WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2010

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Disability, including proof.

Moore v Sullbark Builders, Inc., _____ N.C. App _____, 680 S.E.2d 732 (2009)

Mr. Moore was a trim carpenter who fell at work, suffering serious injuries. When he arrived at the hospital, he was given a urine drug test that was positive for cannabinoids and opiates. The defendants denied the claim, pursuant to N/C/G/S/ § 97-12, on grounds that the injury had been caused by intoxication. The Industrial Commission decided that the defendants had failed to meet their burden of proving that affirmative defense and awarded compensation for on-going total disability.

The Court of Appeals affirmed. There was testimony from competing doctors, but it appears that they both agreed that there was no way to tell that Mr. Moore was intoxicated from the urine test, both because the concentrations of marijuana metabolites were not stated and the test, because it was not being confirmed, stated on its report that it should not be used for non-medical purposes. There was no reference to opiates beyond the initial mention in the factual recitation part of the opinion. The Court also affirmed the finding of total disability, holding that evidence supported the decision that Mr. Moore had met his burden of proving that, with unsuccessful attempts to return to the employer (which demanded a signed waiver of liability for further injuries as a condition of return) and to a former employer that attempted to accommodate him, limited education, lack of experience in other fields, the impossibility that he would be able to earn his pre-injury wage at half-time work, which would require an hourly wage in excess of $26.00 and doctor's opinions keeping him out of work. The opinion, interestingly, lacks very specific analysis of specific prongs of Russell v. Lowe's Prod. Dist..

Freeman v. Rothrock, et al, 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), 363 N.C. 249, 676 S.E.2d 46 (2009), _____N.C. App _____, 689 S.E.2d 569 (2010)

This is the Court of Appeals decision on remand of the "leftover" issues, after the Supreme Court had reversed its holding that the claim could be barred for misrepresentations in the hiring process. The Commission, before the Court of Appeals' reversal on the misrepresentation issue, had awarded compensation for total disability and decided that the defendants were not entitled to any credit for the proceeds of prior clincher settlements. The defendants had appealed those parts of the Commission decision, as well, but they had not been addressed at the Court of Appeals the first time around, because that Court had held that the claim was barred in its entirety.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's findings and conclusions that Mr. Freeman had proved his total disability under

both the second and third prongs of the Russell v. Lowe's Prod. Dist. Test and that the Commission had correctly decided that prior clincher settlements could not be considered equivalent to accelerated payments of compensation for total disability. The third prong of the Russell test was satisfied with evidence and findings that Mr. Freeman was unable to perform any jobs he had had prior to his injury, so that he would need additional training before he could do something else, which rendered job search before that training was obtained futile. Contrary to the defendants' contention that his job search, under the second prong, had not been reasonable, because he had only tried to get jobs he was unable to do, the Court affirmed the Commission's decision that his failed attempts to find work in a field in which he had experience was proof of his disability.

2. Standard of review of Commission decisions.

Cannizzaro v Food Lion, _____ N.C. App _____, 680 S.E.2d 265 (2009)

Mr. Cannizzaro, a truck driver, was hit in the head by a falling box of Gatorade, then fell and hit his head on the floor, being knocked out for about five minutes. His claim was accepted. He suffered headaches, speech problems, mild memory deficits and other head injury symptoms. Radiology revealed nothing. He returned to work at full duty after about eight months. His family doctor wrote him out of work for diabetes, depression and cervical radiculopathy about six months later, but review by a specialist indicated no specific etiology for his symptoms. He obtained an opinion from a neuropsychologist in Pennsylvania that his problems were caused by a traumatic brain injury. Dr. Gualtieri, a neuropsychiatrist, opined that he had no organic cause of his symptoms, but that he did have a conversion reaction that was that was caused, at least in part and indirectly, by his accident. The Commission decided that the on-going symptoms and disability were caused by the compensable accident and awarded compensation. The defendant appealed.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision, specifically noting that the neuropsychologist in Pennsylvania was an expert competent to testify, despite not being a medical doctor, that the Commission had accurately found that his opinion and Dr. Gualtieri's were not entirely inconsistent and that the Commission had weighed the evidence properly, even when deciding not to give much weight to Dr. Schmickley's opinion. The defendants argued that the 1984 Court of Appeals case of Brewington v. Rigsbee Auto Parts had held that conversion disorders are not compensable, but the Court pointed out that the Court in that case had actually held that the Commission's decision in that case had been supported by competent evidence and was deciding the same thing here, just in the opposite direction. This last argument may be part of a trend of oversimplification in representation of case holdings that appears to have been increasing from the defense side recently.

Nale v Ethan Allen, ____ N.C. App _____, 682 S.E.2d 231 (2009)

Ms. Nale worked as an interior designer for the employer and twisted her left knee on the job. Medical treatment was relatively sporadic. She continued to work, receiving restrictions

along the way. She left employment with the employer on May 1, 2006, about 10 months after her accident, had surgery on her knee in September and returned to work about two weeks later for another employer. She filed for a hearing in February of 2007, had an injection in March and started having problems with her right knee in May. The Industrial Commission decided that she had suffered a compensable injury to her left knee, that the right knee problem were related to the left knee injury, and that she was entitled to compensation for total disability from May to September of 2006. The defendants appealed.

The defendants abandoned their contention that the left knee injury was not compensable, and the Court of Appeals reversed as to the compensability of the right knee and remanded as to the proof of disability, which was not dependent on the right knee. The Court held that the medical testimony as to cause of the right knee problems did not support the Commission's finding, as the doctor had testified that favoring the left knee would cause the right one to work harder, but the plica he found in the right knee would not have arisen due to overuse, and he only testified that the causal relationship was "possible." Ms. Nale's testimony that she felt that her favoring of the left was causing problems with the right was not competent. The disability issue was a mess, as the Commission had found that Ms. Nale voluntarily left her job with the employer in May of 2006 but had satisfied the job search requirements for South Carolina unemployment benefits thereafter and was, therefore, entitled to compensation until she returned to work, all of which the Court considered confusing. Worse, the Court mentioned that its review of the record appeared to show that Ms. Nale had transferred from the North Carolina location where she had been working to Charleston, South Carolina in February of 2006 to get married, but she lost her job when the store was bought out in May, after which she drew South Carolina unemployment benefits based on her most recent employment, which made more sense, but was not what the Commission had written.

3. Occupational disease, including coverage.

Hawkins v Gen. Elec. Co., _____ N.C. App _____, 683 S.E.2d 385 (2009)

Mr. Hawkins was exposed to chemicals at work and, after about five years at work, started suffering skin and breathing problems. His doctors diagnosed a delayed hypersensitivity allergy to chemicals at work, which eventually required him to leave the employment. His problems improved after leaving the workplace and it was determined that he would be unable to work at any job where he would be exposed to the chemicals to which he was allergic. The Commission decided that both the contact dermatitis and the asthma were occupational diseases and awarded compensation for total disability and medical benefits. The defendants appealed.

The Court of Appeals affirmed in part and reversed in part, holding that while there was evidence to support the Commission's decision that the asthma was caused by the exposure at work, there was no evidence that Mr. Hawkins' exposure placed him at a greater risk than others of sustaining the asthma. It is hard to imagine that the doctors would not have testified to that, and the answer was pretty obvious, but apparently the question was never asked specifically enough for the Court. The Court held that there was sufficient evidence to satisfy both criteria as to the contact dermatitis and that Mr. Hawkins had proved his disability with evidence that he

was 63 years old when he left the employer, had spelling and math skills below high school level, had worked exclusively in aircraft assembly and maintenance and would require significant training to get a job in a different industry. The Court noted that evidence had been presented to satisfy the last three prongs of the Russell v. Lowe's Prod. Dist test, but did not state the Commission's specific findings or any evidence of job search or return to work at reduced wages. Most significantly, the Court distinguished the decision in Sebastian v. Mona Watkins Hair Styling, in which an onset of contact dermatitis caused by aggravation of the plaintiff's pre-existing sensitivity to chemicals had resulted in compensation only until symptoms cleared, noting that Sebastian was decided before Russell, which provided a framework for proving inability to earn wages due to the compensable condition.

Jones v. Steve Jones Auto Grp., 363 N.C. 745, 687 S.E.2d 687 (2009)

Mr. Jones was part owner of a car dealership. When a building was remodeled, the construction company failed properly to seal the exterior walls, which resulted in a lot of mold in the walls and other interior surfaces. Over time, Mr. Jones began to suffer respiratory symptoms and cognitive difficulties, eventually resulting in his being removed form work by the majority owner. The Industrial Commission determined that Mr. Jones had an occupational disease and awarded compensation and medical benefits. The defendants appealed.

This case wasn't really close, and the Court of Appeals, Judge Stephens writing, affirmed. In the process, she rejected arguments based on 1) alleged failure to prove increased risk: the defendants included an argument that there was no evidence that the nature of employment in a car dealership increased risk of disease from mold exposure, which the Court shot down by pointing out that the question was whether the specific employment circumstances of the individual employee increased the risk, and the requirement that Mr. Jones work in a building that exposed him to an elevated amount of mold did so,;2) alleged speculativeness of medical testimony: the defendant asserted that the medical opinions on cause were based on mere temporal relationship between the exposure and the onset of symptoms, which the Court pointed out was not true, because it was also based on the fact that Mr. Jones was exposed; and 3) alleged peculiar sensitivity: the doctors had testified that the inflammatory response in Mr. Jones' lungs was not a simple allergic reaction to something, which allergy pre-existed the exposure. The issue of treatment of the lien against proceeds of Mr. Jones' third party claim against the construction company was remanded to the Commission, which had not considered it, despite the plaintiff's argument that by failing to present evidence as to the lien at hearing, the defendants had waived it. It is not clear whether the Court meant to restrict the forum for addressing the lien to the Commission, which can only distribute it in accordance with the basic statutory framework, unlike a Superior Court judge, who can adjust the lien as necessary.

Evans v Conwood LLC, _____ N.C. App _____, 681 S.E.2d 833 (2009)

Ms. Evans testified that she worked with her hands constantly. She ultimately developed carpal tunnel syndrome. Her claim was denied. Further, there was conflict between the employer and an insurance carrier, because Ms. Evans' symptoms and diagnosis occurred during the period that the carrier was at risk, but she did not go out of work until a few months after the employer had become self-insured. The Commission decided that the CTS was a compensable

occupational disease and that the claim accrued when Ms. Evans went out of work for surgery, so that the employer was liable as a self-insured. The employer appealed.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision as to the foundation of the plaintiff's hypothetical question that generated the medical opinion that the CTS was caused by work activity and that the activity placed Ms. Evans at a greater risk of getting CTS than the general population not so employed. Much of the employer's argument consisted of a demand that the Court crawl through the evidence and reweigh it, which the Court declined to do. The decision that the employer was liable as self-insured was supported by the evidence that even though Ms. Evans had been having significant symptoms before the change in coverage, she continued to work thereafter and continued to deteriorate, so the last injurious exposure occurred during the self-insured period. The Court expressed some grumpiness that the employer cited a case in its brief without either notifying that it was unpublished or sending a copy to opposing counsel, but declined to assess sanctions.

4. Resumption of compensation after unsuccessful trial return to work.

Davis v. Hospice & Palliative Care, _____ N.C. App _____, _____ S.E.2d _____ (2010)

Ms. Davis, a nurse, suffered an admittedly compensable injury while lifting a patient and developed significant pain problems, that were diagnosed by some, but not all, of the testifying medical experts, as Complex Regional Pain Syndrome. She was sent to a lot of doctors, including an examination she obtained by order of a Special Deputy Commissioner by Dr. Rauck, who opined that she had CRPS and recommended a spinal cord stimulator for treatment thereof. At that, the defendants filed a Form 61, "denying" the claim by reporting that it was limited to cervical strain only. The same Special Deputy Commissioner denied Ms. Davis' request to have Dr. Rauck designated her authorized treating physician, so a Form 33 Request for Hearing was filed for that purpose. Several days before the hearing, the employer offered Ms. Davis a desk job. The job was approved by Dr. Hansen, who didn't think she had CRPS, and Dr. Rauck approved it with stated restrictions on use of the left hand and arm. A Form 24 Application to Stop Payment was filed after she failed to show up for orientation as instructed. She then attempted the job, lasting for about five weeks before Dr. Rauck took her out. Ms. Davis' lawyer notified the defendants promptly, first by e-mail and then with presentation of a Form 28U prepared by Dr. Rauck, that the trial return to work had been unsuccessful, but the defendants refused to resume compensation. More than a year later, the Deputy Commissioner reinstating compensation for total disability since the departure from work, awarding a late payment penalty of 10% for all compensation that was past due by 14 days, designating Dr. Rauck as the authorized treating physician and ordering payment for denied medical treatment. The defendants appealed.

The Court of Appeals affirmed. In the most important part, the Court rejected the defendants' argument that they had been improperly denied the opportunity to take Dr. Rauck's testimony for purposes of resisting the motion to reinstate compensation, holding that pursuant to N.C.G.S. § 07-32.1, reinstatement of compensation is automatic upon notification that an injured

worker's trial return to work has been unsuccessful, which the defendants received via the e-mail (before the Form 28U was prepared), so that defendants do not have a right to present any evidence on the issue. The most important part of the opinion is the assumption that an "unsuccessful" return to work is defined simply as one in which the employee is no longer working, which allows § 97-32.1 to fulfill its purpose, without allowing defendants to tangle up the resumption of compensation in arguments about the reasons workers might be out. The Court mentioned that the defendants' remedy, if it wishes to argue that the reason for the absence from work does not qualify the employee for compensation, is by Form 24 or hearing request. The Court also held that the evidence supported the Commission's decision that Ms. Davis had proved her disability and that the motion to change treating physicians was not barred by failure to appeal the Special Deputy's denial of it, as such things can be addressed by hearing at any time.

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

Watkins v. Trogdon Masonry, Inc., _____ N.C. App _____, _____ S.E.2d _____ (2010)

Mr. Watkins delivered a forklift to a repair place for repair of a flat tire. The repair people informed him that the tire would have to be replaced. Mr. Watkins waited while attempting to contact the employer for authorization. After having sat around for a while, he stood up, stretched, walked a few steps and fell, fracturing his hip. While he was being treated for that, doctors discovered that he had chronic blocked coronary arteries but did not appear to have had a recent heart attack. He gave a recorded statement in which he said that his leg had just given way. The Deputy Commissioner found a compensable accident, but the Full Commission reversed. Mr. Watkins appealed.

The Court of Appeals affirmed, rejecting arguments that 1) the paper transcript of the recorded statement should not have been admitted into evidence, as it was not the best evidence of the statement, when the tape of it was available: the Court noted that there had been no contemporaneous objection to the statement based specifically on that theory, so that the defendants were not given the opportunity to cure the alleged defect by presenting tapes that the adjuster had with her at her deposition, and in any event, she had testified that the transcript was accurate and that she had independent recollection of the statement; 2) the Commission had implicitly decided that a heart-related problem had caused the fall, when the evidence did not support that: the Court noted that the Commission had not found that; and 3) the Commission's decision that the fall was caused by an idiopathic condition was not supported by the evidence: it was.

6. Liability for medical expenses—attendant care.

Boylan v. Verizon Wireless, _____ N.C. App _____, 685 S.E.2d 155 (2009)

Ms. Boylan suffered a compensable back injury and got a lousy result from L5-S1 fusion

surgery. She was left with severe pain and weakness, tended to fall frequently and had a hard time taking care of herself. She was cared for for about two years by a daughter who moved up from Georgia to do it, then Ms. Boylan moved to be closer to her sister, who took over care, along with the sister's husband, as allowed by their work schedules. She filed for a hearing, seeking an order that she was permanently and totally disabled, as well as for past and future attendant care, life care planning and home modifications. The Deputy Commissioner awarded all of that, except the life care planning, and awarded an attorney's fee of 25% of both the on-going compensation for total disability and the payments to the family for attendant care. On review, the Full Commission affirmed everything, except for refusing to declare the total disability to be permanent and eliminating the fee from the attendant care.

The Court of Appeals mostly affirmed, holding that there was evidence to support all of the parts of the Commission's decision, and that the Commission had properly considered the life care planning before refusing to order it. The most important part of the decision was that the order of retroactive attendant care was not prohibited by a provision in the Industrial Commission rating guide that ostensibly requires prior approval for it. The Court focused instead on the statute. Ms. Boylan's appeal as to the fee (which had been reduced by the Commission entirely on its own initiative) was dismissed, as the Court lacked jurisdiction, because the only available route for challenging the Commission's decision is through Superior Court.

7. Procedural issues, including notice, appeals, and fees.

Gregory v. W. A. Brown & Sons, 192 N.C. App. 94. 664 S.E.2d 589 (2008), 363 NC 750, 688 S.E.2d 431 (2010)

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.

The Court of Appeals, Justice Newby writing, reversed on the appealable issue, holding consistently with Judge Jackson's dissenting opinion. The Court distinguished Richardson v. Maxim Healthcare, in which it had held about a year earlier that actual notice was sufficient to satisfy the notice requirement, without a separate showing of prejudice, on grounds that Richardson had involved an acknowledged verbal notice, while this case involved a denial by the employer that notice had been given, along with some messy, misleading medical records. The Court predicted, in dicta, that there could be cases in which non-written notice was given that was insufficient in its content to allow an employer to act so as not to be prejudiced.

Justice Hudson dissented, joined by Justice Timmons-Goodson, opining that once the Commission had decided that notice had been given, there was no distinction between this case and Richardson and refusing to accept that there would be situations in which actual notice was not sufficient to eliminate prejudice.

Fonville v Gen. Motors Corp., _____ N.C. App _____, 683 S.E.2d 445 (2009)

Ms. Fonville suffered an admittedly compensable injury at an employee appreciation luncheon when she was hit on the head by a tent pole. She was out of work for about three months before being released by her family doctor to return for four hours per day. Interestingly, the employer's Form 60 was filed the day after she returned to work. After a couple of days, her hours were reduced to two per day, after complaints that looking at her computer made her head and left eye hurt. A couple of weeks later, she returned to the doctor complaining of totally disabling headaches and was sent a neurologist, who determined that the headaches were coming form uncontrolled high blood pressure. On November 29, 2005, the neurologist released her to return to work on January 2, 2006, expecting that she would be at MMI by then. Ms. Fonville was terminated for unrelated reasons on November 22, 2005, and the defendant unilaterally stopped compensation for total disability at the end of January. She returned to work for another employer in September of 2006, without having made any attempts to find a job before then. The Commission denied additional compensation for total disability and any further medical treatment.

The Court of Appeals reversed, holding that when the defendant had accepted the case and was paying compensation, then stopped compensation without following proper procedures to do so, the injured worker was not required to prove disability, and compensation should have been paid until Ms. Fonville returned to work, which is a circumstance under which compensation can be stopped without the Form 24 procedure. Judge Calabria was unimpressed by the defendant's complaint that it was being required to pay compensation that was not due, noting quite forcefully that the blame for that situation lay with the employer for having ignored the Act and Commission rules. The Court also held that the 10% penalty should be paid. The plaintiff's appeal of the Commission's denial of medical benefits was rejected, on grounds that there was evidence to support the decision that none was needed, as there was no evidence to contradict the neurologist's opinion that Ms. Fonville would be at MMI on January 2, 2006.

Berardi v. Craven Cty. Schools, _____N.C. App ____, 688 S.E.2d 115 (2010)

Ms. Berardi suffered an admittedly compensable back injury. Her authorized pain management doctor treated her with drugs, injections and radiofrequency ablation. When the doctor ordered additional radiofrequency ablation procedures, the defendant refused to pay for them. Ms. Berardi filed a Form 33, requesting the expedited procedure for handling medical treatment requests, pursuant to N.C.G.S. § 97-78(f) and (g). The Commission ordered the treatment, and the defendant appealed. The total time to decision, from filing of the Form 33 Request for Hearing to the Full Commission order was, somewhat longer than anticipated by the statute, a little more than four months. The Court of Appeals decision was filed about one year after the Full Commission decision.

The Court of Appeals dismissed the appeal as interlocutory, as the defendant argued that the condition that was to be treated by the denied treatment was not caused by the compensable injury, which would require an evidentiary hearing to determine. The Court was clearly aware of purpose behind the expedited procedure and that allowing appeals to the Court of Appeals would thwart it.

Silva v. Lowe's Home Improvement, ____ N.C. App _____, 676 S.E.2d 604 (2009)

This is the second time before the Court of Appeals for this case. Mr. Silva suffered a couple of work-related injuries, including this one, and had significant restrictions. During a meeting with a supervisor about work activities that Mr. Silva found difficult, things got heated, and Mr. Sylva was fired. The Full Commission's decision that the firing was directly related to the light duty job restrictions and that the defendants had failed to show that a non-disabled employee would have been fired in the same circumstances was affirmed by the Court of Appeals, but the case was remanded for more specific findings as to whether Mr. Sylva had proved disability. On remand, the Full Commission sent the case back down to a Deputy Commissioner for the taking of additional testimony on the disability issue. The Full Commission then awarded compensation for total disability through the date of hearing and beyond. The defendants appealed.

The Court of Appeals affirmed, holding that the Full Commission had not exceeded the bounds of the remand, violated statute or rules or abused its discretion by having the Deputy take

additional evidence. The Court also noted that the defendants had not only failed to object to the use of the Deputy or the taking of additional evidence, they had agreed in a pre-trial agreement to the witnesses and issue, so any claim of irregularity had been waived. The Commission's finding of disability was sufficiently supported by the treating doctor's testimony that he did not think Mr. Silva could, as a practical matter, continue in gainful employment, under the first prong of the test is Russell v. Lowe's Prod. Dist. Mr. Silva's argument that the Commission had erred in failing to award attorney's fees as a sanction for unreasonable defense, pursuant to N.C.G.S. § 97-88.1, was not properly preserved.

D'Aquisto v Mission St. Joseph's Health, _____ N.C. App _____, 680 S.E.2d 249 (2009)

Ms. D'Aquisto's case was complicated, but the only issue at this stage was attorneys' fees. In her original victory before the Industrial Commission, the full contingency fee had been awarded, as a sanction pursuant to N.C.G.S. § 97-88.1, to be paid by the defendant, above and beyond the award of compensation. The Court of Appeals affirmed, but the Supreme Court held that the defense had not been unreasonable. The decision was then remanded to the Full Commission, which, on motion of the plaintiff, modified its previous order by providing that the fee was to be paid out of Ms. D'Aquisto's recovery, which resulted in payment by the defendant of two initial checks, including an attorneys' fee of about $27,000. Thereafter, she moved the Commission for an order of attorneys' fees to be paid by the defendant, pursuant to § 97-88, for prevailing on an appeal brought by the defendant, and the Commission awarded about $36,000. The defendant appealed.

The Court of Appeals affirmed, holding that the Supreme Court's decision that fees were not available under § 97-88.1 did not bar an award under § 97-88, which does not require a finding of unreasonable defense. The defendant also argued that the plaintiff could only seek the fees during the proceeding to which they were applicable before the Commission, and not when there was no longer an appeal pending before the Commission, citing a Court of Appeals case, apparently not noticing that it had been reversed on that issue by the Supreme Court. The defendant was also not successful in arguing that litigation had ended when the contingency fee was awarded on remand, so as to foreclose further proceedings, when the issue of fees pursuant to § 97-88 had not been addressed.

Soder v. Corvel Corp., _____N.C. App _____, 690 S.E.2d 30 (2010)

Mr. Soder lost his claim for occupational disease before the Deputy Commissioner and appealed to the Full Commission. After the defendants filed a motion to dismiss the appeal, on grounds that Mr. Soder had failed to file timely his brief and Form 44, Mr. Soder filed a response to the motion that also included a brief and Form 44 and a motion that they be deemed timely filed. The Commission denied the motion, dismissed the appeal and denied a motion for reconsideration. Mr. Soder appealed.

The Court of Appeals affirmed, holding that not only did the Commission not abuse its discretion in refusing to allow the appeal to go forward, but that failure to file anything stating the grounds for appeal could not be waived by the Commission. Mr. Soder argued that that only applied to cases in which the appealing party failed to file at all, while the filing in this case had

merely been late. The Court held that the Commission was permitted to interpret its own rules and had done so and that the Commission had not abused its discretion. The motion to reconsider on grounds of excusable neglect was deficient in failing to mention excusable neglect

Baxter v Nicholson, 191 N.C. App. 168, 661 S.E.2d 892, (2008), 363 NC 829, 690 S.E.2d 265 (2010)

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.

On discretionary review, the Supreme Court reversed, holding that N.C.G.S. § 128-7, which provides that State officers continue in their offices until their successors are "duly qualified," is not inconsistent with Article VI, Section 10 of the North Carolina Constitution as to appointed officers, and that qualification included taking the oath of office, which Commissioner Bolch's successor had not yet done when the opinion and award was filed.

Justice Brady concurred in the result.

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8. Seagraves issues.

Castaneda v. International Leg Wear Grp., 194 N.C. App. 27, 668 S.E.2d 909 (2008), 363 NC 369, 677 S.E.2d 454 (2009)

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.

The Supreme Court affirmed *per curiam*.

9. Suspension of compensation for refusal of medical treatment.

Sykes v Moss Trucking, _____ N.C. App _____, 685 S.E.2d 1 (2009)

Mr. Sykes suffered an admittedly compensable back injury that left him with sufficient restrictions as to render him totally disabled, in light of his experience. Repeated disagreements over medical care and compliance with vocational rehabilitation resulted in an order of the Industrial Commission suspending compensation, pursuant to N.C.G.S. § 97-25, until he complied with treatment rendered by the doctor authorized by the Commission as the treating physician. After a period of suspension, Mr. Sykes returned to that doctor, but only to obtain referrals to other doctors that he liked better, which the authorized treating physician willingly gave him. The Commission awarded resumption of compensation, on grounds that Mr. Sykes

was complying with direct referrals from the authorized treating physician and that he was unable to participate in vocational rehabilitation, because the defendants were refusing to offer it. The defendants appealed, and Mr. Sykes represented himself.

The Court of Appeals reversed, holding that the Commission had erred in finding that Mr. Sykes had complied with treatment by the authorized doctor, because all evidence was that he had sought no treatment from that doctor, returning to him only to get referrals away from him. The defendants were justified in refusing to provide vocational rehabilitation, because it was supposed to be under the supervision of the authorized doctor that Mr. Sykes was continuing to refuse to see.

10. Injury by accident.

Gray v. RDU Airport Auth., _____ N.C. App _____, _____ S.E.2d _____(2010)

Mr. Gray was a traffic control officer at the airport, responsible for vehicular traffic. As part of that job, he regularly directed pedestrian traffic in an elevated crosswalk, that also served as a speed bump, that was about six inches high, with sloping sides. He had had surgery for tendonitis and a bone spur in his left Achilles tendon and had been back at work for a couple of months when he stepped backwards onto the sloping part of the crosswalk and suffered a torn Achilles tendon. The Industrial Commission denied his claim, because it was not caused by an accidental event.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision. Mr. Gray emphasized that he had not been aware of his exact position within the crosswalk and that he had not expected to step onto the sloped part, arguing that the Commission had failed properly to consider his testimony as to that, but there was also evidence that he often stepped onto the sloped part of the crosswalk while backing out of the way of pedestrians. There is some language near the end of the opinion regarding subjective versus objective definition of accidents, which is probably not significant, as the plaintiff-appellant seems to have been concerned that whether an event is unexpected by the injured worker would not be considered, while the Court was talking more about whether the plaintiff's subjective view of whether an accident had occurred would control decisions. The decision is adequately supported by the appearance that the Commission did not think that Mr. Gray's step had been unusual, compared to lots of other times he had made the same step.

11. Third party lien issues.

Jones v. Steve Jones Auto Grp., 363 N.C. 745, 687 S.E.2d 687 (2009)

Mr. Jones was part owner of a car dealership. When a building was remodeled, the construction company failed properly to seal the exterior walls, which resulted in a lot of mold in the walls and other interior surfaces. Over time, Mr. Jones began to suffer respiratory symptoms and cognitive difficulties, eventually resulting in his being removed form work by the majority

owner. The Industrial Commission determined that Mr. Jones had an occupational disease and awarded compensation and medical benefits. The defendants appealed.

This case wasn't really close, and the Court of Appeals, Judge Stephens writing, affirmed. In the process, she rejected arguments based on 1) alleged failure to prove increased risk: the defendants included an argument that there was no evidence that the nature of employment in a car dealership increased risk of disease from mold exposure, which the Court shot down by pointing out that the question was whether the specific employment circumstances of the individual employee increased the risk, and the requirement that Mr. Jones work in a building that exposed him to an elevated amount of mold did so,;2) alleged speculativeness of medical testimony: the defendant asserted that the medical opinions on cause were based on mere temporal relationship between the exposure and the onset of symptoms, which the Court pointed out was not true, because it was also based on the fact that Mr. Jones was exposed; and 3) alleged peculiar sensitivity: the doctors had testified that the inflammatory response in Mr. Jones' lungs was not a simple allergic reaction to something, which allergy pre-existed the exposure. The issue of treatment of the lien against proceeds of Mr. Jones' third party claim against the construction company was remanded to the Commission, which had not considered it, despite the plaintiff's argument that by failing to present evidence as to the lien at hearing, the defendants had waived it. It is not clear whether the Court meant to restrict the forum for addressing the lien to the Commission, which can only distribute it in accordance with the basic statutory framework, unlike a Superior Court judge, who can adjust the lien as necessary.

Leggett v AAA Cooper Transportation, _____ N.C. App _____, 678 S.E.2d 757 (2009)

Mr. Leggett was injured in a car wreck caused by a negligent third party. As of the time the hearing was held before a Superior Court judge to adjust the lien, he had been paid about $35,000 in indemnity benefits and $148,000 in medical benefits, for a total of about $183,000. His third party recovery was limited to $30,000 from the tortfeasor and another $69,000 from his personal UIM coverage. His attorney's fees were $15,000. The judge extinguished the lien completely.

The Court of Appeals affirmed. The employer argued that the Superior Court judge had exceeded her jurisdiction by making findings of fact on issues decided by the Industrial Commission, apparently including some that were contrary to the Commission's findings, based on Mr. Leggett's testimony and documentary evidence at the special proceeding, but the assignments of error as to that were too general to preserve the alleged error, and the judge was allowed to make findings based on evidence. The argument that the lien order was void, because the judge had failed to review the voluminous medical records handed up by the plaintiff was contradicted by specific references to information form those medical records in the findings of fact and was not persuasive, when the defendant had had an opportunity to ask Mr. Leggett questions about the records on cross-examination and to argue about them to the judge. The Court of Appeals did not find any abuse of discretion, in light of the facts found and the evidence presented as to what Mr. Leggett was not getting in his third party case, and was not concerned about alleged double recovery, as the relatively recent amendments to N.C.G.S. § 97-10.2(j) made clear that reduction of liens was anticipated, even when judgments or settlements exceeded the amount of the lien.

Alston v. Fed. Express Corp.,_____ N.C. App _____ 684 S.E.2d 705 (2009)

Ms. Alton suffered a compensable injury in an automobile accident caused by a third party. Her claim was accepted, and she was paid about $50,000 in medical benefits, $30,000 in wage compensation and a settlement of $142,500, for a total of around $225,000. She settled her State Tort Claim against the third party for $300,000. A Superior Court judge reduced the lien tot $50,000, pursuant to N.C.G.S. § 97-10.2(j). Ms. Alston then filed a proposed distribution order with the Industrial Commission. The Commission ordered payment of $50,000 to the employer. Ms. Alston then filed a motion to reconsider, contending that the Superior Court had intended to reduce the amount of the employer's recovery by its *pro rata* share of attorney's fees. The Commission stayed disbursement pending clarification. Ms. Alston moved the Superior Court to clarify, and the Court ordered that the employer would pay its share of the attorney's fees. The employer appealed.

The Court of Appeals mostly reversed, holding that the motion to clarify was proper, as a motion for relief from the Superior Court's original order, under Rule 60(b) of the Rules of Civil Procedure, but holding that there is no provision in § 97-10.2(j) for an award of attorney's fees and that the Superior Court's order must be remanded, because it lacked findings of fact regarding several specific factors specifically required by § 97-10.2(j). The holding regarding an "award of attorney's fees" is a little confusing, as it appears that the Court of Appeals may not have recognized that the Superior Court had merely clarified that it had intended for the amount it established as a lien to be further reduced for attorney's fees, which does not seem erroneous, especially since the Court below could have done the same thing by simply stating the amount to be repaid as $33,333.33, having taken the sharing of the cost of recovery into account. However, this case is a warning that practitioners should make sure that the Superior Court judge's order in such cases is clear.

12. Credit.

Clayton v Mini Data Forms, Inc., _____ N.C. App _____, 681 S.E.2d 544 (2009)

Mr. Clayton, a press operator, sustained an admittedly compensable back injury. After some treatment, he was returned to work with significant, which were modified. He was unable to do his regular job, so he was placed in a "job" on a press that made only small things, four hours per day. Even there, he needed help doing some of the required tasks, he was sent home frequently when there was not enough work to occupy him even part time, and he missed time occasionally due to increased back pain. The defendants paid compensation based on wage loss. Mr. Clayton filed for a hearing to have himself declared totally disabled. The Deputy Commissioner decided that the "job" was not suitable employment, as it was make-work that was not evidence of wage earning capacity, and awarded compensation for total disability. On the more significant issues, the Deputy also concluded that the employer was not entitled to credit for the wages that were paid, so that Mr. Clayton was entitled to full compensation for total disability, subject only to credit for partial disability compensation that had been paid, and that the defendants were liable for a 10% penalty for late payment of the compensation that was

past due. Both parties appealed to the Full Commission, which affirmed as to everything except the credit for the wages, which it granted and the 10% penalty. Mr. Clayton appealed.

The Court of Appeals affirmed in part, reversed in part and remanded, holding that while the Workers' Compensation Act does not technically provide for a "credit" for wages paid under these circumstances, there is case law interpreting the Act as allowing for an offset for wage replacement, even if it is due and payable when paid, so that the injured worker will not receive more than he is entitled to receive under the Act. However, on remand, the Commission was required to make findings and conclusions as to whether the wages paid were Tantamount to workers' compensation benefits or otherwise meant to compensate Mr. Clayton for his disability. Sick and vacation pay were not available for offset, under that analysis. However, the Court held that the 10% penalty was applicable, even though the net result of offsetting might be the same as the total disability compensation that had been ordered, because the employer had unilaterally cut the compensation from the full amount for total disability to the amount it paid for the purported partial disability, and the compensation ordered was total, even though reduced by offset. The Court agreed with the Commission that defense had not been unreasonable, and so affirmed the Commission's refusal to award attorney's fees as a sanction, under N.C.G.S. § 97-88.1.

13. Average weekly wage.

Barrett v. All Payment Servs., Inc., _____ N.C. App _____, 686 S.E.2d 920 (2009)

Mr. Barrett was a long-time stunt man who suffered an admittedly compensable injury to his back in a car stunt in 1993. He continued working, receiving conservative treatment, until a pair of surgeries in August and September of 2001. The issue of how much to pay him came before the Industrial Commission, which ordered compensation based on wage loss, pursuant to N.C.G.S. § 97-30 from the time of the accident until about two weeks before the August 2001 surgery, followed by compensation for total disability pursuant to § 97-29 indefinitely thereafter. Due to the sporadic nature of his employment, in which he was paid $60,000 for six weeks for the job he was working at the time of his injury, but only earned about $37,000 for the rest of the year, the Commission used the "fifth method" under § 97-2(5) and calculated the wage by dividing Mr. Barrett's total income for the year before his injury by 52 to be $1679.11. Both parties appealed.

On defendant's appeal, the Court of Appeals held that remand was required, because in ordering the partial wage loss compensation to be paid based on the difference between the wages Mr. Barrett actually made and his pre-injury average weekly wage, the Commission had failed to consider his earning capacity in other jobs. It is not clear how this squares with the "fourth prong" of the Russell v. Lowe's Prod. Dist. rubric, which holds that partial disability can be proved by evidence of other employment at a reduced wage. The Commission was also instructed to make specific findings as to Mr. Barrett's prost-injury average weekly wage, instead of simply laying out the framework for calculating it. The Court affirmed as to the award of compensation for total disability, as the Commission had properly considered other employment when finding, to satisfy the third Russell prong, that under the circumstances, it

would be futile for Mr. Barrett to attempt to find work.

On the plaintiff's appeal, the Court reversed and remanded for recalculation of the average weekly wage, holding consistently with a long line of cases that prohibit the consideration of wages from other employments when calculating the average weekly wage, lamenting that those cases that were applicable to this one describe what is not allowed but never really what is, but noting that doing so was the only way to arrive at a fair number here. The Court virtually begged the Supreme Court to grant discretionary review and give some guidance.

14. Exclusive remedy, Woodson/third party claims.

Van Dyke v. CMI Terex Corp., _____ N.C. App _____, 689 S.E.2d 459 (2009)

Mr. Van Dyke was killed when he was struck by a steel pipe in a plant explosion. His estate sued several parties, including manufacturers of products involved in the accident, co-employees (under the Pleasant v. Johnson theory), and a couple of other parties(for negligence). This appeal only involves one of the parties sued for negligence. Lane Construction Company was part of a somewhat complicated web of related corporations. Part of that was sole ownership of Mr. van Dyke's employer. Lane moved for summary judgment, based on the theory in Hamby v. Profile Prod., L.L.C. that as the sole shareholder and controlling parent of the employer, it was a "member-manager" that was indistinguishable from the employer and thus clothed with the protection of the exclusive remedy of workers' compensation. The motion was denied, and Lane appealed.

The Court of Appeals' decision was technically based on whether the interlocutory appeal would be entertained, because it affected a substantial right. The Hamby case had held that such appeals were proper, when the appealing party was a "member-manager" as Lane alleged itself to be. The Court held that while Lane may have had a relationship with the employer that would have rendered it indistinguishable, if the claim had been based solely on the employer's conduct, the nature of the claim in this case was different, as there were allegations of negligence by Lane outside of the actions of the employer. Therefore, the Hamby case did not apply, and the interlocutory appeal was dismissed. The Court also noted that if it had reached the merits of the appeal, the refusal to grant summary judgment would have been affirmed, as the allegations of independent negligence were supported by evidence that raised genuine issues of material fact.

Edwards v. GE Lighting Systems, Inc., _____ N.C. App _____, 685 S.E.2d 146 (2009)

Mr. Edwards worked for G.E. Lighting Systems, a subsidiary of General Electric, which manufactured industrial lights. Part of the manufacturing process required the use of annealing ovens that baked metal parts in an oxygen free gas containing a lot of carbon monoxide. Mr. Edwards went behind a machine for a cigarette break and died of carbon monoxide poisoning, obviously from a leak. His estate sued both the direct employer and G.E. The Superior Court denied G.E.L.S.'s motion for summary judgment, which denial was reversed by the Court of Appeals. This appeal has only to do with the Superior Court's grant of summary judgment as to

G.E.

The Court of Appeals affirmed. The plaintiff-appellant's argument was based on the theory that G.E. had "voluntarily undert[aken] an independent obligation to monitor safety at the GELS plant and then negligently performed that obligation." The Court disagreed, holding that G.E.'s biannual monitoring program, under which it could access information about safety problems, but only to check if the deficiencies discovered during audits had been cured, was not of the intensity necessary to create the duty, which required a near-take-over of safety control by a non-employer.

Greene, ex rel v Barrick, et al, _____ N.C. App _____, 680 S.E.2d 727 (2009)

Ms. Greene's decedent was killed, while working as a sheriff's deputy, when a tail rotor fell of a helicopter, causing it to crash. The estate filed sued lots of people, including the deputy who had been flying the helicopter and the sheriff, claiming exceptions to the exclusive remedy of workers' compensation for willful, wanton and reckless negligence under Pleasant v. Johnson and for "gross negligence" under Woodson v. Rowland. Summary judgment was granted against the plaintiff on all the claims, except the Pleasant claim against the co-employee and company providing the sheriff's the surety bond that would cover him in his official capacity.

The interlocutory appeal was allowed, because the deputy and the sheriff were claiming sovereign immunity as to any claims against them outside of workers' compensation. In short, the Superior Court decision was affirmed, with the significant part being that sovereign immunity protected the sheriff and his employees for claims in their official capacities, except to the extent that they were covered by the surety bond.

15. Insurance coverage.

City of Durham v. Safety Nat'l Cas. Corp., 363 N.C. 651, 686 S.E.2d 512 (2009)

The City of Durham filed a declaratory judgment action, seeking excess coverage of a workers' compensation claim by the defendant. The parties both filed summary judgment motions, and the Superior Court decided that there was coverage. The injured worker was a police officer who was exposed to a lot of child sexual abuse. She suffered psychological problems and was placed on a leave of absence. She returned to work, apparently to the same job. A couple of years later, she was transferred to the records division, then to warrants, then to traffic. Due to continued stress on the job, she eventually was taken out of work permanently about five years after her return to work from the initial leave of absence. The excess carrier appealed, arguing that the time of accrual of the claim should be the time of the initial leave of absence, which occurred before its coverage period.

The Court of Appeals affirmed, holding that the Superior Court correctly decided that the date for the accrual was properly determined by the last injurious exposure to the hazardous conditions of employment, which occurred immediately before the plaintiff left work

permanently. Policy language was important , as it defined an “occurrence” in an occupational disease as either when work ceased or on the date established by applicable laws.

16. Apportionment for consecutive accidents.

Newcomb v. Greensboro Pipe Co., _____ N.C. App _____, 677 S.E.2d 167 (2009)

Mr. Newcomb suffered an admittedly compensable back injury while working as a delivery driver for Greensboro Pipe. He underwent surgery and continued to have significant back problems, obtained a 15% rating of permanent impairment and eventually was unable to continue working for Greensboro Pipe. He later took a desk job with Mabe Trucking as a load coordinator. He missed some time due to his back and received treatment, but he was generally able to work by September of 2005. In January of 2006, he slipped on a wet floor at work for Mabe and fell. He sought medical treatment that day and, in May of 2006, he underwent additional surgery. He remained out of work through the date of hearing. The Industrial Commission awarded compensation after the second injury, to be split somewhat evenly between the two employers, on a theory of joint and several liability.

The Court of Appeals affirmed, holding that the treating doctor's inability to apportion by percentage, while acknowledging that both injuries had contributed to Mr. Newcomb's condition after the second one, allowed the Commission, within its discretion to award compensation to be paid jointly and severally. The Court noted that the procedure would not apply when there was no other compensable injury, because "an employee cannot be jointly and severally responsible for his own compensable injury." However, the Court mentioned that the analysis was no different from the analysis of cases in which doctors were able to state specific percentages of causal contribution, which includes cases in which one of te causes is not compensable, and did not mention what would have happened if Mr. Newcomb had already settled his prior claim when he suffered the second injury. The calculation of the compensation due from each employer was somewhat complicated, as the total compensation for the second injury was not simply split in half. The first employer was required to pay half of its applicable compensation rate from the first injury, and the second employer paid what was left, which was more.