts that would apply to the second prong of the test in Russell v. Lowes Product Dist.

Judge Tyson dissented, opining that while remand might be appropriate when insufficient findings were made by the Commission, reversal was not. It appears that his opinion as to the Commission's findings on disability was that the issue was sufficiently addressed by the Commission's finding that Mr. Plott had a 10% permanent partial disability of his back. The dissent opined that there was sufficient evidence to support a finding that Mr. Plott refused suitable employment but did not address the majority's holding that such refusal was immaterial in a denied case.

The Supreme Court reversed per curiam, "for the reasons stated in the dissenting opinion. Justice Hudson did not participate, as she had authored the Court of Appeals' majority decision.

9. Barring claims for misrepresentations in hiring process.

Freeman v. J.L. Rothrock, _____ N.C. App _____, 657 S.E.2d 389 (2008); 362 N.C. 356; 662 S.E.2d 904 (2008)

Mr. Freeman suffered an admittedly compensable injury, when he twisted his back turning a crank on a trailer. He was paid compensation for some time. After an unsuccessful attempt to stop compensation for Mr. Freeman's refusal to accept a job as a part-time local delivery driver and part-time receptionist, for $6.66 per hour, the defendants discovered that Mr. Freeman had suffered prior back injuries and had had prior workers' compensation claims, contrary to his representations on a questionnaire associated with his hiring. A second Form 24 Application to Stop Payment, based on the theory that Mr. Freeman's claim was barred on account of his misrepresentations regarding his prior injuries, was rejected. The Deputy Commissioner and the Full Commission found and concluded that misrepresentations in hiring do not bar claims and that if they did, the "Larson test" proposed by the defendants was not met, because the evidence showed that 1) the hiring decision could not have been made in reliance upon the misrepresentations, because Mr. Freeman was hired (pursuant to a procedure designed to satisfy the Americans with Disabilities Act by asking questions about prior injuries only after the initial hiring had taken place) before he made the misrepresentations and 2) there was no causal connection between the condition that was the subject of the misrepresentations and the injury that Mr. Freeman actually had. The Commission also found and concluded that Mr. Freeman had met his burden of proving disability. Then-Chairman Lattimore dissented as to the

proof of disability.

The Court of Appeals, Judge Jackson writing, with Judge Hunter concurring, reversed, holding that a claim can be barred on account of misrepresentations in the hiring process, using the "Larson test," which requires the defendants to meet a burden of proving that 1) there was deliberate misrepresentation, 2) the employer relied upon the misrepresentation in hiring the employee and 3) there was a causal connection between the false representation and the injury. In so holding, the majority dismissed the apparently contrary prior authority of Hooker v. Stokes-Reynolds Hospital as dicta. After creating the defense, the Court then held that the Commission had erred in its findings that the evidence did not meet the test, essentially acknowledging in the process that there was evidence to support the Commission's findings, but picking through the record to find evidence to support contrary findings.

Judge Wynn dissented, noting that the defense had been rejected in both published (Hooker) and unpublished opinions of the Court of Appeals and opining that adoption of the "Larson test" was "impermissible judicial legislation."

Both an appeal (as to the adoption of the defense, which was addressed by the dissent) and a petition for discretionary review (as to the handling of the evidence) have been filed, and plaintiff's counsel awaits word on the PDR. Interestingly, in response to the PDR, the defendants argued that the Court of Appeals was free to make its own findings of fact, despite evidence to support those made by the Commission, because the issue is "jurisdictional."

10. Intoxication.

Gratz v. Hill, _____ N.C. App _____, 658 S.E.2d 523 (2008)

Mr. Gratz, a roofer, had beer for breakfast on the way to a job site. Upon arrival, the other workers decided not to get on the roof, because it was too windy. Mr. Gratz went ahead, ignoring safety equipment. Within a few minutes, he had fallen off the roof, sustaining serious injuries. He testified that he had begun to staple the first course of roofing paper when it slipped. He lost his footing and tried to scoot up the roof, but it was damp, and he slipped off. Five to seven hours after the fall, his blood alcohol content was .11%, which indicated a level of around .22% at the time of the accident, and he tested positive for cannabinoids and cocaine metabolites. The Commission denied his claim on grounds of intoxication.

The Court of Appeals, Judge Jackson writing, affirmed, holding that Mr. Gratz had failed to rebut the presumption of intoxication that was raised by a blood alcohol content that significantly exceeded the legal limit for driving, and that the causal connection between the intoxication and the injury was proved by testimony from the toxicologist that the poor judgment displayed in getting on the roof, when co-workers were refusing to do so, was consistent with the intoxication. Interestingly, the Court also cited with approval testimony from a co-worker that Mr. Gratz fell off the roof because of his intoxication, apparently based on years of roofing experience. That seems odd, in light of some other recent opinions in which testimony of medical experts has been scrutinized for its competency.

11. Subcontractor issues.

Masood v. Erwin Old Company, 181 N.C. App. 424, 639 S.E.2d 118 (2007); _____N.C. _____, 647 S.E.2d 612 (2007)

Mr. Masood was shot by a robber, while working as a cashier at a gas station. His immediate employer, Abbasi, was uninsured for workers' compensation. Abassi leased the premises, including the underground tanks, gas pumps and other equipment, from Erwin Oil. Erwin Oil was a "jobber," which purchased gasoline wholesale from producers, then sold the gasoline, through its own stores or dealers like Abassi, which received a commission on the gas sold. Mr. Masood claimed workers' compensation from Erwin Oil as a statutory employer, pursuant to N.C.G.S. § 97-19. The Commission denied the claim, on grounds that Erwin Oil was an owner, not a principal contractor, so there could be no subcontract to Abassi.

The Court of Appeals reversed. The issue was jurisdictional, so the Court was free to consider the evidence de novo. Erwin Oil's contract with producer Amoco, which provided the gas sold at Abassi's Amoco station, required Erwin Oil to use its "best efforts" to market the gas and offer or cause to be offered for sale amounts necessary to satisfy public demand. The Court held that the obligation to sell gasoline to meet public demand was sublet to Abassi, by a contract that required Abassi to keep the station open 18 hours per day, seven days per week.

Judge Hunter dissented, agreeing with the Commission that Erwin Oil was a landlord, which sold gasoline to Abassi for sale on consignment.

The Supreme Court affirmed per curiam, with Justice Hudson not participating.

12. Causation issues.

Davis v. Harrah's Cherokee Casino, 178 N.C. App. 605 (2006); 632 S.E.2d 576; 362 N.C. 133, 655 S.E.2d 392 (2008)

Mr. Davis suffered an admittedly compensable ruptured disc in May of 2001. He had surgery in September and returned to work on October 31, about seven weeks after surgery. On November 7, 2001, he complained to his doctor about leg pain and was given steroids. An MRI on December 20 showed scar tissue around a nerve and degenerative changes. On December 31, 2001, he reported having slipped and fallen at home recently and an increase in pain in his back and both legs since. He was written out of work from December 27, 2001 through February 1, 2002. He underwent surgery on April 2, 2002 and then missed enough time from work to exceed his entitlement under the FMLA and was terminated. The Deputy Commissioner denied additional benefits, concluding that the surgery and disability after the fall at home were not related to the compensable injury. The Full Commission decided the opposite.

The Court of Appeals affirmed, holding that case fell within the rule from Horne v. Universal Leaf Tobacco Processors, that an aggravation of a compensable injury is compensable,

if it "is a natural consequence that flows from the primary injury," and that that will not be disrupted by an intervening cause, "[u]nless the subsequent aggravation is the result of an independent, intervening cause attributable to [a] claimant's own intentional conduct." The Court held that there was no evidence that the fall was due to Mr. Davis' intentional conduct, and the surgery was both for narrowing of the spinal canal caused by degeneration and for scar tissue removal. The finding and conclusion of on-going total disability were supported by the fact that Mr. Davis had not yet been released from medical care, but also by his testimony about his pain and dysfunction and his qualification for Social Security disability benefits. Importantly, the treating doctor testified that the symptoms after the fall were related to the fall, but also that a person who had undergone back surgery was likely to suffer worse symptoms from a subsequent injury.

Judge Stephens dissented, opining that Horne did not apply, because the surgery after the fall was for correction of degenerative changes that happened to be present at the same level as the prior surgery, not for the scar tissue from that surgery. She viewed the scar tissue removal as incidental and not the reason for the surgery, citing the surgeon's testimony for support. She agreed with the majority that there was no evidentiary support for the Commission's finding that the first surgery made Mr. Davis more likely to develop degenerative changes, but objected to what she characterized as the majority's approval of the Commission's "selection of information from the medical records" to support the causation decision, particularly the removal of scar tissue, when the same doctor testified unequivocally that the surgery was for the unrelated degenerative changes. She also distinguished Horne on its facts, as Mr. Horne was still out of work, recovering from his second back surgery at the time of his subsequent accident, while Mr. Davis had returned to work and was apparently doing well. Judge Stephens did not address the distinction between the cause of the subsequent surgery, for which she made an argument against causation, and the cause of Mr. Davis' disability, with respect to which the majority had pointed out medical testimony that the clearly compensable surgery would likely make symptoms worse after a subsequent injury. That is, she did not address the possibility that, if she was correct, the second surgery would not be covered, but the period of disability after the fall would.

The Supreme Court, Justice Hudson writing, affirmed and modified, holding that there was evidence to support the Commission's findings that the scar tissue and degenerative changes addressed in the second surgery were caused by the first injury and its surgery. The Court pointed to medical testimony, which had been quoted extensively in the Commission's Opinion and Award, that the first injury and surgery would make a person more prone to degeneration thereafter. The Court also made a point of mentioning evidence that Mr. Davis had returned to work prematurely, because he was afraid of losing his job, and that he had contacted his surgeon before the fall at home, complaining that he was having pain similar to that he suffered before the first surgery. The Supreme Court modified the Court of Appeals decision by disavowing the lower Court's opinion that the evidence did not support the Commission's finding that the first injury and surgery had made Mr. Davis more likely to develop degenerative changes that would lead to the second surgery (the Supreme Court opined that there was evidence to support that finding) and holding that the Horne analysis was misplaced, because the Commission had based its decision on direct cause, not on the theory that an intervening cause had not cut the causal connection between the compensable injury and the second surgery. The issue addressed by Horne never came up, and the only reason the Commission mentioned intervening cause is that

the defendants asserted it.

Roberts v. Dixie News, Inc., _____ N.C. App _____, 658 S.E.2d 684 (2008)

Ms. Roberts suffered an admittedly compensable back injury caused by lifting at work. After treatment, she was assigned a 10% rating and permanent restrictions against lifting over 25 pounds, which was much less than the 100 pounds she had to lift while working for the employer. She found her own job working for a catering company but only lasted a couple of months, as what had been touted as an office job actually required lifting 90 pounds. The defendants did not reinstate compensation. A couple of months later, she found another job in South Carolina, which exceeded her lifting restrictions. She lasted for about a year before she re-injured her back lifting and lost that job. It may be important that South Carolina requires an accident for a compensable back injury, which may explain why she did not simply seek workers' compensation benefits for a new injury. It also appears that her doctors attributed her problems after the South Carolina incident to her original injury. Ms. Roberts finally hired a (really good) lawyer, who procured a Form 28U, which contained the doctor's opinion that she had become unable to work again, but the defendants refused to honor it, without explanation. Ms. Roberts moved Deputy Commissioner Phillips for immediate reinstatement of compensation, which was granted, pending a hearing that was coming up. At hearing, Deputy Commissioner Phillips decided that the second episode was a new injury that cut off the defendants' liability after it. During her appeal to the Full Commission, Ms. Roberts moved the Commission for an order requiring continued payments, and that motion was "held in abeyance," pending the Full Commission decision. The Full Commission ultimately decided in favor of Ms. Roberts and awarded on-going benefits. Both parties appealed.

The Court of Appeals affirmed as to everything, holding that there was evidence to support the Commission's finding that the defendants had presented no evidence that the second incident was an independent intervening cause, specifically rejecting the defendants' argument that Ms. Roberts' decision to try to lift things that were too heavy for her constituted an injury caused by her own intentional conduct. Ms. Roberts' appeal of the Commission's refusal to order compensation pending the Full Commission decision was also rejected. The Court noted that a party's appeal from the Industrial Commission to the Court of Appeals acts as a supersedeas that maintains the status quo between the parties, but that there is no authority for the idea that application for review of a Deputy Commissioner's decision to the Full Commission does the same. The defendants were permitted to stop compensation after the Deputy Commissioner decided that they could, so no penalty for late payment was applicable.

13. Change of condition.

Ward v. Floors Perfect, _____ N.C. App. _____, 645 S.E.2d 109 (2007); 362 N.C. 280, 658 S.E.2d 656 (2008)

Mr. Ward owned and operated the employer. After 12 years of installing flooring, his knees were damaged badly enough that he stopped doing the installing. Shortly thereafter, he gave up the business and went to school. The Commission found and concluded that patellofemoral pain constituted a compensable occupational disease but that he had failed to

prove any reduction of wage earning capacity. He was awarded compensation for permanent partial disability to both knees. Mr. Ward appealed to the Court of Appeals and lost, and the defendants paid the ratings. Mr. Ward then claimed a change of condition. The Commission found and concluded that he had not experienced a change of condition, but awarded compensation based on wage loss, under N.C.G.S. § 97-30. Both parties appealed.

The majority of the Court of Appeals, Judge Tyson writing, affirmed as to Mr. Ward's appeal and reversed as to the defendants'. The Court held that the Commission's decision that there had been no change of condition was supported by testimony from the treating physician that Mr. Ward's restrictions were the same and his capacity for work had not changed in kind or character since the time the doctor testified in the first phase of the case. Arthroscopic surgery for a meniscus tear was not related to the compensable occupational disease. The Court agreed with the defendants that no compensation should have been awarded for partial disability, as no compensation of any kind could be awarded without a finding of change of condition.

Judge Wynn dissented, opining that Mr. Ward had proved a change of condition with evidence that he had taken jobs that paid less than his pre-injury wage, thereby proving a drop in wage earning capacity under the fourth prong of the test in Russell v. Lowes Product Distribution (citing Shingleton v. Kobacker Group).

The Supreme Court, in a one-paragraph per curiam decision, held that the Commission's Conclusions of Law 1 and 2, which stated that there had been no change of condition but that Mr. Ward had experienced a loss of wages, were inconsistent and that the Court of Appeals had erred in attempting to resolve the inconsistency. The case was remanded to the Court of Appeals, with instructions to remand to the Industrial Commission for a new opinion and award determining whether Mr. Ward had undergone a change of condition affecting wage earning capacity.

14. Average weekly wage.

Shaw v. U. S. Airways, Inc., _____ N.C. App _____, 652 S.E.2d 22 (2007), rev. 361 N.C. 630; 652 S.E.2d 231 (2008)

Mr. Shaw was a unionized employee who suffered an admittedly compensable back injury. Pursuant to the applicable collective bargaining agreement, the employer contributed to two different types of retirement plans—one pension plan that was entirely funded by the employer and a 401(k) plan to which the employer made contributions that matched the employee's. The only issue was whether the employer's contributions to those plans were part of the average weekly wage, which would have increased the average weekly wage by about $50.00. The Industrial Commission concluded that the contributions were "fringe benefits" and not part of the average weekly wage.

The opinions of the Court of Appeals and Supreme Court are long and filled with different arguments, but the bottom line is fairly simple: that the contributions in question are not part of the average weekly wage. The Court of Appeals, Judge Geer writing with Judge Elmore concurring, reversed the Commission, despite an uphill battle against the majority of authority

from other states and a comment for Larson's treatise that that result would be a surprising change for employers after decades of not having to include such benefits. In short, the majority opined that the employer's contributions were paid as part of the compensation package and were, unlike health insurance premiums that were beneficial to employees only to the uncertain extent that benefits were paid, certain as to their amount. Judge Hunter dissented, emphasizing the Larson position and opining that the majority was engaging in judicial legislation.

The Supreme Court, justice Newby writing, reversed, holding that lack of language in N.C.G.S. § 97-2(5) specifically including fringe benefits in the average weekly wage required exclusion. Justice Hudson, joined by Justice Timmons-Goodson, dissented, opining that the contributions were deferred wages and part of the overall compensation for the work performed by Mr. Shaw, noting that he had left a higher-paying job to take the one with the employer because of the retirement benefits. Justice Hudson also disagreed with the majority's approach of shrinking the benefits available under the Workers' Compensation Act when there was no statutory mandate to do so.

Conyers v. New Hanover County Schools, _____ N.C. App _____, 654 S.E.2d 745 (2008)

The only issue in this case is average weekly wage calculation. Ms. Conyers had been a school bus driver for 12 years. She worked and was paid only during the school year. She did not work during the summer. The Deputy Commissioner used the "first method" of calculation under N.C.G.S. § 97-2(5), dividing her annual wages by 52 to obtain an average weekly wage. The Full Commission reversed, using the "third method" to divide by the actual weeks worked, which yielded a significantly higher rate.

The Court of Appeals, Judge Stephens writing, held that while the "first method" was not available, because Ms. Conyers did not work a full year, the "third method" was also not appropriate, because it yielded a result that was unfair to the employer and provided a windfall to the employee. Therefore, the Commission was required to use the "fifth method" on remand, which is to come up with something that is fair. The Court noted that there is no particular formula to be used under the "fifth method," then went on to dictate that the only fair way was essentially to apply the calculation from the "first method." The Court did not mention whether its decision would have been affected by the addition to the facts of summer employment, particularly if the summer employment paid at a rate greater than the bus driving did.

Bennett v. Sheraton Grand, _____ N.C. App _____, 650 S.E.2d 660 (2007)

Ms. Bennett's claim was accepted, and the defendants started paying compensation, without filing anything with the Industrial Commission. After several years, they realized that they had miscalculated the average weekly wage by dividing the annual wage by the number of paychecks—26, because they were biweekly—instead of 52 weeks, which resulted in an approximate doubling of the compensation rate. When the defendants unilaterally cut the compensation they were paying, Ms. Bennett requested a hearing. The defendants responded that they should be allowed credit for overpayment. The Commission decided that the defendants' failure to accept or deny the claim within 14 days, or to file anything with the

Commission notifying of the payments, as required by N.C.G.S. § 97-18, was sanctionable and deprived them of the right to challenge the amount of the payments, noting that credit would be burdensome to Ms. Bennett. Reduction of the compensation rate was not permitted until the date of the Deputy Commissioner's decision. Thereafter, the defendants were allowed to reduce payments to the compensation rate that was stipulated to be correct, and a credit was allowed for the small excess that they had been paying after the unilateral reduction.

The Court of Appeals, Judge Tyson writing, affirmed, holding that mandatory credit under N.C.G.S. § 97-42, for payments that were not due and payable when made, did not apply, because the claim had been accepted, and § 97-42 provides that the Commission has discretion in deciding whether to allow credit. The sanction of not permitting credit was affirmed, because that sanction was discretionary with the Commission, and there was no showing that discretion had been abused.

Patel v. Stanley Works Customer Support, 178 N.C. App. 562; 631 S.E.2d 892 (2006); 362 N.C. 79, 653 S.E.2d 145 (2007)

The only issue on appeal was the average weekly wage. Mr. Patel sustained an admittedly compensable back injury in June of 1997. His condition gradually worsened, until he had to leave work in December of 1998 for back surgery. He returned to work in June of 1999, but only lasted a couple of months before going out again. As of the time of hearing, he had undergone numerous additional procedures and had remained out of work. The defendant paid compensation throughout. At the beginning of the case, the Form 19 reporting the injury indicated that Mr. Patel worked 12 hours per day, seven days per week and earned $773.64 per week, including overtime. When he went out of work, compensation was started, memorialized by a Form 60 that indicated the same average weekly wage and noted payments at a compensation rate of $512.00 per week. In January of 2003, the defendant notified Mr. Patel that it had miscalculated his average weekly wage and unilaterally reduced the compensation rate to $206.40. At hearing, the defendant presented a Form 22 Wage Chart purporting to support its position, but it did not have any markings for the days worked, had only monthly wage totals in the right-hand column, and had different monthly totals for five of the 12 months that were not explained. Further, attendance records indicated missed days during some of the months that did have the same total wages. The Commission ordered continuing compensation at the original rate.

The Court of Appeals, Judge Geer writing in an unpublished opinion, held that the Form 19 and Form 60 were sufficient evidence to support the Industrial Commission's decision, especially in light of the irregularities noted in the Form 22.

A petition for discretionary review was originally granted, along with a writ of supersedeas, then was determined to have been improvidently granted. Therefore, the case is probably not entitled to precedential value, as it reverts to the Court of Appeals' unpublished opinion.

15. Coverage, including cancellation.

Lowery V. W. David Campbell d/b/a Campbell Interior Systems And Cisco Of Florence, 185 N.C. App. 659, 649 S.E.2d 453 (2007); 362 N.C. 231; 657 S.E.2d 354 (2008)

Mr. Lowery worked for Locklear, a subcontractor of Campbell, when he suffered and injury in South Carolina. He filed a claim against Locklear in North Carolina and won, but Locklear apparently had no insurance. Campbell found out that the claim might be made against it before the hearing in the claim against Locklear, and denied the claim for failure to file in time. After Mr. Lowery obtained the decision against Locklear, he filed a declaratory judgment action in Superior Court, asserting the existence of a contract between Campbell and Locklear to insure Locklear's employees. Campbell failed to answer and default was entered, followed by default judgment. Campbell moved to set aside the default, but that motion was denied. Campbell appealed, on grounds that the trial judge had abused his discretion and that the Superior Court lacked subject matter jurisdiction over the issue.

The Court of Appeals affirmed, holding that the trial court had not abused its discretion, as Campbell had failed to show that it exercised any care after it was served, simply sending the papers to a South Carolina lawyer with no instructions and conducting no investigation. The Superior Court was held to have jurisdiction over the insurance issue, as it did not affect the workers' compensation claim, which had already been decided by the Commission before the declaratory judgment action was filed.

In dissent, Judge Stroud cited cases in which the Industrial Commission had been held to have jurisdiction over insurance matters in comp cases, noted that Campbell fell within the provisions of N.C.G.S. § 97-19 as a liable upstream contractor, and opined that the default judgment was void for lack of subject matter jurisdiction, which was exclusively in the Commission.

The Supreme Court affirmed per curiam.

16. Exclusive remedy, Woodson/third party claims.

Hamby v. Profile Products, L.L.C., et.al. , 179 N.C. App. 151, 632 S.E.2d 804 (2006); 361 N.C. 630; 652 S.E.2d 231 (2007)

This is a Woodson/third party case. Mr. Hamby fell into a pit where wood chips were moved with large augers. A co-employee tried to stop the augers, but the first emergency stop button was inoperable. By the time the co-employee had gotten to another button to stop the machine, Mr. Hamby's left leg had been mangled, so that part of it was amputated. He and his wife sued outside of workers compensation, alleging violations that would subject an employer to liability under the Woodson v. Rowland and Pleasant v. Johnson standards. The trial court dismissed the claims at summary judgment against the employer (Terra-Mulch) and the co-employee (Hoffman), but did not grant summary judgment for Profile Products, a limited liability

company that was the sole owner of Terra-Mulch, which was also a limited liability company. (Denial of summary judgment as to another defendant, ESG, is not involved in this appeal.) Profile appealed.
The technical issue on appeal was whether the appeal was interlocutory, so that it should be dismissed and the case sent back down for trial. The Court of Appeals held that it was. However, that decision turned on the more general issue of whether there was such an identity of interest between Terra-Mulch and Profile that Profile should be treated the same, with respect to the exclusive remedy provisions of the Workers' Compensation Act. The Court of **Hassell v. Onslow County Board of Education , ____ N.C. App. ____, 641 S.E.2d 324 (2007)**

Ms. Hassell was an elementary school teacher for the defendant for about ten years, then moved to teach sixth graders in middle school. She was unable to maintain classroom discipline, and her students openly insulted, disrespected and physically assaulted her. She apparently was having a hard time with academic things, too. Her referrals of students to the principal for discipline were far in excess of the other teachers', who did not have the same problems controlling the kids as Ms. Hassell did. As things got worse, her principle subjected her to "action plans," in which Ms. Hassell was required to show progress toward improvement in specific teaching areas. Eventually, she broke down, suffering disabling anxiety. The Commission denied the occupational disease claim, on grounds that the evidence did not show that there were characteristics of her job that placed her at a greater risk of contracting an anxiety disorder than the risk on those not so employed.

The Court of Appeals affirmed, emphasizing that the problem was not Ms. Hassell's job, but her inadequacies in performing it.

Judge Wynn dissented, opining that the question was not one of apportioning blame for the conditions under which Ms. Hassell worked, but whether those conditions were more hazardous than those experienced by other people. Judge Wynn noted that all the evidence indicated that other teachers did not work in the same conditions as she did.

Lane v. American National Can Company , ____ N.C. App. ____, 640 S.E.2d 732 (2007)

Mr. Lane claimed an occupational disease, after he developed stress problems, allegedly due to repeated increases in and changes in workload that resulted from serial downsizing by his employer. Three experts testified generally favorably to him, including one who said that his job placed him at a greater risk of suffering depression than members of the general public, based on "the model theory of high demand and low discretion." A defense expert testified against him. The Commission denied the claim.

On the plaintiff's appeal and the defendant's cross-appeal, the Court of Appeals remanded, holding that the Commission had merely recited the expert testimony, without specifically finding whether the job exposed Mr. Lane to a greater risk of contracting his psychological condition than the general public not so exposed. The Court held that the Commission had not erred by refusing to exclude the defense expert, giving a good analysis of the standard for acceptance of expert evidence. The defendant's appeal of alleged failure of the Commission to address its discovery motions was rejected, on grounds that the Full Commission's boilerplate statement that the parties had not shown good ground to reconsider,

rehear or amend the deputy's opinion and award was sufficient to constitute an implicit ruling on those motions.

Appeals held that Profile, as a member, manager, director, etc, of a limited liability company (Terra-Mulch) could not be liable solely by reason of that status, for the torts of the company of which it was a member, but that it could be liable for its own conduct. Therefore, it was not necessarily covered by the same exclusive remedy protection as the employer, Terra-Mulch, and there was not necessarily any risk of inconsistent verdicts against the different defendants that would justify an interlocutory appeal. The Court did not share Profile's concern that there would be a disruption of its representation, which had been by the same lawyers as represented Terra-Mulch.

In dissent, Judge Tyson opined that Profile, as a manager of Terra-Mulch, was in the same position as Terra-Mulch and subject to the Workers' Compensation Act, and was therefore protected by the exclusive remedy. He also pointed out that the pleadings were the same as to both defendants, so that there was no viable claim for liability as to Profile for conduct other than through Terra-Mulch. The dissent leaves lingering the interesting implication that managers, both corporate and individual, can be liable for workers' compensation benefits directly, which would be a major change that would open the opportunity to obtain benefits from individual officers and corporate parents of uninsured, impecunious corporate employers.

The Supreme Court, Justice Newby writing and Justice Hudson not participating, reversed, interpreting the Delaware limited liability company statutes as immunizing "members" from liability based on their member status and holding that Profile was a member of Terra-Mulch, conducting its business. The admittedly interlocutory appeal was proper, because there was a risk of inconsistent trial results, as Terra-Mulch was proceeded against before the Industrial Commission and Profile faced trial in Superior Court.

In dissent, Justice Timmons-Goodson opined that the dissent below and the majority had improperly constructed an appeal for the defendants, as they had not argued anything having to do with limited liability company statutes either at the trial court or the Court of Appeals. There was no risk of inconsistent results, as Profile was the only defendant left at the trial level. She also opined that the majority had approached the case backwards, first determining the result of the appeal and then using that result as the reason for finding that the interlocutory appeals should be heard.

Christopher v. N.C. State Univ., ____ N.C. App. ____, ____ S.E.2d ____ (2008)

Mr. Christopher filed a tort claim for respiratory problems allegedly caused by exposure to mold. The claim was dismissed by the Industrial Commission, on grounds that he was an employee and that his exclusive remedy was under the Workers' Compensation Act. The Court of Appeals affirmed on the *pro se* appeal.

17. Litigation loans.

Cross v. Capital Transaction Group, Inc., _____ N.C. App _____, 661 S.E.2d 778 (2008)

Ms. Cross received money from Captran with the provision that the amount plus "investment fees" would be paid back from proceeds of her workers' compensation claim. If she received nothing, then she would not be required to pay back. Through two installments, she was given $2500, and "investment fees" were $3125, for a total allegedly owed of $5625. Ms. Cross and her attorney, Sam Scudder, filed a declaratory judgment action, which resulted in an order that Sam transfer the total amount to the defendant.

The Court of Appeals reversed, holding that the prohibition against assignment of workers' compensation benefits in N.C.G.S. § 97-21 applied to bar the lien claimed by the defendant. The Court did not buy any of the clever explanations as to why the defendant was not a creditor and the amount was not a loan. The Court did not address whether Ms. Cross was liable for payment independently of the lien issue.

18. Payment by different defendants for consecutive accidents.

Starr v. Gaston County Bd. of Educ., _____ N.C. App _____, 663 S.E.2d 322 (2008)

This is a fight between two insurance programs as to which has to pay compensation after a point in time following a second injury with the same employer. Mr. Starr suffered an admittedly compensable low back injury on April 17, 2001, when the school system was self-insured through the N.C. School Boards Trust ("NCSBT").. After disc surgery, he returned to work in October of 2001. He continued to be treated and missed work, for which he was paid compensation for total disability, on three separate occasions. In August of 2002, while the school system was insured by Key Risk Insurance Company, he suffered another admittedly compensable injury when he was rear-ended. He was treated for cervical problems, and the Form 18 he filed for that injury indicated injuries to the neck and shoulder on the right side. He was released to return to work with restrictions on February 11, 2003 by a doctor to whom he had been referred for neck treatment. Mr. Starr did not return to work, and there was apparently no dispute as to his continuing total disability, for which Key Risk continued to pay compensation. In July of 2003, Key Risk filed for a hearing to establish that Mr. Starr's disability after March 11, 2003 (probably meant February) was related to his first injury and for reimbursement from NCSBT for what Key Risk had paid after that date. The Industrial Commission found and concluded that Mr. Starr's disability due to the second injury lasted only until February 11, 2003, after which NCSBT was liable for continuing total disability and ordering the requested reimbursement.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's findings and conclusions that the total disability due to the second injury ended on February 11, 2003, after which the continuing total disability was due to the lower back, which had not been aggravated by the second accident. The Court reviewed the medical evidence and the filings associated with the second accident, which did not mention any low back problems,

and noted that Mr. Starr had continued to have pain and low back treatment throughout the time between the injuries. NCSBT's argument seems to have been that aggravation had to be found, when Mr. Starr was not totally disabled by his lower back before the second accident but was after the point chosen by the Commission for shifting liability back to the first incident.