WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2009

By Jay A. Gervasi, Jr.
Greensboro, NC

CONTENTS

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

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.

Castaneda v. Int'l Leg Wear Group, _____ N.C. App _____, 668 S.E.2d 909 (2008)

Ms. Castaneda alleged a back injury when she was struck in the back by a heavy box that was coming down a conveyor, so that she was knocked off balance and fell, grabbing a rail. She reported immediate back pain, required assistance from co-employees to stand up and was taken to the emergency room. She was given muscle relaxants and instructed to stay out of work the next day, which was a Friday. On the following Monday, she called in to work to report that her back hurt too much to come in. On Tuesday, she went to work and asked her employer to send her to a doctor. They responded by presenting her with a "written verbal" warning about work performance. She did not understand English well enough to read it, but refused to sign because she thought she was being terminated, instead initialing it, which she thought would indicate only that she had bee presented with the form. She had received no prior warnings, but she was terminated that day, though the employer contended that she had resigned voluntarily, perhaps by refusal to accept the warning. The following day, she was sent to an industrial medical clinic, where she was given pain drugs and work restrictions. She was then seen by an orthopedist who ordered an MRI before leaving the clinic and leaving her to another orthopedist, who then sent her to a spine specialist. The MRI showed an annular tear at L4-5. The second orthopedist testified that the "questionable" annular tear was not caused by the accident, but the third one testified that, more likely than not, it was, though he also used a lot of other words that were less certain. Deputy Commissioner Rowell decided in favor of Ms. Castaneda. The Full Commission, Commissioner Lattimore writing with Commissioner Young concurring agreed, with Commissioner Sellers dissenting regarding causation.

The Court of Appeals, Judge Calabria writing with Judge McCullough concurring, affirmed, holding that the testimony of the third doctor, to whose testimony the Commission had decided to give greater weight, on account of his specialty in spinal surgery, was not mere speculation, despite some equivocation and uncertain-sounding verbiage. Perhaps more significantly for citation in other cases, the Court analyzed the issue of proof of disability in the presence of a termination, holding that the record supported the Commission's decision that the employer had not carried its burden of proving that Ms. Castaneda was terminated for reasons independent of her workers' compensation injury and that, even if it had, that would not end the

discussion, as she had presented evidence of job search to prove her disability. That is, the Court essentially interpreted the Seagraves-type analysis as being one of burden-shifting, such that if the employer meets its burden of proving a non-related termination, the employee can still obtain compensation by presenting evidence to prove disability under the Russell v. Lowes Product Distribution structure.

Judge Tyson dissented, picking out portions of the third orthopedist's testimony that he considered to indicate that his causation opinion had been speculative.

Alphin v. Tart L.P. Gas Co., , _____ N.C. App _____, 666 S.E.2d 160 (2008)

Mr. Alphin suffered an admittedly compensable back injury in 1990. There followed a Form 21 and a few Form 26 Agreements for initial total disability, followed by multiple agreements for compensation for increasing ratings of permanent partial disability alternating with additional periods of total disability. There were also Form 24 Applications to Stop Payment, primarily based on allegations of refusal to cooperate with vocational rehabilitation services provided by the defendants. The Executive Secretary's office approved one in 1995. In 1996, Mr. Alphin filed for a Form 33 Request for Hearing alleging that the defendants were refusing to pay compensation for permanent, total disability. A couple of months later, he filed a motion for reinstatement of benefits, on grounds that he had complied with voc rehab and, if the Commission decided that he had not, that he was ready, willing and able to comply then. The Deputy Commissioner decided that Mr. Alphin had cooperated, but that is compensation ended when he reached maximum medical improvement in 1996, so that he was entitled only to his rating. Both parties appealed to the Full Commission, which decided that he had failed to cooperate, plus that he was able to work at sedentary employment. The Court of Appeals reversed in an unpublished opinion, affirming the decision that Mr. Alphin had failed to cooperate, but holding that the consequence was a suspension of benefits, not termination, so that the Commission had to address whether he had shown his willingness to cooperate. In 2000, the Full Commission determined that he had not shown that he was willing to cooperate and suspended compensation, again finding that he was able to work at sedentary employment, so that he was entitled to the most recent chunk of his 25% rating of permanent partial disability to the back. Mr. Alphin filed an appeal to the Court of Appeals, but did not perfect it.

In 2001, Mr. Alphin filed a motion to resume payment of compensation for temporary total disability, alleging refusal by the defendants to provide vocational rehabilitation services when he had expressed willingness to cooperate with them. The Executive Secretary's office denied the motion, on grounds that the previous Full Commission decision was at that time still on appeal to the Court of Appeals. A couple of months later, Mr. Alphin filed a Form 33 alleging that he had received no compensation for total disability since 1995 and had not returned to gainful employment. The Deputy Commissioner denied, finding Mr. Alphin's assurances that he would cooperate not credible, based on his prior conduct and his demeanor at hearing. The Full Commission noted that Mr. Alphin had not been evaluated by a doctor since 1993 and ordered that he be examined before they made a decision. The treating physician examined Mr. Alphin and testified by deposition, which was received into the record in September of 2004. In March of 2007, the Full Commission concluded that Mr. Alphin had

failed to show that his failure to cooperate had ceased and that his presumption of on-going disability had "ended" and that he had failed to disability after compensation was stopped in 1995.

The Court of Appeals, Judge Geer writing, reversed the Commission's conclusion that the presumption of disability had ended, holding that even though the prior proceeding had ended in 2000 with a Full Commission decision that Mr. Alphin was capable of sedentary work and entitled to a rating, that was not the equivalent of a decision that he was not disabled, as there had been no decision as to whether he was actually able to obtain employment. Therefore, the last thing controlling the presumption was a Form 26 for additional compensation for total disability that had preceded that decision. However, the Court affirmed the decision that Mr. Alphin's refusal to cooperate continued, which was supported by evidence that, among other things, he had testified that he considered the conduct before his compensation was suspended in 1995 to have been sufficient and that his lip service as to his willingness to cooperate had not been supported by any real conduct, other than an application for assistance with the State Division of Vocational Rehabilitation that was filed a few days before hearing. The Court rejected Mr. Alphin's contention that the Commission had improperly ordered the medical examination, when the issue of whether he was totally or partially disabled was not before the Full Commission at the time, with appeal having been only on the issue of cooperation. The Court pointed out that the disability issue had been part of the proceedings from the time Mr. Alphin filed his Form 33 alleging as the issue that he had not received compensation for total disability and had not returned to work. The Court noted that the Commission, which received claims without formal pleadings, was required to address all aspects of those claims.

Carey v. Norment Sec. Indus., _____ N.C. App _____, 669 S.E.2d 1 (2008)

Mr. Carey fell off a ladder, caught his arms in the grid of a suspended ceiling, then dropped a few feet to the floor, landing on his feet. After about a week, he started havning problems with his mid-back, which shifted around some over time. Eventually, his primary symptoms were in his neck. He missed occasional days of work for physical therapy and other treatment, then almost a year after his accident, was taken out of work, where he stayed from February to July of 2005. The rehab nurse testified that Mr. Carey had described to her an episode in which he turned his head and felt a pop in his neck about the time of the start of the period of total disability. He was released to return to work in May of 2005, but testified that he held off until after a mediation that was coming up, on instructions from his lawyer, who told him that he needed to go back to work immediately thereafter. Deputy Commissioner Baddour denied the claim for benefits based on the neck problems, but the Full Commission reversed, with Commissioner's Mavretic and Sellers in the majority and Commissioner Lattimore dissenting.

The Court of Appeals reversed in part, holding that while the evidence was sufficient to support the decision that the neck problems were related to the admittedly compensable accident, Mr. Carey had failed to prove that he was disabled after he was released by the doctor in May of 2005. The record contained evidence from the employer that there was a job available to him on the date he was released but that it was gone by the time he contacted it about a month later. The opinion does not reflect whether the employer said during the mediation that there was a job

available for Mr. Carey. The Court remanded for findings of fact as to which were the "sporadic" dates of additional total disability before February of 2005. The defendant was denied credit for short term disability benefits paid to Mr. Carey, because the issue was not raised below. Mr. Carey's claim for attorney's fees under N.C.G.S. § 97-88 was denied discretionarily.

Judge Wynn dissented only as to the "sporadic" days, opining that there was evidence of which days those were, noting that the Commission had ordered the parties to "confer and stipulate based on payroll and medical records."

Silva v. Lowe's Home Improvement, _____ N.C. App _____, _____ S.E.2d _____ (2009)

This is the second trip to the Court of Appeals for this case. Mr. Silva suffered a pair of compensable injuries, then was fired by the employer after discussion of problems with his light duty work became heated. The Court of Appeals affirmed the Full Commission's decision that the employer had failed to prove that the termination was independent of the workers' compensation injury, but remanded, because the Commission had awarded compensation without finding whether Mr. Silva had proved disability. On remand, the Full Commission further remanded to a Deputy Commissioner for taking of additional evidence on the issue, then decided that while Mr. Silva's testimony without documentation of over 300 job contacts was not accepted as evidence of a reasonable job search under the second prong of the test in Russell v. Lowe's Products Dist., he proved disability under the first prong, with somewhat conflicting medical testimony that he was incapable of any work.

The Court of Appeals affirmed, holding both that the Commission had not exceeded the scope of the remand by exercising its discretion to take the additional evidence and that the defendants had waived any contention on that subject by failing to object and by stipulating on a pre-trail agreement to the testimony in question. The Court also held that the evidence, with respect to which the Commission had authority to determine weight, was sufficient to support the findings and conclusion that Mr. Silva was disabled.

Treat v. Mecklenburg County, _____ N.C. App _____, 669 S.E.2d 800 (2008)

Mr. Treat was a real estate appraiser who suffered admittedly compensable physical injuries that limited him to sedentary work. He returned to sedentary work from November of 2002 through January of 2003. There was a dispute as to whether he was entitled to compensation for total disability from February of 2003 through April of 2004, which was resolved by use of a "not-clincher" compromise agreement that he would be paid a compromised lump sum for the disputed period, after which the defendant would resume compensation for total disability, with the filing of a Form 62 Notice of Reinstatement, with continued compensation conditioned on Mr. Treat's cooperation with vocational rehabilitation provided by the defendant, That agreement was approved in March of 2004. A dispute later arose that was resolved by a Full Commission decision that Mr. Treat was entitled to compensation for total disability until January of 2005, which included findings and conclusions that he had refused suitable employment and that, assuming that he had not, he had failed to prove his disability.

Mr. Treat appealed, arguing that when the Commission concluded that he had failed to prove disability, it erred by placing on him the burden of proof, when there was an approved agreement.

The Court of Appeals affirmed, noting that in other cases, the approved agreements that gave rise to the presumption of on-going disability had been on Forms 21 or 26, which provided, with respect to total disability, an agreement to pay on-going benefits. This case was distinguished, in that the promise that was approved in the "not-clincher" was to resume compensation pursuant to N.C.G.S. § 97-18 without an agreement, with filing of the Form 62 Notice of Reinstatement.

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.

Cooper v. BHT Enters., _____ N.C. App _____, 672 S.E.2d 748 (2009)

Ms. Cooper suffered an admittedly compensable injury to her lower back when she skipped on ice in walk-in freezer and fell. A few months after her fall, she reported to her treating doctor that she had a catch in her neck. A month later, she was released to return to work with no restrictions. More consistent neck problems were not reported until about six months after the accident. She ended up with neck surgery and was released by her surgeon, but continued to treat with her family doctor for chronic pain through the date of hearing. The Deputy Commissioner awarded on-going compensation for total disability. The Full Commission reversed, deciding that Ms. Cooper had failed to prove that the neck problems were related to her compensable accident or that she was disabled past the date she was released to work for her lower back problems.

The Court of Appeals, Chief Judge Martin writing, with Judges Wynn and Stephens concurring, affirmed, holding that there was evidence to support the Full Commission's findings that the neck problems did not appear until six months after the accident and that the positive medical expert opinions on causation were insufficient, as they were based only on a *post hoc ergo propter hoc* logical fallacy. While the Commission's decision could probably have been affirmed based on a decision not to accord weight to the medical opinions based on the delay in reporting the neck problems, the *post hoc ergo propter hoc* analysis seems a bit off-base, as the opinions were based not only on the fact that symptoms followed the event, but also on the presence of a mechanism of injury that explained the symptoms, unlike the true *post hoc ergo propter hoc* cases, in which there really is nothing more than a temporal relationship. It may be that the testimony was developed in a way in which that was not pointed out, but in any event, this case could prove dangerous, by reinforcing the misplaced defense argument that, in essence, any time symptoms follow an event, the event cannot by the cause of the symptoms. The Court rejected Ms. Cooper's argument that the Commission improperly allowed review, when the defendant failed to file a Form 44, which constitutes an abandonment of all issues under Commission Rule 701(2). The Court distinguished Roberts v. Wal-Mart Stores, Inc. in which the Court had held that the Commission could not waive the requirement that a plaintiff file a Form 44, on grounds that the Roberts plaintiff had also filed no brief, so that the opposing party had received no notice of the issues on review. The Court also held that Ms. Cooper did not prove disability after her release to return to work by a reasonable job search, when the only evidence of job search was her attempts, during the time she was being kept out of work by the doctor, to obtain light duty work from the employer.

Biggerstaff v. Petsmart, Inc., _____ N.C. App _____, 674 S.E.2d 757 (2009)

This case is an excellent example of how to deal with defense ergonomics experts in occupational disease cases. Ms. Biggerstaff worked as a dog groomer. She claimed a back injury while lifting a dog, which was denied by the defendants. A Form 33 Request for hearing was filed, but by the time of hearing, a claim had been added for carpal tunnel syndrome as an occupational disease. The Deputy Commissioner denied the back injury claim, but the Court of Appeals opinion is not clear as to what happened to the CTS part. The Full Commission found the CTS to be compensable and awarded compensation for total disability through the date of the decision and beyond.

The Court of Appeals affirmed in part, holding that the Commission had properly considered all evidence and that the evidence supported the findings that the CTS was caused by Ms. Biggerstaff's employment and that her employment placed her at a greater risk of contracting CTS than the risk to the general public. The Court's review of the expert testimony revealed that plaintiff's counsel had handled the defendants' ergonomist, Al Gorrod, very well, by providing Mr.Gorrod with alternative foundational evidence that Ms. Biggerstaff performed grooming activities about 90% of her time, instead of the 60% he had assumed when generating his initial, negative opinion. Mr. Gorrod testified that if the true percentage was 90, then he would reverse his opinion to say that the work caused the disease. Mr. Gorrod's reversal also disposed of the defendants' physician expert, who had based his opinion on Mr. Gorrod's. The Court remanded for findings addressing disability. Ms. Biggerstaff had presented additional evidence before the Full Commission that she did not work after she left Petsmart until about a year and a half later, when she was paid $140.00 for a month of substitute teaching. She had been allowed by her treating physician to return to work with significant restrictions about half-way through that period. The Court's demand for additional findings is a bit hard to figure out, as the Court stated that it was unable to determine from the record whether Ms. Biggerstaff had earned any wages during the time between going out of work and beginning the substitute teaching or whether her injury had prevented her from earning them. Ordinarily, the absence of that evidence would require simple reversal for failure of evidence to support the finding and conclusion that the plaintiff was disabled after being allowed by the doctor to return to light duty work.

Matthews v. Wake Forest Univ., 187 N.C. App. 780, 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 and coverage.

Johnson v. City of Winston-Salem, 188 N.C. App. 383, 656 S.E.2d 608 (2008), disc. Review denied, 362 N.C. 359, 664 S.E.2d 308 (2008), aff'd, _____ N.C. _____, _____ 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.

The Supreme Court affirmed, *per curiam*.

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.

Mann v. Technibilt, Inc, _____ N.C. App _____, 666 S.E.2d 851 (2008)

Ms. Mann's claim for an occupational disease of carpal tunnel syndrome was accepted by the defendants when Travelers was on the risk. She continued to work for the employer at the same job while undergoing conservative treatment. The employer switched workers'

compensation carriers to the Hartford, after which Ms. Mann continued to work for about another eight months, with increasing symptoms, before moving the Commission for an order that the defendants pay for a second opinion regarding treatment, with a doctor of Ms. Mann's choice. That motion was granted by a Special Deputy Commissioner, and the defendants appealed by requesting a hearing. In the course of that appeal, Travelers, which had been ordered to pay for the examination, alleged that the Hartford was the proper carrier on the risk, and the Deputy Commissioner so found. The Full Commission agreed.

The Court of Appeals held that the Commission had correctly applied the law, in that the carrier on the risk during the last injurious exposure is liable for an occupational disease, and there was evidence to support the findings and conclusion that Ms. Mann was last injuriously exposed while the Hartford was insuring the employer. However, the case was remanded, because the Commission had failed to address the Hartford's contention that Travelers was estopped to deny liability. There was no discussion of the legal framework for analyzing that issue.

4. Sufficiency of findings of fact.

Huffman v. Moore County, _____ N.C. App _____, 669 S.E.2d 788 (2008)

Seven claims for injuries caused by chemical exposure in a n allegedly "sick building" were consolidated for hearing. The Deputy Commissioner awarded compensation, but the Full Commission reversed. On the first appeal, based on the plaintiffs' contention that the Commission had failed to make sufficient findings as to alleged spoliation of evidence, the Court of Appeals remanded, with an unpublished opinion. The Commission cleaned up the findings in question, then came to the same conclusion, based on testing that indicated levels of chemicals below those necessary to cause disease and according greater weight to the testimony of defense medical experts, one of whom testified, in essence, that fibromyalgia and multiple chemical sensitivity caused by chemical exposure (as opposed to psychological and psychosocial factors) did not exist, than to the plaintiffs' treating physicians.

On this second appeal, the Court again remanded, this time because the Commission had failed to make any findings of fact, having instead simply listed various items of expert testimony, without actually stating what the Commission found. Interestingly, the Court openly invited the Commission to take additional evidence, noting that the medical opinions were relatively old, that "the expert testimony…reflects uncertainty about fibromyalgia and multiple chemical sensitivity that existed when the depositions were taken" and that "in the intervening years the medical community may have gained a greater understanding of these conditions." The implication is that the Court (Judge Arrowood writing and Judges Wynn and Bryant concurring) was aware of changes in the medical community's view of the conditions in question, since one of the defense experts testified that "scientific medicine does not accept the pseudoscience and speculation of illness and causation upon which the opinions of certain health professionals involved [in this case] have been based."

On remand, the Full Commission added some language to indicate what it was finding as

fact, declined to take any additional evidence and denied the plaintiffs' motion to take judicial notice of a recent article by one of their experts. Review of the Full Commission opinions also reveals that the Commission, from its first Opinion and Award, denied the defendant's motion to exclude the plaintiffs' expert evidence as "junk science," pursuant to the U.S. Supreme Court's decision in Daubert v. Merrill Dow Industries, in favor of North Carolina procedure as set out in State v. Goode, which focuses the argument in such situations on evaluation of the weight to be given evidence.

Williams v. Law Cos. Group, 188 N.C. App. 235, 654 S.E.2d 725 (2008), reversed, _____ N.C. _____, 666 S.E.2d 750 (2008)

Ms. Williams had experienced a prior car wreck in which both of her femurs were broken and underwent surgery that involved placement of metal rods. In September of 2000, while working for the employer, she was in another car wreck, which resulted in pain in neck, lower back and chest. She was paid on-going compensation for total disability. Surveillance performed in December of 2001 and January and May of 2002 showed that she was able to move around without a limp. In the course of treatment, her doctors discovered that the rod in her right leg had broken, but there was no medical opinion that the breakage was probably related to the compensable injury. Apparently on request for hearing by the defendants, Deputy Commissioner DeLuca determined that Ms. Williams was not disabled by her compensable injury after March 7, 2002 and had no permanent impairment, awarding credit for payments made between March 7, 2002 and the time the defendants terminated compensation pursuant to his opinion and award. The Full Commission reversed, awarding on-going compensation for total disability and other benefits.

The Court of Appeals, reversed, holding that there was no competent evidence to support the Commission's decision, based on the Court's perception that the award had been based on a finding that disabling leg pain was the result of the leg pain, when there was no sufficiently certain evidence that the broken rod or leg pain from any other source was related to the compensable accident.

Judge Geer dissented, opining that the case should be remanded to the Commission for additional findings of fact, as she was unable to determine whether the Commission's decision was based on pain from a leg injury, with respect to which she agreed with the majority that there was insufficient evidence, or pain from a separate pain syndrome related to the back injury from the accident, for which there was evidence.

The Supreme Court reversed, *per curiam*, "for the reasons stated in the dissenting opinion," and remanded for "findings of fact regarding whether plaintiff' current disability was caused by the 21 September 2000 accident without consideration or the broken rod in plaintiff's femur."

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

Billings v. General Parts, Inc., 187 N.C. App. 580, 654 S.E.2d 254 (2007), disc. review

denied, 362 N.C. 233, 659 S.E.2d 435 (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.

Floyd v. Exec. Personnel Group, _____ N.C. App _____, 669 S.E.2d 822 (2008)

Ms. Floyd worked for Penco, a manufacturer, through Executive Personnel, a temporary agency, for about two years, off and on. It was not unusual for temporary workers like her to apply for and be accepted for permanent employment with Penco. Ms. Floyd applied and was told she would need to go to a designated doctor for drug testing and a physical. On the way home from that visit, she was injured in a car wreck. The Deputy Commissioner decided that she was not an employee of Penco at the time, but that she was employed by the temp agency, which was liable for her benefits. The Full Commission agreed as to Penco and the employment relationship with the temp agency, but decided that the injury did not arise out of the employment with the temp agency.

The Court of Appeals, with Judge McCullough writing and Judges Tyson and Calabria concurring, affirmed, holding that Ms. Floyd was not yet an employee of Penco, not was it guaranteed that she would have become one, and that the accident did not arise out of her employment with the temp agency, as neither Penco nor the temp agency required her to apply for permanent employment. The Court refused to consider arguments based on dual employment or the special errand exception, because they had not been raised at the Commission level, though the Court noted that those arguments were not persuasive. The Court also refused to find error in the Commission's failure to make findings as to some other matters, holding that the

Commission had made findings that were sufficient to support the conclusions of law.

6. Liability for medical expenses.

Scarboro v. Emery Worldwide Freight Corp., _____ N.C. App _____, 665 S.E.2d 781 (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.

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

Richardson v. Maxim Healthcare/ Allegis Group, 188 N.C. App. 337, 657 S.E.2d 34 (2008),

rev, in part, 362 N.C. 657, 669 S.E.2d 582 (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 Supreme Court reversed as to the notice issue, holding that that Court had never actually addressed the issue, as the true holding of Booker v. Duke Medical Center had been that the employer had failed to raise the notice issue before the Industrial Commission, so that the statement that mere actual notice is not sufficient to satisfy § 97-22 without lack of prejudice was dicta. The Court then held that actual notice to the employer eliminates the need for written notice and that the requirement of providing a reasonable excuse for failure to give written notice applies only when the employer does not have actual notice. The Court also noted that in addition to providing the employer with the opportunity to investigate and otherwise defend itself against the claim, notice triggers duties on the part of the employer to notify the Commission within five days and notify the injured worker within 14 days as to whether it will accept or deny the claim, none of which the employer in this case did. The Court affirmed the Court of Appeals' decision to deny coverage of the left breast implant, finding no evidence to support the Commission's findings that it was damaged by the accident or that replacement was otherwise required.

Daugherty v, Cherry Hospital, _____ **N.C. App. _____, _____ S.E.2d _____ (2009)**

Ms. Daugherty was attacked by a patient while working in the High Risk Unit at the employer's state psychiatric hospital. After being seen by Employee Health Services, she was cleared to return to work the following day. A month later, in December of 1992, she was seen by psychiatrist Dr. Gagliano, who took her out of work for a week for major depression. After one day at work, she went back to the psychiatrist, who took her out of work for another month. Her family doctor extended her leave for another two weeks. She filed a Form 18 Notice of Accident to Employer and Claim of Employee in February of 1993. Her claim for physical injuries was accepted, but her claim for psychological injuries was denied by the employer. At the end of the period of doctor-directed total disability, she was released by the family doctor to return to work with restrictions, which the employer was unable to accommodate. She returned to a receptionist job from March 12 through June 30, 1993, after which she was sent back to her regular technician job. At that time, she refused to return to her regular job but took one in the Infirmary unit, resigning in November of 1994 to devote more time to her education in an LPN program. In the meantime, the family doctor had given an unequivocal opinion that her psychological problems were caused by the attack. The employer requested that Ms. Daugherty be examined by Dr. Gagliano again, which she refused to do, at which point the defendant advised that any right to compensation would be suspended, pursuant to N.C.G.S. § 97-27(a). Her lawyer withdrew from representation, then died. Ms. Daugherty filed a Form 33 Request for Hearing in January of 2006, seeking retroactive benefits. The case was bifurcated for addressing first the defendant's contention that the claim was barred by laches. Deputy Commissioner Rowell decided that the claim was not time-barred, but the Full Commission dismissed the claim with prejudice.

The Court of Appeals, Judge Stephens writing, with Judges Steelman and Deer concurring, reversed in part and remanded, holding that the equitable doctrine of laches does not apply to failure to prosecute in workers' compensation claims, because Industrial Commission Rule 613 provided an adequate remedy at law, as distinguished from the cases in which equitable estoppel had allowed employees to avoid the filing time limitation in N.C.G.S. § 97-24, where

there was no such remedy. The Court then analyzed whether supportable findings allowed dismissal under that rule, opining that while the requirements that 1) the delay was deliberate or unreasonable and 2) the defendant was prejudiced (by preventing the defendant from obtaining information or take steps to mitigate their exposure) were satisfied, the element that 3) a sanction short of dismissal would not be sufficient had not been addressed by the Commission. The case was remanded for consideration of that element. There was no discussion as to whether Rule 613 applied in a case that did not involve a voluntary dismissal or withdrawal of a claim. Also, while the Court's analysis of the applicability of an equitable principle to the case is sound, there does not appear to be much practical difference between laches and Rule 613 as applied.

Erickson v. Siegler, _____ N.C. App _____, 672 S.E.2d 772 (2009)

Mr. Erickson felt a pop in his back while turning, shortly after having moving heavy things around while changing the axle on a water truck. He had immediately severe symptoms in his lower back and legs and was seen by doctors at the VA. The defendants accepted the claim without prejudice, pursuant to N.C.G.S. § 97-18(d) and did not revoke that acceptance. Upon referral, neurosurgeon Dr. Detamore determined that Mr. Erickson had problems arising from both is neck, where he had had a previous fusion surgery, and his lower back and performed surgery on the neck. Dr. Detamore was also of the opinion that the neck problems were causally related, by significant contribution, to the incident at work. Soon after the surgery, Dr. Detamore retired, and Mr. Erickson's care was transferred to Dr. Wadon, another doctor at the same practice, who disagreed on causation of the neck problems, ascribing them entirely to unrelated, pre-existing degeneration. She assigned a rating of 10% permanent partial disability of the lower back and referred him to a pain management doctor, Dr. Harris, who diagnosed lower back problems caused by the injury and neck problems secondary to the surgery, treated him and assigned a 5% rating. A functional capacity evaluation resulted in sedentary work restrictions. Mr. Erickson filed a Form 18 a little more than two years after his injury, claiming injuries to his back and legs. Three months after that, he filed a Form 33 Request for Hearing alleging injury to the upper, middle and lower back. The defendants admitted liability for the lower back, but denied it for the neck. A separate motion was filed, for the claim for the neck problems to be dismissed as not timely filed. The defendants obtained a compulsory medical examination from orthopedist Dr. Parikh, who opined that the neck problems were not related to the compensable incident. The Deputy Commissioner and the Full Commission, with then-Chairman Lattimore dissenting, rejected the motion to dismiss and gave greater weight to the opinions of the original treating neurosurgeon, Dr. Detamore, in awarding on-going compensation for total disability and medical benefits for the neck as well as the lower back.

The Court of Appeals affirmed, holding that the defendants had accepted the claim, as opposed to a body part. The Court noted that there had been no specific limitation of the parts accepted and that to require the injured worker to make claims for specific body parts would require him to diagnose the causes of his own medical problems before making a claim. The Court further noted that the employer had paid medical bills for treatment that included treatment of the neck, and that Mr. Erickson's filings detailing body parts had been submitted less than two years after those payments, which provided an alternative timely filing, pursuant to N.C.G.S. § 97-24(a)(ii). The Court also rejected the defendants' argument that the Commission had erred in finding a causal relationship between the incident and the neck problems, when Dr. Detamore's

testimony, to which the Commission had explicitly accorded more weight, supported it. The Court specifically rejected the argument based on failure of "magic words," when Dr. Detamore had testified that he could not give an opinion "to a reasonable degree of medical certainty," but causation was more likely than not. The case was remanded for detailed findings as to the average weekly wage, as the Form 22 Wage Chart that supposedly resulted in the Commission's figure did not appear to support it.

Gregory v. W.A. Brown & Sons, _____ N.C. App _____, 664 S.E.2d 589 (2008); 362 N.C. 681; 670 S.E.2d 232 (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.

Meares v. Dana Corp., _____ N.C. App _____, 666 S.E.2d 819 (2008), disc. review denied, 363 N.C. 129, 673 S.E.2d 359 (2009)

Mr. Meares suffered an admittedly compensable right knee injury, and the defendant also accepted liability for aggravation of pre-existing degeneration in the left knee, caused by the injury to the right knee. In a prior proceeding, the Commission had determined that the defendant was entitled to credit against total disability compensation for money paid under a severance package. The Court of Appeals reversed that. While that appeal was pending, the defendant requested a hearing asking the Commission to declare Mr. Meares permanently and totally disabled, noting that he had refused to sign a Form 21 Agreement to that effect. The Commission ordered continued compensation for temporary, total disability, noting that Mr. Meares had still not reached maximum medical improvement for the left knee, and awarded attorney's fees to plaintiff's counsel under both N.C.G.S. § 97-88 for the "no fault" ground that there had been an appeal resulting in a decision for the plaintiff ($5000) and § 97-88.1 for unreasonable pursuit of the hearing ($10,000), finding that nothing had changed since TTD was awarded in the prior proceeding.

The Court of Appeals affirmed, holding that the Commission had properly decided that compensation for permanent, total disability was inappropriate, when the injured worker had not reached maximum medical improvement as to all of the injuries in the claim. The Court analyzed the issue under N.C.G.S. § 97-47, holding that there had not been a change of condition, so there was no basis for seeking review of the previous award by the Commission. The Court further held, on *de novo* review, that pursuit of the hearing had been unreasonable, for the same reason, and that the evidence did not indicate an abuse of discretion by the Commission in awarding fees under N.C.G.S. § 97-88.1. In discussing the Commission's discretionary decision, the Court noted approvingly that the Commission had expressed suspicion that the defendant was trying to start the clock on limiting time for Mr. Meares to make a death claim, particularly because he had experienced deep venous thrombosis and pulmonary embolus during the right knee replacement that posed a potentially life-threatening complication when the left knee is replaced in the future.

Discretionary review was denied.

Kyle v. Holston Group, 188 N.C. App. 686, 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), disc. review denied, 363 N.C. 128, _____ S.E.2d _____ (2009)

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.

Sprinkle v. Lilly Indus., _____ N.C. App _____,____ S.E.2d ____(2008)

Mr. Sprinkle was injured in a car wreck while traveling between work sites. The defendants denied the claim, arguing that injury was not within the course of employment and lost, appealing to the Court of Appeals, which affirmed in an unpublished opinion. In the meantime, Mr. Sprinkle obtained extensive medical treatment, which was paid for by his health insurance, then by the same insurance under a COBRA extension after he lost his job, and then under his wife's insurance, when COBRA coverage expired. After finally losing the claim, the carrier paid the appropriate wage compensation, reimbursed Mr. Sprinkle for his out-of-pocket medical expenses and reimbursed the health insurance carriers for what they had paid. Mr. Sprinkle then filed for a hearing, seeking interest pursuant to N.C.G.S. § 97-86.2 for the time during which the first appeal was pending. The Commission awarded interest on the wage compensation and Mr. Sprinkle's out-of-pocket medical expenses, but denied it as to the medical expenses that had been paid for by the health insurance carriers, which would have brought the total to nearly $200,000. Mr. Sprinkle also sought attorney's fees as a sanction for unreasonable defense, which the Commission denied. Mr. Sprinkle appealed.

The Court of Appeals affirmed, holding that interest was only payable to compensate Mr. Sprinkle for loss of the "use value" of the money of which he was deprived, and that none could be assessed as to money lost by the health insurance carriers. The Court worried about the potential windfall to Mr. Sprinkle otherwise, and was not persuaded that the interest could be independently justifiable as a penalty, in the absence of a compensatory goal. Mr. Sprinkle's motion to compel discovery of the amounts paid to the health insurance carriers was properly denied, as the decision that he could not have interest based on those amounts rendered the information sought irrelevant. The Commission did not abuse its discretion by refusing to award attorney's fees.

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.

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. Seagraves issues.

Jones v. Modern Chevrolet, _____ N.C. App _____,_____ S.E.2d _____(2008)

Mr. Jones suffered an admittedly compensable injury to his right knee. The employer did not have light duty available, so he continued out of work while conservative treatment failed and he underwent arthroscopic surgery for a bad torn meniscus. Shortly before surgery, he also reported pain in his left knee. He was released to return to work with no restrictions on April 25, 2005. He continued to complain of left knee pain and received a second steroid injection in it in May of 2005. That did not help, and he was sent for an MRI. On July 1, 2005, Mr. Jones was terminated, ostensibly for poor workmanship on a brake job. The next day, he received the results of the MRI, which indicated a torn meniscus in the left knee, for which he underwent surgery on September 27, 2005, after undergoing an examination by another orthopedist that was required by the defendant. He eventually received ratings to both knees and was released to sedentary work. The defendant accepted the claim for both knees and paid compensation for all

time out of work, except for the period between the termination on July 1, and the surgery on September 27. After Mr. Jones requested a hearing seeking compensation during that period, Deputy Commissioner DeLuca denied and the Full Commission awarded it.

The Court of Appeals, Judge Arrowood writing, remanded for findings of fact, holding that the Commission had merely recited testimony without stating its own findings. Specifically, the Court required findings as to whether Mr. Jones was, at the time of his termination, in a "vulnerable" position in his employment, which the Court held to be a necessary prerequisite to application of the Seagraves analysis, in which the employer bears the burden of proving that the injured worker was terminated for misconduct independently of his workers' compensation claim. The Court noted that there was evidence sufficient to support application of Seagraves, that it was not necessary to show that an employee was working under restrictions, and that the Commission could infer that Mr. Jones' left knee condition during the time he was working and when he was terminated was similar to when the MRI was obtained.

Judge Wynn dissented, opining that the Commission had properly applied Seagraves without any need to make specific findings that Mr. Jones was "vulnerable."

9. Suspension of compensation for refusal of suitable employment.

Munns v. Precision Franchising, Inc., _____ N.C. App _____, 674 S.E.2d 430 (2009)

Mr. Munns was working as a service technician, earning $730.38, when a car rolled over his left foot and leg. His claim was accepted. Surgery involving installation of a plate in his leg was performed, and a Functional Capacity Evaluation concluded that he could do moderately heavy work, as long as he did not stand, walk or crawl for more than 30 minutes between 15 minute breaks. Dr. Sanitate assigned sedentary restrictions, but approved a job as a service writer that was presented by the defendants, despite lack of any reference to standing and walking requirements in the description and a letter from plaintiff's counsel containing information about those things. Mr. Munns refused to accept the service writer position, on grounds that it was a make-work job, was outside his physical capabilities and did not pay enough to be a suitable replacement for his job of injury. There was another meeting with Dr. Sanitate, including a representative of Mr. Munns' lawyer's office, which led again to approval of the described job. The first Form 24 Application to Stop Payment was denied, on grounds that the job description did not adequately describe the physical requirements of the job and that the documented pay scale was not sufficiently close to the pre-injury wage. The second one was referred for an evidentiary hearing. The Commission found and concluded that Mr. Munns had refused suitable employment and suspended compensation after the date of the second meeting with Dr. Sanitate.

The Court of Appeals remanded for additional findings of fact, holding that on both the issue of wage suitability and the issue of physical suitability, the purported findings had been nothing more than recitations of the evidence. The Court acknowledged that disparity in wage between the average weekly wage and the wage for the offered substitute employment was a

factor to be considered in determining suitability, then noted that the Commission had recited conflicting testimony on how much would be earned, including Mr. Munns' testimony that there had not been a full-time service writer at that store for about a year, without stating its finding as to which testimony it was accepting and what the wage was. The Court held that the decision that the job was not "make-work" was supported by evidence that the employer had been advertising for employment of a service writer to the general public.

10. Barring claims for misrepresentations in hiring process.

Freeman v. J.L. Rothrock, 189 N.C. App. 31, 657 S.E.2d 389 (2008), reversed and discretionary review improvidently allowed, 362 N.C. 356, 662 S.E.2d 904 (2009)

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."

The Supreme Court reversed, *per curiam*, "for the reasons stated in the dissenting opinion," and remanded to the Court of Appeals for consideration of issues that were not considered there—whether the evidence supported the Commission's findings and conclusion that Mr. Freeman had proved disability and whether the defendants were entitled to credit against compensation for total disability for proceeds Mr. Freeman had received in prior settlements of other claims with other employers (which the Commission had rejected).

11. Employee definition.

Baccus v. N.C. Dep't of Crime Control & Pub. Safety, _____ N.C. App _____, 671 S.E.2d 37 (2009)

Ms. Baccus was injured while in military training in California, as a member of the North Carolina Army National Guard. She received some benefits through the Veterans' Administration and sought additional benefits for North Carolina workers' compensation, for inability to perform her civilian job as a nursing assistant. The only issue was whether the Industrial Commission had subject matter jurisdiction over the claim. The Commission decided that it did and awarded benefits.

The Court of Appeals vacated, holding that Ms. Baccus did not, at the time of her injury, meet the definition of "employee." The Court acknowledged that the case was one of first impression and that the statute was not clear. There had been prior appellate cases in which National Guard personnel had been determined to be employees of the State when injured in National Guard activities. However, those cases had been decided before a 1999 amendment to N.C.G.S. § 97-2(2) that had added to the part in which "employee" includes National Guard personnel the language "while on State active duty under orders of the Governor." National Guard employment status is complicated by the way that activity is generally paid for by the Federal Government, while control is shared between Federal and State authorities. The Court opined that the addition of the language had been in response to the decisions in the prior cases and was intended by the General Assembly to provide workers' compensation jurisdiction only when injuries occur while personnel are engaged in activities for which they have been specially called up by the Governor, such as responding to riots or natural disasters.

12. Subcontractor issues.

Putman and Thompson v. Alexander, _____ N.C. App _____, 670 S.E.2d 610 (2009)

Mr. Putman and Mr. Thompson were working on a deck as employees of Randy Alexander when the deck collapsed, causing injury to both. Their claims were consolidated for hearing, and the Court of Appeals wrote identical opinions on the appeals related to both plaintiffs. The work was being performed on new construction at a residential development project named the Villas of Provence. The land was owned by William Patterson. His daughter

Marsha Patterson-Jones, was a licensed general contractor and owner of Majestic Mountain Construction, Inc., which was the general contractor for the Villas of Provence project. Her husband, Ben Jones, was the site manager for the project. Nobody had any workers' compensation insurance. It was undisputed that Ben Jones had arranged for Randy Alexander to do carpentry work on the project. The injured workers filed claims against Alexander as their employer and against Majestic Mountain and Marsha Patterson-Jones as an upstream general contractor, pursuant ot N.C.G.S. § 97-19. The Industrial Commission awarded compensation to be paid by Majestic Mountain (and Randy Alexander) and assessed personal liability for penalties, in the amount of all benefits awarded, against Ms. Patterson-Jones, as a person in a position to obtain workers' compensation insurance for Majestic Mountain who failed to do so, pursuant to N.C.G.S. § 97-94(d).

The Court of Appeals affirmed, despite several arguments, some quite specious, through which Majestic Mountain and Ms. Patterson-Jones attempted to squiddle out for under liability. First, the Court dismissed the appeal as to Mr. Thompson, because the notice of appeal was erroneously served on Mr. Putman's attorney, then granted the defendants' petition for writ of certiorari to hear the appeal, anyway. The Court then rejected arguments, among others, that Ben Jones had not been an employee of or an authorized agent of Majestic Mountain when he hired Alexander (there were Majestic Mountain business cards with his name on them) and that Ms. Patterson-Jones was a part-owner of the project, which would make the contract with Alexander a general one instead of a subcontract (there was no evidence, other than a vague verbal assertion of a phantom transfer of a 15% interest sometime before the accident that made her an "undisclosed principal"). The Court also rejected arguments that the sanction under § 97-94(d) did not apply to statutory employers defined by § 97-19 and that the magnitude of the sanction, which could be in the total amount of compensation owed, was limited to wage compensation and did not include medical compensation.

13. Causation issues, including Pickrell presumption.

Reaves v. Industrial Pump Service, _____ N.C. App. _____, _____ S.E.2d _____ (2009)

Mr. Reaves, a welder, and a partner were sent by the employer to a paper plant in Virginia to repair a piece of equipment for a customer. The room in which the equipment was located was hotter than the surrounding area, and Mr. Reaves complained a couple of times that he felt hot and needed to leave the room. Most of the time, his partner was doing the work, though Mr. Reaves stayed in the room pursuant to company policy of having a second person around for safety. At some point, about 12 hours into the project, the partner walked Mr. Reaves to their truck and left him in the passenger seat, telling him he would return in about 45 minutes. When he returned to the truck, Mr. Reaves was dead. An autopsy revealed that he had severe atherosclerotic cardiovascular disease, and the cause of death was determined to be coronary artery disease. The Industrial Commission denied the claim for death benefits.

The Court of Appeals remanded for additional findings of fact, because 1) the Commission had failed to address whether the presumption of compensability of unexplained death, form the Pickrell v. Motor Convoy, Inc. was applicable, when there was evidence of pre-

existing heart disease, but even the defendants' expert had testified that that was not fatal on its own, in the absence of a precipitating event, 2) the Commission had found facts under the misapprehension of law that the relevant comparison in determining whether "extreme conditions" caused the death by a heart problem was between the conditions at the time of the death and the injured workers' usual work conditions, instead of comparing those conditions to conditions experienced by others in the general public, not so employed (though analysis of the alternative ground of "unusual or extraordinary exertion" would properly involve comparison of the exertion to the injured worker's usual exertion) and 3) the Commission had failed to make any findings as to whether the death was contributed to by the partner's lack of training, when there was expert safety testimony that Mr. Reaves should have been taken to a medical facility instead of being placed in the company truck, so that if the partner had received training that is required by OSHA for employees working in hot and humid workplaces, Mr. Reaves would not have died (the Commission erroneously discussed that testimony only as it applied to the issue of whether a 10% penalty for willful failure to comply with a safety requirement was appropriate under N.C.G.S. § 97-12)).

14. Credit.

Strickland v. Martin Marietta Materials, _____ N.C. App _____, 668 S.E.2d 633 (2008)

Mr. Strickland suffered a shoulder injury, and compensability was denied by the defendants. Benefits were paid for 26 weeks, pursuant to an employer-funded group short-term disability plan. Mr. Strickland lost at the Deputy Commissioner level but prevailed before the Full Commission. The Commission initially refused to allow any credit for the STD payments, citing the defendants' delay in filing their denial of the claim. On motion for reconsideration, the Commission allowed the credit, but reduced it by 25% to help fund the plaintiff's attorney's fee.

The Court of Appeals reversed, holding that discretion as to whether to grant the credit pursuant to N.C.G.S. § 97-42 for payments that were not due and payable when paid has been held not to be discretionary when a workers' compensation claim has not been accepted and that the exception in the Church v. Baxter Travenol Laboratories case that allows reduction to help fund plaintiffs' attorneys' fees, assuming the case is still valid law at all, is limited to circumstances, like in Church, in which the difference between the compensation awarded and the credit for the non-comp payments is so small as to interfere with the ability of the plaintiff to obtain counsel. In this case, the Court opined that plaintiff's counsel was being paid sufficiently without the reduction.

15. Average weekly wage.

Shaw v. U. S. Airways, Inc., 186 N.C. App 474, 652 S.E.2d 22 (2007), rev. 361 N.C. 630; 652 S.E.2d 231 (2008); 362 N.C. 457; 665 S.E.2d 449 (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.

16. Approval of disputed settlement agreements.

Chaisson v. Simpson, _____ N.C. App _____, 673 S.E.2d 149 (2009)

Mr. Caisson suffered an admittedly compensable injury to his knee, which his treating physicians expected to cause future arthritis problems that would require treatment. He refused to sign a Form 21 Agreement, presumably for the amount of his rating, and his claim was referred to an adjuster with a reputation for getting hard cases settled quickly, which led to the nickname "The Liquidator." Mr. Chaisson testified that while he was unrepresented, he negotiated a settlement with the adjuster for $97,500. The file was sent to Hedrick Gardner to prepare the clincher. After trading messages with the adjuster and writing to Mr. Chaisson, all of which confirmed the amount of settlement, the lawyer prepared a clincher in the amount of %97,500 and sent it to Mr. Chaisson for execution, with a cover letter reiterating the amount of the settlement and giving instructions and information. Mr. Chaisson signed it and mailed it back to the lawyer. By the time she sent it to Liberty Mutual for execution, the adjuster had left, and those remaining refused to sign, insisting that the amount of settlement was incorrect and should have been $25,000, possibly because medical information generated after the agreement was reached cast some doubt on the magnitude of future medical expense. Mr. Chaisson sent the

clincher, which he had signed, to the Executive Secretary for approval. The Executive Secretary decided that an evidentiary hearing would be necessary and referred the matter to a Deputy Commissioner. At that point, Mr. Chaisson hired Lenny Jernigan. The Commission approved the agreement.

The Court of Appeals affirmed, rejecting all of the attempted technical dodges presented by the defendants and citing the Lemly v. Colvard Oil Co. case, in which the Court had affirmed approval as a settlement of the summary signed at a mediation, when the defendant had filed it, after the plaintiff had reneged and refused to sign the clincher. The only real defense, that the clincher had not been signed by the defendants, was addressed by noting that the lawyer's signature on the cover letter provided the defendants' signature required to complete the written memorial of the agreement, as a matter of general contract law. The Court also held that the Commission had properly decided that the clincher was fair and just to all parties. Finally, the Commission did not abuse its discretion by awarding an additional 25% for attorney's fees as a sanction for unreasonable defense under N.C.G.S. § 97-88.1, as there was simply no evidence, other than obvious verbal lies, to support the carrier's contention that there had ever been agreement to any amount other than $97,5000, which was supported by multiple documents—including a clincher prepared by the carrier's lawyer—all testimony, and a complete lack of any documentation from the carrier to the contrary.

17. 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);_____ N.C. App. _____ ,_____ S.E.2d _____ (2009)

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 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.

Upon remand to the trial court, Mr. Hamby moved for reconsideration of the grant of summary judgment in favor of Terra-Mulch, on grounds that the Supreme Court's decision that Profile was to be treated as the employer allowed conduct of Profile to be imputed to Terra-Mulch, which would change the foundation of the summary judgment motion as to Terra-Mulch. That motion was denied. Thereafter, Mr. Hamby appealed the non-interlocutory grant of summary judgment in favor of Terra-Mulch. The Court of Appeals, Judge Wynn writing, affirmed, holding that the forecast of evidence did not rise to the level necessary to prove a Woodson claim. In rejecting the appeal of the denial of the motion to reconsider, which involved mostly quite extraordinary evidence of a report of safety deficiencies by an underwriting investigator, who termed Terra-Mulch's workplace the most unsafe he had seen, which resulted in refusal of a company to sell the employer workers' compensation insurance, the Court noted that the evidence still would not have supported Woodson liability. The refusal of the trial court to compel responses to discovery before granting summary judgment was held to be within that court's discretion, as Mr. Hamby had stated that the information sought would merely "bolster" his argument as to the Woodson claim that he contended was already supported by other evidence.

Hassell v. Onslow County Board of Education , 181 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.

Edwards v. GE Lighting Sys., _____ N.C. App _____, 668 S.E.2d 114 (2008)

Paul Edwards operated an annealing oven used in the manufacture of specialized lights. The annealing took place in an oxygen-free environment, high in carbon monoxide, that was produced by an exothermic generator. While taking a break behind an oven. Mr. Edwards died of carbon monoxide poisoning. His estate filed a lawsuit, alleging liability beyond the exclusive remedy of workers' compensation, under the framework announced in Woodson v. Rowland. The trial court denied the defendants' motion for summary judgment.

The Court of Appeals, With Judge Steelman writing and Judges Tyson and Stroud concurring, reversed, holding that the allegations—including the employer's failure to perform preventive maintenance for two years before the accident, that the employer had reduced its maintenance budget in the years preceding the accident, that an OSHA investigation following the accident had resulted in citations for serious violations, and that the employer had ignored a recommendation recommendations from a safety consulting firm that carbon monoxide monitors be installed—did not rise to the level required by Woodson to constitute intentional conduct, substantially certain to result in serious injury or death. In so doing, the Court noted that post-Woodson had been generally negative toward liability outside the exclusive remedy. One important factor was that, while OSHA citations were issued after Mr. Edwards' death, there were none regarding carbon monoxide before it. Curiously, the Court opined that there was no evidence that the employer knew its conduct was substantially certain to result in injury or death. One must assume the Court meant that the employer was unaware that its multiple failures to maintain or provide proper ventilation would result in an accumulation of carbon monoxide, as it

would be a bit insulting to suggest that the employer was so stupid that it did not realize that exposure to carbon monoxide kills people.

On a procedural interesting point, the Court rejected the plaintiff's argument that the appeal should be dismissed as interlocutory, citing Supreme Court authority for the proposition that depriving an employer of immunity from suit pursuant to the exclusive remedy was a sufficiently weighty right as to require allowance of an interlocutory appeal.

Christopher v. N.C. State Univ., ____ N.C. App. ____, ____ S.E.2d ____ (2008); _____ N.C. _____,666 S.E.2d 481 (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.

18. Litigation loans.

Cross v. Capital Transaction Group, Inc., _____ N.C. App _____, 661 S.E.2d 778 (2008); 363 N.C. 124, ____ S.E.2d ____ (2009)

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.

The defendants' petition for discretionary review was denied.

19. 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.