WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2011

By Jay A. Gervasi, Jr.
Greensboro, NC

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1. Standard of review of Commission decisions, including sufficiency of findings.

Garner v. Capital Area Transit, _____ N.C. App _____, 702 S.E.2d 319 (2010)

Ms. Garner was working as a bus driver for the employer. She had had three prior bus accidents before the incident claimed in this case, in which another bus backed into the front of hers. Ms. Garner testified that the impact had been severe enough to throw her back in her seat and that she had felt a pop in her neck. There was contrary evidence, including video that showed that the driver of the other bus, who had described only minor impact, had been standing at the time and had not been jerked or fallen. There was no damage to Ms. Garner's bus, and the defendants presented an expert accident reconstructionist, who testified that the change in speed of the vehicles was 1 to 1.7 miles per hour. The Commission found and concluded that Ms. Garner's account of the severity of the impact was not credible and that the opinion of the doctor who performed her neck surgery, to the effect that the accident had aggravated her pre-existing neck condition, was not competent, because it was based on her "dubious history."

The Court of Appeals affirmed, holding that the Commission's decision was based on a proper assessment of the weight of the evidence. Ms. Garner argued, in part, that the Commission had relied on inadmissible opinion about a biomechanical analysis presented by a defense expert, but the Court noted that after her objection to that evidence, there was no indication that it had been considered by the Commission in reaching its decision.

Huffman v. Moore County, 194 N.C. App. 352, 669 S.E.2d 788 (2008), ____ N.C. App ____ , _____ S.E.2d _____(2010)

Seven claims for injuries caused by chemical exposure in an 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had failed to make sufficient findings as to alleged spoliation of evidence, the Court of Appeals remanded, with an unpublished opinion.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.

On the third appeal to the Court of Appeals, the Commission's decision, in favor of the defendant, was affirmed. The plaintiffs argued that the Commission failed to comply with the Court's mandate by depriving the plaintiffs of an opportunity to be heard and by relying on a proposed opinion and award that was submitted by the defendant. The Court noted that the plaintiffs had not submitted a statement and supporting brief (which could have included a request to present additional evidence and could have described what that evidence would show) within 30 days of the mandate, as required by IC Rule 702A, choosing instead to file a request, two weeks after that deadline, that the Commission judicially notice a report from a military Research Advisory Committee about toxic exposure diseases, which the Commission rejected, by proper exercise of its discretion, on grounds that the contents of the report were controversial. It was also permissible to rely on a proposed decision submitted by the defendant, as long as the Commission remained free to make its own decision and to modify or reject the proposal. The plaintiff's arguments that the Commission 1) improperly relied on environmental test results that were irrelevant, because they were obtained after renovations to the building that corrected many of the conditions that the plaintiffs alleged had caused their diseases, 2) had applied the incorrect legal standard by requiring the plaintiffs to prove exact levels of exposure, instead of allowing other evidence that proved harmful exposure and 3) improperly relied on testimony by defense experts who were not qualified to testify about the subjects upon which they testified, were rejected and characterized as arguments about the weight of evidence that the Commission ultimately determined was insufficient to meet the plaintiffs' burden of proving that they had occupational diseases.

2. Occupational disease, including time to file.

Johnston v. Duke Univ. Med. Ctr., _____ N.C. App _____, 700 S.E.2d 426 (2010)

This is a very dangerous case. Ms. Johnston was a nurse who started having foot problems associated with excessive standing and walking on hard floors in the 1990's. By 2001, she had been diagnosed with plantar fasciitis and Achilles tendinitis, which eventually required surgery in September of 2001. By that time, her orthopedist had advised her that her problems were caused by the work-related stresses. She returned to her job in about three months (during which time she presumably received group disability benefits and had her medical bills paid by group health insurance), against the recommendation of her orthopedist and with restrictions. She sought workers' compensation benefits, which were denied, but she did not file anything with the Industrial Commission, despite the employer's invitation to do so. In March of 2002, she moved to a job that required less walking, but she continued to have foot problems and missed work intermittently. In January of 2004, she complained of additional symptoms, including bilateral numbness. Studies showed no evidence of plantar fasciitis. She saw another doctor, who diagnosed tarsal tunnel syndrome, posterial (sic) tibial tendon disease, Baxter's nerve compression and a ganglion cyst and recommended surgery. She left Duke in March of 2004, to take care of her aunt in Texas, and returned to a different job at Duke in June of 2004. She worked in that position for about a year without seeking medical treatment. In 2005, her symptoms worsened and she went back to her orthopedist, who referred her to Dr. Easley, who diagnosed tarsal tunnel syndrome and Achilles tendinopathy and performed surgery in October of 2005. Ms. Johnston left Duke in July of 2005 and has been receiving long and short-term disability benefits since November of 2005.

In April of 2007, Ms. Johnston filed a Form 18, claiming disability since August of 2005. The Industrial Commission decided that Ms. Johnston suffered from an occupational disease, but denied the claim as time-barred.

The Court of Appeals affirmed, holding that because the testifying doctors had opined that there was "overlap" between the various diagnoses and that the original orthopedist had opined that Ms. Johnston probably had (undiagnosed) tarsal tunnel syndrome as early as 2001, the two-year period to file the claim began at least in 2001, when she was out of work following the first surgery and had been advised by her orthopedist that her problems were related to the walking and standing she did at work. The Court stated that while there were various diagnoses, they were all part of the same on-going injury, so that it was unnecessary to file a new claim as to each one, which the Court couched as beneficial to claimants in general, and claims must be filed when they first arise, which prevents evidence from getting stale.

The dangerous part has to do with claims in which there is some small period of disability that an injured worker might consider not worth fighting about, followed by a long period of work, followed by an increase in symptoms that leads to much more substantial disability and medical treatment. The Court addressed Ms. Johnston's stated concern about that directly in a footnote, stating that the ruling would not apply to unrelated problems with the same body part and that on balance, it preferred to accept the problems that might arise from this decision, in light of the advantages associated with prompt filing. In stating that the opinion "will stimulate the filing of claims in a timely manner," it appears that the Court may have an elevated perception of the awareness unrepresented injured workers have for the details of recent statutory interpretations. The Court did not discuss what happens when a worker suffers an occupational

disease that results in a very short period of disability, then becomes more severely disabled later as the result of additional damage of the same kind, caused by additional exposure to the same occupational hazard.

3. Enforceability of mediated settlement agreements.

Kee v. Caromont Health, Inc., _____ N.C. App _____, _____ S.E.2d _____(2011)

Ms. Kee claimed a back injury while turning a patient. She worked with light duty restrictions for about five months, after which she was taken out of work completely by her doctor. The claim for compensation was apparently denied, and Ms. Kee filed a Form 33 Request for Hearing on the same day she went out of work. At a mediated settlement conference about three months after she filed the Form 33, she was given the choice of having the claim accepted and returning to light duty work or settling on a lump sum of $20,000, resigning and signing a general release. She signed a mediated settlement agreement providing for the latter choice. When the formal clincher was prepared, she refused to sign, and the defendant requested a hearing to enforce the mediated settlement agreement. The Deputy Commissioner approved it, but the Full Commission refused to do so, on grounds that the mediated settlement agreement did not comply with Commission rules.

The Court of Appeals affirmed, noting that IC Rule 502(2)(e) provides that settlement agreements must contain language "That no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released," and that the mediated settlement agreement not only did not contain that language, but contained a provision that was directly contrary to it. The defendant's argument that the offending provision should have been severed from the agreement and the rest of the terms enforced was rejected. The Court did not decide whether the "resignation and release" language was severable, but stated that even if it was, the agreement would fail, because the language required by Rule 502(2)(e) was *not* in the agreement, and the Courts cannot add such language to contracts. The Court also stated that the Commission might have had discretionary authority to waive the requirement in Rule 502(2)(e), but it had chosen not to do so.

Shepherd v. Nat'l Fed'n, _____ N.C. App _____, _____ S.E.2d _____(2011)

Mr. Shepherd sustained a compensable injury, but the defendants refused to pay compensation for "wage loss." He prevailed at the Deputy Commissioner and Full Commission levels, and the defendants appealed to the Court of Appeals. While the appeal was pending, the parties reached a clincher settlement at mediation that provided for a $50,000 payment, with contingencies associated with reimbursement of conditional Medicare payments and a Medicare Set-Aside Arrangement. While waiting for the Medicare mess to be processed, the Court of Appeals affirmed the decision of the Full Commission. After the contingencies had been satisfied, with an MSA that fit what the defendants were willing to pay and their unilateral willingness to reimburse Medicare for the conditional payments without the previous condition that the reimbursement be reduced to account for plaintiff's cost of recovery, Mr. Shepherd refused to sign the clincher. His lawyer withdrew, and the defendants submitted to mediated settlement agreement to the Industrial Commission Executive Secretary for approval. She denied the motion to enforce the agreement, saying that a hearing would be required, in the absence of Mr. Shepherd's consent to approval. The Deputy Commissioner approved the settlement, awarding a fee to withdrawn counsel. Mr. Shepherd appealed to the Full

Commission, which vacated the Deputy Commissioner's opinion and award, on grounds that the Commission lacked jurisdiction to address the settlement, after the Court of Appeals had rendered its decision on appeal.

The Court of Appeals reversed the Full Commission's decision, holding that while N.C.G.S. § 1-294 provides that appeal to the Court of Appeals stays Commission action on the judgment appealed from, it also provides that the Commission retains the power to "proceed upon any other matter included in the action and not affected by the judgment appealed from," which includes exercising its administrative functions, like approving settlement agreements. The case was remanded to the Commission for decision as to whether the settlement should be approved.

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

Cardwell v. Jenkins Cleaners, Inc., _____ N.C. App _____, 698 S.E.2d 131 (2010), _____ N.C._____, _____ S.E.2d _____ (2011)

The employer was located in a leased space and did not control the parking lot. Ms. Cardwell was on her way in to work one morning and had stepped from the asphalt parking lot onto a small concrete area immediately adjacent to an employee-only back entrance, when she slipped on black ice and injured her wrist. The Industrial Commission denied the claim, on grounds that the accident did not arise out of and in the course of Ms. Cardwell's employment, under the "coming and going" rule, because she had not reached the employer's premises when she was injured.

The Court of Appeals affirmed, holding that Ms. Cardwell was injured when she was not on the employer's premises, so that the "coming and going" rule excluded her claim. The majority was unimpressed with the argument that she was in the course of her employment, because she had the key in her hand to unlock the door and was very close to it when she fell, relying instead on the fact that she had not reached the employer's premises before her accident.

In dissent, Chief Judge Martin opined that the area where Ms. Cardwell fell, which was only a few steps from the door and close enough that she was able to pull herself up and unlock the door with her left hand, was "in such proximity and relation as to be in practical effect a part of the [defendant-] employer's premises."

On appeal, the Supreme Court reversed and remanded the case to the Industrial Commission to make specific findings as to precisely where Ms. Cardwell fell and whether the concrete area was part of the parking lot or "'in such proximity and relation as to be in practical effect a part of the employer's premises.'" NCAJ filed a formal amicus brief, drafted by Vernon Sumwalt and Burton Craige. The NC Association of Defense Attorneys filed one drafted by M. Duane Jones and Ashley Ferrell of Hedrick, Gardner.

5. Liability for medical expenses, including mileage reimbursement.

Price v. Piggy Palace, _____ N.C. App _____, 696 S.E.2d 716 (2010)

Mr. Price suffered severe burns when a co-employee slipped and fell, spilling hot grease on him. He was sent from the local hospital to N.C. Baptist Hospital, where he underwent burn treatment, including skin graft surgery on his ankle and foot. His recovery went well initially, then he developed some problems with hypertrophic scars and pigmentation abnormalities, along with pain and itching. One treating doctor stated that maximum medical improvement could be addressed after all options for treating the scars had been exhausted and referred Mr. Price to another treating doctor, who recommended pulse dye laser treatment. The defendants refused to pay for the laser treatments, even after a letter from the second doctor explaining the importance of proceeding and deposition testimony to the same effect. The Deputy Commissioner ordered the laser treatment and awarded mileage reimbursement for Mr. Price's parents, for trips to the hospital. He also awarded $10,000 for disfigurement. The Full Commission mostly agreed, though it reversed the award for disfigurement, on grounds that it was premature, in light of the further healing that might be derived from the laser treatment. The Full Commission also awarded $5000 in attorney's fees to plaintiff's counsel.

The Court of Appeals, Judge Stephens writing, affirmed, in part. It does not appear that the defendants appealed the order to provide the laser treatment. With respect to the payment for the parents' travel, the Court cited evidence that Mr. Price's mother had spent every day at the hospital with him, providing useful services, including helping to hold him down during scrubbing debridement sessions, helping him do recommended walking, helping with bathing and providing "relief" through emotional support that the doctor testified was useful and necessary. In addition to the travel necessary for her to be there, Mr. Price's father made a number of trips to bring clothing and other supplies in support of the mother's mission. The defendants argued that I.C. Rule 407(6) only provides for reimbursement to employees for medically necessary sick travel, to which the Court responded that the rule dictated to whom the reimbursement was to be made—the injured worker—but did not limit the reimbursement to travel by the employee, so that there was no obstacle to payment to Mr. Price for travel performed by his parents related to necessary medical treatment.

The award of attorney's fees was remanded for additional findings and conclusions, because it was not clear how much of the award was for unreasonable defense as to the refusal to pay for the laser treatments, which would apply to the initial hearing under N.C.G.S. § 97-88.1, and how much was payable under § 97-88, which would apply only to appeals.

Javorsky v. New Hanover Reg'l Med. Ctr., _____ N.C. App _____, _____ S.E.2d ___ (2010)

Ms. Javorsky was working as a nurse, moving a patient, when she felt pain in her neck. She had previously pulled a muscle in the same area, but her pain had been resolved by taking some muscle relaxers and Ibuprofen. She apparently took some leftover medicine that did not work this time, and she suffered increased radiating pain. She returned to work on her next shift and reported her injury a few days later, preparing a written report. She was sent to a physiatrist,

who ordered an MRI and referred her to a local (Wilmington) neurosurgeon. The neurosurgeon's physician's assistant diagnosed a small left-sided disc herniation at C4-5 and a large paracentral-to-right-sided herniation at C5-6. He gave the options of two-level fusion or shots and physical therapy, and also told Ms. Javorsky that she might be a candidate for less invasive micro endoscopic diskectomy, which was being performed by Dr. Adamson in Charlotte. She chose the latter, which resolved her neck pain, but left her with some weakness and a burning sensation in her right shoulder blade. She continued to work, at restricted duty, until the time of her surgery. About two months after her injury, the employer filed a From 19 Report of Injury. A month later, the adjuster for the employer's servicing agent spoke with Ms. Javorsky by telephone, asked her how she was injured and investigated the claim by reviewing the Form 19 and medical reports. A week later, the adjuster asked for a recorded statement, which Ms. Javorsky refused. The claim was then denied with a Form 61, on grounds that Ms. Javorsky had not described a specific traumatic incident or accident, had not experienced pain while working and had refused to give a recorded statement. (It is fair to suspect that the last one was the main reason). The Deputy Commissioner awarded benefits for medical treatment of the neck and compensation for about three weeks of total disability (presumably the time she was out after her surgery). Both parties appealed to the Full Commission, which ordered those things, plus treatment of Ms. Javorsky's left shoulder and attorney's fees for unreasonable defense, pursuant to N.C.G.S. § 97-88.1.

The Court of Appeals affirmed, finding support for the treatment of the left shoulder in opinion testimony from Dr. Adamson and affirming the Commission's decision to designate both Coastal Neurosurgical in Wilmington and Dr. Adamson in Charlotte as authorized treating physicians, despite the defendant's contention that it was unreasonable for it to have to pay for transportation expenses related to the 200-mile distance between them. As to the latter, the Court focused on the Commission's discretion to approve medical care and found that that discretion had not been abused. Interestingly, there was no discussion of a plaintiff's right to control treatment, when a case has been denied. There is a somewhat mysterious reference to alleged error in the Commission's finding that Susan Ramsey is the defendant's patient safety manager. That finding, and the one that Ms. Javorsky continues to have occasional weakness in her neck and left shoulder blade pain, were held to be supported by evidence. Finally, the Court affirmed the award of attorney's fees, noting that the adjuster had failed to interview the witness on the accident report and that the defendant continued to deny the claim, even after the medical experts testified that the injuries were related to the specific traumatic incident at work.

Busque v. Mid-America Apt. Cmtys., ___ N.C. App _____, ____ S.E.2d _____(2011)

Ms. Busque had a long history of foot and leg problems. In January of 2003, she suffered an admittedly compensable foot injury, but apparently missed no time from work. The last payment (presumably for medical treatment) was made in July of 2003. She continued to have problems, including a disputed diagnosis by one doctor of Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome, but she did not ask the defendants to pay for them. In July of 2007, she requested a hearing, seeking additional benefits. The Commission decided that she did not have RSD and that the additional problems were not related to her compensable injury, but ordered a second opinion evaluation to determine a rating of permanent partial disability. Both parties appealed.

The Court of Appeals affirmed the denial of further benefits, citing evidence to support the Commission's decision, but reversed as to the second opinion, holding that the bar to additional medical treatment two years after the last payment therefor, under N.C.G.S. § 97-25.1, barred the claim for the second opinion. Interestingly, the Court noted Ms. Busque's argument that "last payment of…compensation" referred to payments pursuant to a "final award," then did not address it, moving on instead to hold that denial of a contention that the defendants were equitably estopped to assert the time bar, based on the allegations that the claim was in a continuing state of denial and that the and that the defendants promised future medical treatment, was supported by evidence to the contrary.

The Court did not address whether Ms. Busque would have been entitled to compensation for PPD if she had presented evidence of a rating.

6. Procedural issues, including Industrial Commission power to revise orders, interlocutory appeals, and fees.

Ammons v. Goodyear Tire & Rubber Co., ____ N.C. App _____, _____ S.E.2d _____ (2011)

If this case had gone the other way, it could have caused serious political trouble. Mr. Ammons suffered an admittedly compensable injury to his back and left arm in 2005. He then alleged injuries in 2006 and 2008 to his right hand and arm, which were denied. The Commission decided against him as to both of the new claims, but in the process fond and concluded that after his return to work from his 2005 injury, his job had been so modified as to constitute make-work. Compensation was therefore awarded for total disability indefinitely. Neither party appealed.

A couple of months later, Mr. Ammons filed a motion to show cause as to why the defendants should not be held in contempt for refusing to pay the TTD benefits. The defendants countered that Mr. Ammons had been paid at his full wage level, so that no TTD was due. Deputy Commissioner Rideout denied the contempt motion and ordered the parties to submit a motion for appropriate relief to Deputy Commissioner Phillips, who had generated the original opinion and award. DC Phillips then filed an amended opinion and award, adding that she had not explained in the original that since Mr. Ammons was "gainfully employed in an unsuitable position, but earning full salary wages, that he was not entitled to further compensatory benefits as double recovery is not contemplated by the Act. The Full Commission affirmed, and Mr. Ammons appealed.

The Court of Appeals, Judge Stephens writing, held that the Commission has "expansive power to set aside its own judgments" and that DC Phillips' clarification of her own opinion and award was an appropriate exercise of that power, not an improper substitute for the defendants' failure to appeal the original decision.

Blalock v. Southeastern Material, ____ N.C. App _____, _____ S.E.2d _____(2011)

Mr. Blaylock had lung problems due to a long history of cigarette smoking. He was working as a carpenter, when he was called upon to tear down a cinder block wall with a masonry saw and a sledgehammer. He wore a mask that was ineffective and inhaled a large amount of dust over a two-day period. He suffered increased breathing problems that persisted, for which he went to a doctor a few days after the exposure. He was disabled thereafter. The defendants denied the claim on the "common sense" theory that Mr. Blaylock's pre-existing, smoking-related lung problems were the main cause of his disability. All three doctors testified that Mr. Blaylock had significant lung problems caused by his smoking, but that he had been able to work with those problems, before he suffered an exacerbation caused by the inhalation of the dust. The defendants fought the claim, anyway, and lost.

At both levels of the Industrial Commission, Mr. Blaylock sought attorneys' fees, pursuant to N.C.G.S. § 97-88.1, for unreasonable defense. The Deputy Commissioner found and concluded that the defense had not been unreasonable. The Full Commission failed to address the issue. The defendants appealed the unfavorable result, so when Mr. Blaylock moved for the Full Commission to address the fee issue, it decided that it had been divested of jurisdiction by the appeal. The Court of Appeals then dismissed the appeal as interlocutory, and the FC considered the motion, deciding that the defense had not been unreasonable. The defendants appealed again, Mr. Blaylock cross-appealed on the fee issue, and the defendants abandoned their appeal, accepting liability for the claim and leaving the cross-appeal as the only issue before the Court of Appeals.

The Court of Appeals noted that the standard of review on the issue required the appellate court to decide *de novo* whether the defense was unreasonable and to affirm the amount of fee awarded, if it was supported by any evidence. The Court then went on to hold that the defense had been unreasonable, stating that the medical evidence was unanimous in favor of compensability and that the defendants' "common sense" argument, which was not supported by any admissible expert opinion evidence, was insufficient to constitute a reasonable defense. The case was remanded to the Commission for determination of the amount of the fee.

Evans v. Hendrick Auto. Group, _____ N.C. App _____, _____ S.E.2d _____(2011)

Ms. Evans was injured on a business trip in Charlotte when, on the way back to her hotel from an employer-sponsored dinner, which "included alcoholic beverages," she "put her leg over the side of an escalator" while riding it, hit a pillar and fell 25-30 feet. The Commission found and concluded that the injury was compensable and awarded compensation for temporary total disability, medical expenses, and compensation for partial disability pursuant to N.C.G.S. § 97-30. The parties joined in a motion to amend the Full Commission's decision, to correct clerical errors in the calculations of the § 97-30 benefits. The defendants appealed to the Court of Appeals within the time allowed from the Full Commission decision, but the Commission had not yet addressed the motion to amend.

The Court of Appeals, on plaintiff's motion, dismissed the appeal as interlocutory, as at the time appeal was taken, the Commission's decision was not yet final, because the correction of the clerical errors was still outstanding.

Thomas v. Contract Core Drilling & Sawing, _____ N.C. App _____, _____ S.E.2d ___ (2011)

Mr. Thomas claimed that he stepped into a "step-down" that was an inch or two lower than the rest of the floor, without noticing it or intending to step into it, and that his knee popped. He was initially diagnosed with a left knee strain and a possible ACL or collateral ligament tear. His claim was denied by the carrier about two weeks after the injury. 10 days later, when he called the employer to inquire about his claim, he was informed that his claim was denied and he was terminated. After he had filed for hearing, he obtained insurance coverage as a dependent on his wife's policy (because his own insurance had been terminated when he was) and sought treatment. He was eventually diagnosed with chondromalacia patella and a meniscus tear, for which he had surgery. His treating physician testified that pre-existing chondromalacia was aggravated and the meniscus tear was caused by the accident at work. The Deputy Commissioner awarded compensation for total disability and reserved the issue of permanent, partial disability for future decision. The Full Commission mostly agreed but declined to award compensation for disability after the date of hearing, finding that the hearing had followed surgery too quickly for Mr. Thomas to have had an opportunity to do the job search necessary to prove disability. Therefore, the issue of disability after the date of hearing was explicitly reserved for later determination.

The Court of Appeals dismissed the defendants' appeal as interlocutory, rejecting Mr. Thomas' argument that the issues other than the duration of total disability could be addressed, because they had been finally decided. The Court held that all issues in the decision appealed from must be resolved, to avoid "piecemeal" appeals.

Javorsky v. New Hanover Reg'l Med. Ctr., _____ N.C. App _____, _____ S.E.2d ___ (2010)

Ms. Javorsky was working as a nurse, moving a patient, when she felt pain in her neck. She had previously pulled a muscle in the same area, but her pain had been resolved by taking some muscle relaxers and Ibuprofen. She apparently took some leftover medicine that did not work this time, and she suffered increased radiating pain. She returned to work on her next shift and reported her injury a few days later, preparing a written report. She was sent to a physiatrist, who ordered an MRI and referred her to a local (Wilmington) neurosurgeon. The neurosurgeon's physician's assistant diagnosed a small left-sided disc herniation at C4-5 and a large paracentral-to-right-sided herniation at C5-6. He gave the options of two-level fusion or shots and physical therapy, and also told Ms. Javorsky that she might be a candidate for less invasive micro endoscopic diskectomy, which was being performed by Dr. Adamson in Charlotte. She chose the latter, which resolved her neck pain, but left her with some weakness and a burning sensation in her right shoulder blade. She continued to work, at restricted duty, until the time of her surgery. About two months after her injury, the employer filed a From 19 Report of Injury. A month later, the adjuster for the employer's servicing agent spoke with Ms.

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Spears v. Betsy Johnson Mem'l Hosp., _____ N.C. App _____, _____ S.E.2d _____ (2011)

Judge Robert C. Hunter (the Hunter who has been on the Court of Appeals longer) did an outstanding job in this case, giving serious and respectful consideration to a *pro se* appeal that was clearly without merit and contained outlandish allegations.

Ms. Spear suffered an admittedly compensable accident, when she was pushed by a co-employee during a physical altercation. About a year later, she was terminated for poor work performance unrelated to her injury. She requested a hearing, claiming that a large number of conditions were caused by her accident. Deputy Commissioner Baddour decided that only her neck pain and related headaches were related and awarded compensation for work missed before her termination. The Full Commission agreed, adding that she had wage earning capacity for sedentary work. The Court of Appeals affirmed, noting that Ms. Spears had failed to assign error to any of the Commission's findings of fact which, having thus been established as binding, supported the Commission's conclusions of law. That decision was not further appealed.

Several months later, Ms. Spears, proceeding *pro se*, requested a hearing to re-try her claim, set aside the prior Full Commission decision and enter default judgment against the defendants. Deputy Commissioner Rowell, entered an opinion and award noting that the Form

33 Request for Hearing should be treated as a motion for modification of the award for change of condition, denied the defendants' motion to dismiss the claim as time-barred, ordered payment of the compensation for total disability that the Full Commission had previously awarded, along with a 10% penalty for late payment, and ordered payment of medical expenses. After a hearing a few months later, Deputy Commissioner Harris denied the motion to set aside the Full Commission decision, the motion for default judgment and the claim for change of condition. The Full Commission essentially affirmed, and after a motion for reconsideration was denied, Ms. Spears appealed.

The Court of Appeals affirmed, addressing and rejecting each of Ms. Spears' arguments. She made an interesting argument that because Commissioner's Mavretic and Scott had heard the case during the first Full Commission proceeding, they were prohibited from sitting on the panel the second time around. However, the Court explained that the prohibition in N.C.G.S. § 97-85 applied to Commissioners or Deputies who had heard the claim at the initial hearing, not to those who had previously sat on Full Commission review panels. In response to her contention that the defendants had committed fraud on the Commission by tampering with or removing evidence from the record, made intentional misrepresentations and colluded with Deputy Commissioner Baddour to "write a false story," the Court first noted that the motion was not technically pursuant to Rule 60(b) of the N.C. Rules of Civil Procedure but was permitted by the Commission's inherent power to supervise its own judgments, which includes setting aside prior judgments if justice requires it, then held that the Commission did not abuse its discretion in denying her motion to set aside the prior Full Commission decision, when Ms, Spears had failed to raise her "extremely serious concerns" before that decision was made. The Court also held that the Commission had not erred in deciding that *res judicata* precluded relitigation of the causal relationship between her accident and the various medical conditions that were previously found not to be related to it. The Court affirmed the Commission's decision that Ms. Spears had failed to prove a change of condition, noting that she made no reference to the statute providing for that or any legal or factual analysis, and finally found without merit additional arguments that were "frankly, difficult for this Court to follow."

7. Seagraves issues.

McLaughlin v. Staffing Solutions, _____ N.C. App _____, 696 S.E.2d 839 (2010)

Mr. McLaughlin suffered an admittedly compensable injury while on an assigned job that he had obtained through the defendant, when another employee drove a forklift into a stack of crates, causing a 700-pound crate to fall on Mr. McLaughlin. Shoulder surgery left him with significant restrictions and a release to working no more than four hours per day. After a couple of odd jobs, the employer staffing service offered him a job in its own office. The opinion is not clear as to how long he worked there, but he was terminated within no more than a couple of weeks, on alleged grounds that he smelled of alcohol and refused a breathalyzer test. Shortly thereafter, his treating orthopedist released him at maximum medical improvement, with a 28% rating of the left arm and sedentary restrictions. A second opinion doctor gave a rating of 35% and opined at deposition that it was likely that Mr. McLaughlin was totally disabled. After his termination,, he sought employment through the Veterans' Administration, the Employment

Security Commission and the vocational rehabilitation specialist assigned by the defendant, but he was unable to find employment, with the four-hour restriction's apparent being a major obstacle. The Commission found that Mr. McLaughlin's termination constituted a constructive refusal of employment, under the rubric in Seagraves v. Austin Co. of Greensboro, but (apparently unlike the Deputy Commissioner) awarded compensation for on-going total disability, and refused to pay Mr. McLaughlin's wife for attendant care. Only the defendant appealed.

The Court of Appeals affirmed, holding that under the Seagraves, a constructive refusal of suitable employment can be found, when an employee is terminated for misconduct, unrelated to his compensable injury, for which a nondisabled employee would ordinarily be terminated. However, the burden then shifts to the claimant, who can still obtain compensation for disability, if he is able to prove that he is unable to work due to his injury. In this case, even though the termination satisfied the Seagraves test for constituting a constructive refusal of employment, evidence of Mr. McLaughlin's unsuccessful efforts to obtain employment thereafter supported the Commission's decision that he was disabled and entitled to compensation. The defendant argued that the Commission had erred by accepting the testimony of both the treating orthopedist, who opined that Mr. McLaughlin was capable of some work but with significant restrictions, and the second opinion doctor, who opined that he was totally unable to work, on purported grounds that the two opinions were inconsistent and could not both be accepted logically. However, the Court pointed out that the doctors were referring to different time periods, and the opinions supported alternative methods of proving total disability, pursuant to the framework in Russell v. Lowes Prod. Dist.

The case was remanded for determination of the attorney's fees and other expenses to be awarded under N.C.G.S. 97-88, because while the plaintiff had been the one who appealed within the Commission, the defendant's appeal to the Court of Appeals, resulting in a decision in favor of Mr. McLaughlin, could support an award.

8. Suitable employment.

Nobles v. Coastal Power & Elec. Co., **____ N.C. App _____, 701 S.E.2d 316 (2010)**

Mr. Nobles suffered an admittedly compensable fracture of his leg that required surgical stabilization. He was released at maximum medical improvement a little more than two years later. A functional capacity evaluation determined that he was unable to do his previous job, which involved installation of transmission power lines in North Carolina and South Carolina, and determined that he could work at a medium physical demand level. The employer offered him two sedentary jobs. The treating physician approved both, but recommended the fleet manager's assistant position. Apparently before that was sorted out, Mr. Nobles went back to the doctor with meniscus problems, which were treated surgically. When he was released to light duty work, the employer offered the fleet manager's assistant job, paying $19.50 per hour. (The opinion does not mention whether that was Mr. Nobles' pre-injury wage, but the lack of discussion of any issue as to that implies that it was, as does a reference to a compensation rate of $514.38) Mr. Nobles agreed to accept it, because he had not yet reached maximum medical

improvement, as long as he was provided with a company vehicle, as he had been before his injury. The employer refused, noting that the company truck had been necessary in his installation job, because he would travel directly from his home to job sites, but that office personnel generally did not get one. A few months later, Mr. Nobles was released at maximum medical improvement, with the same restrictions as before and an opinion from the treating physician that the fleet manager's assistant job would be appropriate. The doctor had previously opined that it "would not be appropriate for Plaintiff to commute the 60.3 miles from Cerro Gordo (where he lived) to Defendant's office in Wilmington," but he testified that Mr. Nobles was physically capable of the drive.

The Commission found and concluded that Mr. Nobles had unjustifiably refused suitable employment and had failed to prove disability, then awarded compensation for temporary total disability through the date of maximum medical improvement and a credit to the defendants for payments after that.

The Court of Appeals affirmed, holding that the evidence supported the finding that the fleet manager's assistant job was a real job, even though it had only been filled intermittently in the past, because there was testimony that the employer's growing business justified a full-time, permanent employee in that position, that valuable work was not being done without one and that the duties of that position had been filled with a combination of employees, outside consultants and excessive work imposed on other employees. Mr. Nobles argued (I think) that even if the job was useful to the defendant-employer, there was no evidence to support the requirement that it was available in the job market from anyone other than the employer. Interestingly, the Court did not really address that issue directly, answering the contention with evidence that the proffered position was legitimate with respect to the employer.

The Court endorsed the Commission's decision not to take seriously Mr. Nobles' argument that the job was too far from his home, in light of evidence that his pre-injury job usually required travel to more distant locations and that he had been willing to accept the job, if he had been provided a company vehicle. There is no discussion in the opinion as to any consideration of the increased cost and other burdens, such as unpaid driving hours, required to commute so far without the company vehicle that had been part of his pre-injury job.

Finally, the Court affirmed the Commission's decision that Mr. Nobles had not proved disability after he was released to restricted work, as the only evidence he had presented was two labor market surveys from a vocational expert, to which the Commission had chosen not to give much weight.

McLeod v. Wal-Mart Stores, Inc.,___ N.C. App _____, _____ S.E.2d _____(2010)

Mr. McLeod suffered an admittedly compensable injury to his back. The defendant-authorized doctor released him at maximum medical improvement, after which he went to a couple of other doctors. The Industrial Commission ordered payment for the treatment by the other doctors and determined that Mr. McLeod's job, which he continued to do through the date of hearing, was not suitable.

The Court of Appeals affirmed, holding that acceptance of the compensability of the claim with a Form 60 raised the Parsons v. Pantry presumption (citing Perez v. American Airlines) that additional medical treatment was related to the compensable injury. The defendant pointed out that the originally authorized doctor had opined that after the time he opined that Mr. McLeod had reached maximum medical improvement, his continued back problems were likely caused by conditions that pre-existed the injury. The Court acknowledged that, but held that when evaluating the issue, the Commission had the power to weigh the evidence and had obviously, though not completely explicitly, chosen to give greater weight to the opinions of the other doctors, so that the defendant did not meet its burden. (**Practice note:** This is not the first time recently that defendants have argued on appeal that, essentially, production of evidence to counter an employee-favorable presumption is sufficient to shift the burden of proof back to the plaintiff. In those cases, the appellate courts have always held that the Commission did not err in choosing to weigh the evidence in such a way as to decide that the defendants' burden had not been met. That is obviously correct, as I doubt many defendants would agree that a plaintiff need only produce some evidence of, for example, initial causation to shift the burden to a defendant to prove otherwise.)

The Court also held that the Commission's decision that the defendant had failed to prove that the job was suitable was properly supported by the opinions of all three doctors that continuing to do the job would likely cause back problems to get worse. The interesting part in this case is that the Court cited testimony like "the problems would recur," Mr. McLeod "would be at risk for increased pain," and he "would be better off in a management or desk type position," without requiring that the job would do further damage. The Court explicitly endorsed equivalency of "would worsen plaintiff's pain" with "not suitable because Mr. McLeod was "not capable of performing it in light of his limitations." That can be very useful, when faced with a doctor who insists that a claimant is "able" to perform a job that will admittedly cause significant pain.

It appears that Mr. McLeod wished to challenge the Commission's refusal to award compensation for total disability, presumably because he continued to earn his original wage at the unsuitable job through the date of hearing. The Court refused to address the issue, because he had not cross-appealed.

9. Injury by accident.

Shay v. Rowan Salisbury Schools, _____ N.C. App _____, 696 S.E.2d 763 (2010), 364 N.C. 435, 702 S.E.2d 216 (2010)

Ms. Shay was a teacher. When going from one floor to the other, she used an elevator, because it was difficult for her to climb stairs. After the elevator broke down, she was forced to use the stairs. After about a month of using the stairs, her knee "popped" while climbing the stairs, without any conventional accident like a trip, slip or twist. She required surgery. Her claim for workers' compensation benefits was based on her contention that climbing stairs was an interruption of her work routine. The Deputy Commissioner denied the claim, but the Full Commission awarded benefits, in a split decision.

The Court of Appeals reversed, holding that by the time Ms. Shay had been forced to use the stairs for a month, using them had become part of her work routine, even if it was strenuous.

Judge Wynn dissented, opining that the passage of time did not make the stair climbing part of Ms. Shay's work routine, when it was not the usual way she had become accustomed to getting to the second floor, noting that the case upon which the majority relied in holding that less time was enough to create a new work routine had involved different kinds of differences between the prior routine and the new one that were not so significant. He also noted that the Commission's experience in assessing work routines required deference to its decision.

There is an order of the Supreme Court, dated about two months after the Court of Appeals opinion, allowing plaintiff's motion to dismiss the appeal.

10. Third party lien issues.

Cook v. Lowes Home Ctrs, Inc., _____ N.C. App _____, _____ S.E.2d _____(2011)

Mr. Cook was injured while working for Oryan, a Tennessee company, at a Lowe's store in North Carolina. His workers' compensation claim was processed under Tennessee law, which included an award of about $95,000 for a 75% whole-body impairment. The total amount paid by the workers' compensation carrier was just over $140,000. He sued Lowe's and a couple of other defendants for negligence in North Carolina and settled with all of them for $220,000. Oryan and its comp carrier intervened. On motion of the plaintiff, a Superior Court judge reduced the workers' compensation lien to $30,000, pursuant to N.C.G.S. § 97-10.2(j). Oryan and its carrier appealed, arguing that Tennessee law, which does not provide for reduction of liens, applied to prohibit the North Carolina judge from reducing theirs.

The Court of Appeals affirmed, holding that the statutes addressing workers' compensation liens are remedial in nature, so that the law of the forum applies. The Court also noted that Oryan and its comp carrier had been allowed to assert and attempt to protect their lien, as provided by Tennessee law. The Court then held that the Superior Court had acted within its discretion in reducing the lien.

Kingston v. Lyon Constr. Co., _____ N.C. App _____, 701 S.E.2d 348 (2010)

M r. Kingston prevailed in his workers' compensation occupational disease claim for mesothelioma caused by exposure to asbestos while working for the employer. He also made claims against several asbestos manufacturers, several of which were settled. He moved the Superior Court to reduce the workers' compensation defendants' lien on the proceeds of the third-party settlements, and the Court reduced it to zero.

The Court of Appeals, Judge Stephens writing, affirmed, holding that the Superior Court had jurisdiction to address the lien, that it had not abused its discretion in refusing to accept the defendants' proffered additional evidence after the motion hearing, and that it had properly

considered the statutory factors and other evidence in extinguishing the lien. The defendants' argument against jurisdiction was based on the requirement that there be a final settlement and their contention that there had not been one, when there were third-party defendants with whom Mr. Kingston had not yet resolved his claims. The Court held that that did not conflict with the finality of settlements against the third parties with which there had already been settlement and noted that if Mr. Kingston obtained additional third-party proceeds from other defendants, the employer and its carrier could seek reimbursement from those proceeds.

The comp defendants had sought to introduce a letter from Mr. Kingston's lawyer that they claimed was inconsistent with his statement at the motion hearing that there were still some third-party claims that had not been settled. The Court first noted the comp defendants had inaccurately designated their motion as pursuant to Rule 60(b) of the Rules of Civil Procedure, because it was made after the motion hearing, but before there had been an order entered, and Rule 60(b) applies only to post-entry motions. However, the Court stated that inaccurate designation does not affect the validity of the motion, and that the motion was properly filed, pursuant to the "well-recognized" right to move a Court to reopen the hearing for receipt of additional evidence, before an order is entered. The Court of Appeals then held that the Superior Court did not abuse its discretion, when Mr. Kingston's lawyer explained that he had been referring to claims that had been dismissed without settlement.

Finally, the Superior Court's discretionary decision to reduce the lien to zero was supported by proper consideration of the statutory and other factors, including the fact that several of the third-party defendants were bankrupt, so that recovery from them was reduced or completely unavailable.

11. Employment status.

Morales-Rodriguez v. Carolina Quality Exteriors, Inc., _____ N.C. App _____, 698 S.E.2d 91 (2010)

Mr. Morales-Rodriguez was hanging from a rope, applying stucco, when the rope came loose, and he fell. The employer-defendant denied the claim, on grounds that he had not "suffered an accident arising out of the course and scope of his employment" and, primarily, that he was not an employee of the defendant employer. The Commission decided that he was an employee and awarded compensation, plus a penalty for late payment, and assessed penalties for failure to have insurance, as well as penalties personally against the vice president of the corporate employer, as allowed by N.C.G.S. § 97-93 against individuals in a position to obtain insurance who fail to do so. It is not clear why similar individual sanctions were not assessed against another individual defendant, who appears to have been the husband of the vice president (and likely the president) and was the only witness presented by the employer-defendant to testify about the employment relationship at hearing. After appeal to the Court of Appeals, the vice president filed for bankruptcy, and the workers' compensation proceedings were stayed until she had been discharged from bankruptcy.

The Court of Appeals affirmed (mostly), holding that since employment status is a jurisdictional issue, the Court was required to review the evidence *de novo*, and that after that review, it agreed with the Industrial Commission that Mr. Morales-Rodriguez was an employee of the employer. The Court found the claimant to be credible, noting that supposed inconsistencies in his testimony appeared to arise mostly from difficulties in interpreting from Spanish and that alleged inconsistencies in his testimony about his injury were a) not relevant to the employment issue and b) resolved by the Commission in his favor, in findings of fact that the defendants had not challenged. On the other hand, the employer's witness, who admitted that Mr. Morales-Rodriguez had been an employee at all times before the project on which he was injured but had requested a change to independent contractor status before his injury, was evasive and seemed to have memory problems regarding relevant information. Having given greater weight to the claimant's testimony, the Court found that none of the indicia of independent contractor status in Hayes v. Elon College were present and concluded that Mr. Morales-Rodriguez was an employee of the employer-defendant. The Court vacated the award of a 10% penalty for late payment, noting that the result had been appealed timely throughout, so that the payment had not become due.

Taylor v. Town of Garner, _____ N.C. App _____, 694 S.E.2d 206 (2010)

Officer Taylor had established a mounted police patrol for defendant Town of Garner. In September of 2007, the Chief of the N.C. State Campus Police Department contacted the Chief of the Garner police to ask about using mounted officers at home football games. Officer Taylor's employment with State was pursuant to a Mutual Assistance Agreement, authorized by N.C.G.S. § 160A-288, which, among other things, allows officers to work outside their jurisdictions with the full powers of officers in the jurisdictions to which they are lent, while providing that pay and benefits, including workers' compensation coverage, will be provided by the usual employer. Contrary to the Mutual Assistance Agreement that parroted the provisions of § 160A-288, Officer Taylor was paid directly by N.C. State, at a rate of $30 per hour, with the encouragement of the Garner police Chief, because that would allow him to take home more money than he would through overtime from his regular job. After he worked the first game, Officer Taylor was instructed to submit a "secondary employment request," because he was being paid directly by N.C. State. After reporting for duty at a game in late October, Officer Taylor and three other mounted officers decided to exercise their horses in a field, where Officer Taylor ran into a guide wire which, when he threw his hand up to protect his head, severed his thumb and knocked him off his horse. Surgery to re-attach the thumb was unsuccessful, but he was eventually able to return to his regular patrol duties. It was stipulated that Officer Taylor had suffered a compensable injury, but both the Town of Garner and N.C. State claimed that the other was liable for benefits, with the Town contending that there was no employee-employer relationship with it at the time of the injury. In the meantime, neither defendant paid for anything. The Commission decided that the Town was liable, under the terms of the Mutual Assistance Agreement, and the Town appealed.

The Court of Appeals affirmed, holding that despite the secondary employment request, Officer Taylor's duties for N.C. State during games subsequent to the first one remained pursuant to the Mutual Assistance Agreement, without which he would not have been authorized to perform police duties, and that that was not disturbed by the method of payment, when it was

clear that that was intended by everyone involved, including the Chief of the Garner police, simply as a mechanism getting Officer Taylor paid more.

Discretionary review was denied.

Woodliff v. Fitzpatrick, _____ N.C. App _____, 695 S.E.2d 503 (2010)

Mr. Woodliff was injured while working as a carpenter. The uninsured defendant denied the claim on grounds that Mr. Woodliff was an independent contractor and not an employee. At hearing, the Deputy Commissioner decided that Mr. Woodliff was an employee and that the defendant employed three or more employees, so as to be covered by the Workers' Compensation Act. The Full Commission agreed that Mr. Woodliff was an employee but decided that he had failed to prove that there were two others, so that the Commission lacked jurisdiction over the claim.

The Court of Appeals affirmed, evaluating the evidence *de novo*, because the issues of employment status and the number of employees are jurisdictional. Plenty of evidence was cited to prove that Mr. Woodliff was an employee, including that he was paid by the hour, was provided tools by the defendant, was supervised almost daily by the defendant, did not work for anyone else or hire helpers, and displayed a magnetic sign with the defendant's business name on his truck. The Court acknowledged that the evidence showed that the other alleged independent contractors singed the same "Subcontractor's Agreement" as Mr. Woodliff did and submitted identical timesheets for hourly pay, but noted that Mr. Woodliff failed to present enough other evidence to carry his burden of proving that the others were employees, despite his contention that others working on the same projects appeared to be in exactly the same position as he was, such that it was illogical to determine that he was an employee and the others were not. The Court rejected Mr. Woodliff's argument that once he had proved his own employment status, N.C.G.S. § 97-3 created a presumption that the defendant had "accepted the provisions of this Article," holding that the burden of proving "employment" under the Workers' Compensation Act includes proving the number of employees. The Court also noted that the rule of liberal construction applies only after it is established that the claim is covered under the Act.

Certiorari was denied by the Supreme Court.

12. Average weekly wage.

Pope v. Johns Manville, ___ N.C. App _____, 700 S.E.2d 22 (2010)

This is a complicated case that is applicable only to claims involving occupational diseases that manifest themselves a long time after harmful exposure, which usually means asbestos-related diseases or silicosis.

Mr. Pope was exposed to asbestos while working for the employer-defendant, an asbestos manufacturer. He left employment with the employer in 1968. Thereafter, he worked for a number of different, non-exposing employers, eventually working as a self-employed turkey

farmer for the last seven years before retiring in 2003. Two years after retirement, he was diagnosed with asbestosis (which is very common, owing to the medical fact that most asbestos-related diseases, including asbestosis, exhibit a "latency period" of at least five years, and often 15, 20 or, as in this case, more years, between exposure and manifestation of the disease). The Commission awarded compensation and the defendants appealed.

The Court of Appeals originally affirmed as to all aspects of the Commission's decision, citing sufficient evidence to support the determinations that Mr. Pope had contracted asbestosis and that he had been disabled by it, rejecting the argument that he could not have been disabled by the disease, because he had retired voluntarily, two years before he was diagnosed (which amounted to an argument that employers that expose their employees to asbestos should be, as a practical matter, immunized from liability in the vast majority of cases of disease caused by the exposure) . The defendants had also challenged the Commission's decision that Mr. Pope's average weekly wage was about $600.00 (yielding a compensation rate of $399.06 per week), based on his earnings as a self-employed turkey farmer, his last job before retirement. The Court affirmed that, rejecting the defendants' argument that because Mr. Pope had been retired at the time of his diagnosis, which was the time that the injury is legally deemed to have occurred, and had no wages, he should not have been awarded" any compensation whatsoever." The Court's underlining of the word "any" and use of the word "whatsoever" probably indicate that the Court was not willing to swallow the result that calculation of average weekly wage would, through another mechanism, practically immunize employers from liability, other than for medical expenses, for a disease that was described elsewhere in the opinion as incurable and usually totally and permanently disabling.

The Court granted the defendants' petition for rehearing on the average weekly wage issue, in which the defendant argued that 1) the Court had erred in relying on N.C.G.S. § 97-61.5, when Mr. Pope had not been removed from his employment due to asbestosis, 2) the average weekly wage should have been based on Mr. Pope's wages when he last worked for the employer-defendant—in 1967, and 3) that the Commission had erred by using wages from employment other than with the employer. The Court rejected the first argument as not being accurate, opined that there was no statutory support for using the old wages, as the time of injury is key to the calculating the wage and the time of injury was at diagnosis and last injurious exposure is not relevant to average weekly wage , and distinguished the cases prohibiting use of wages from other employments by pointing out that they involved attempts to combine wages from other employments with those from the employment of injury, while here, the Commission simply used the wages earned by farming turkeys as a way to approximate, as N.C.G.S. § 97-2(5) dictates for the fifth, "catchall" method of calculating average weekly wage, "the amount which the injured employee would be earning were it not for the injury." However, the Court did reverse itself, remanding the case to the Commission, because the Commission had not made sufficient findings and conclusions as to the "exceptional reasons" why the first four methods of calculating average weekly wage would be unfair.

13. Exclusive remedy, Woodson/third party claims.

Valenzuela v. Pallet Express, Inc., _____ N.C. App _____, 700 S.E.2d 76 (2010)

This is a wrongful death lawsuit based on Woodson v. Rowland and Pleasant v. Johnson. Nery Valenzuela was 17 years old and working with a machine that chomped up pallets into mulch. The safety guard had been removed. A co-worker left the machine to get a forklift, and when he came back, Nery's remains were on the discharge side of the machine. An investigation by the N.C. Occupational Safety and Health Administration resulted in two citations containing eleven violations, including allowing an underage employee to work on heavy equipment and removing guards from the shredder. Nery's estate sued the employer and its president under Woodson and the employer's operations manger under Pleasant. The trial court dismissed all claims on the defendants' motions for summary judgment, in which the defendants had contended that the plaintiff was unable to meet its burden of proof, because there had been no witnesses to the accident.

The Court of Appeals affirmed, citing similar cases in which Courts had determined that the forecast of evidence was insufficient to show deliberate conduct, substantially certain to cause serious injury or death (as to the Woodson claims) or willful wanton or reckless conduct (as to the Pleasant claim).

14. Insurance coverage.

Bell v. Hype Mfg., LLC, ____ N.C. App _____, __ S.E.2d _____(2011)

Mr. Bell suffered a compensable injury on September 28, 2006. Zurich, the defendant carrier, denied coverage for failure to pay premiums. After a hearing was requested, the employer settled the claim with Mr. Bell, and the case proceeded on the coverage issue.

Hype, the employer defendant, paid 50% of the annual premium timely. As the due date for the next quarterly payment of one-third of the remainder approached, Hype, through its insurance agent, notified Zurich that it was closing one of its two North Carolina facilities (and increasing the payroll at the other). While discussions that ultimately led to a significant reduction n premium were on-going, Hype failed to make any payment by the due date of August 17, 2006. On August 24, Zurich sent a letter, received by Hype on August 25, advising that the policy would be cancelled, effective September 11, 2006. Hype finally paid on September 28, the date of Mr. Bell's injury, and coverage was reinstated with an effective date of September 29.

The Commission found and concluded that coverage had been effectively cancelled, and the Court of Appeals affirmed, holding that failure to pay even the undisputed amount of the premium by the due date was grounds for cancellation.

Diaz v. Smith's Home Repair, _____ N.C. App _____, _____ S.E.2d _____(2011)

Mr. Diaz fell off a roof while working and injured his arm. His employer had obtained workers' compensation insurance through the assigned risk pool and paid for it through a premium financing company. As part of that arrangement, the financing company was given power of attorney to notify the carrier of failure to pay and to initiate cancellation of the policy. The employer failed to make a payment and, after a few different correspondences, the policy was purportedly cancelled. The final notice of cancellation was sent by certified mail to the employer, but the employer had moved, and the letter was returned. The Deputy Commission awarded compensation and decided that the policy had not been effectively cancelled. The Full Commission agreed as to the award, but decided that the policy had been cancelled. Mr. Diaz appealed.

The Court of Appeals reversed, holding that the Full Commission had erred in applying N.C.G.S. § 58-35-85, which lays out requirements for cancellation of insurance policies that are financed through premium finance companies, instead of N.C.G.S. § 58-36-105, which controls cancellation of workers' compensation policies. There was no direct North Carolina authority, so the Court relied on authority from other states and the general principle of interpreting law so as to provide compensation in workers' compensation claims. The Court also rejected the carrier's contention that Mr. Diaz lacked standing to appeal, because he was not an "aggrieved party." The case was remanded to the Commission to determine whether the requirements for cancellation under § 58-36-105 had been met.

15. Presumptions, including of cause of medical conditions and compensability of injuries.

Gross v. Gene Bennett Co., _____ N.C. App _____, _____ S.E.2d _____(2011)

Mr. Gross fell through a ceiling at work, landing on a concrete floor 10 to 12 feet below. After going to a hospital, he was sent to a particularly nasty employer-oriented medical clinic, which the Commission found was hostile to his claim from the outset and released him at maximum medical improvement and full duty prematurely, which treated him for a couple of months. At his first visit there, he, as a "steel fabricator/welder/machinist," was given restrictions of no lifting, repetitive bending, pushing, pulling, squatting, kneeling, crawling or climbing. The defendants accepted the claim as "medical-only." He went to an orthopedist on his own about four months after he was released and again about 10 months after, which was about a year after the accident. An MRI taken by the bad doctors, a little more than a month after the accident, showed degeneration and mild disc bulging in the lower lumbar spine, while one taken 13 months later, after the second visit to the orthopedist, showed herniation at L4-5. The Commission assigned greater weight to the orthopedist's opinion and found and concluded that the accident had caused injury to Mr. Gross' back that progressed over time to result in the herniated disc that the orthopedist observed.

The Court of Appeals reversed, holding first that the Commission had improperly applied the Parsons presumption of causation and then erred by relying on the orthopedist's opinions,

when they were too speculative and the Commission's interpretation was not supported by the evidence. While it is not clear that the Commission actually did rely on the Parsons presumption, when it cited Perez v. American Airlines, the opinion does contain a useful discussion of the pre-requisites for using the presumption. According to the opinion, the presumption that additional medical treatment is causally related to an original injury requires that there be prior determination of the claim, by either acceptance of the claim by agreement (Kisiah v. W.R. Kisiah Plumbing), admission by the employer without an agreement (Perez v. American Airlines) or Commission order (Parsons v. Pantry, Inc.). Since there was no prior determination in this case, the presumption was invalid. The Court noted that "acceptance of a claim on a medicals-only basis 'cannot in any sense be deemed an admission of liability.'" The Court did not address whether there is a difference between paying medical expenses without accepting the claim, which clearly does not constitute an admission of liability, and "acceptance of a claim as medical-only," which may be something else. There was no citation to authority regarding the requirement of a determination of compensability by some prior proceeding or acceptance. The Court did affirm the Commission's award of compensation for the couple of months that Mr. Gross was under the care of the company doctors, before he was released at MMI with no restrictions, but that award, even though for a period before the period during which the presumption might have applied, was apparently not considered prior enough.

The orthopedist's testimony was held not to support the Commission's decision on causation, though the ground is not completely clear. The Court cited authority for the requirement of sufficient certainty, so that opinions based on mere speculation and conjecture cannot support an award, and there was quotation in the opinion of the orthopedist's testimony that was stated in terms of "possible" and "likely could have" and rendered at least equivocal by cross examination, but the ultimate discussion of the grounds for reversal focused on the problem that the IC had found that Mr. Gross had had prior back problems, while the orthopedist had conditioned his not-quite sufficient opinion on the lack of any prior back problems at all, which rendered the findings unsupported by the evidence.

McLeod v. Wal-Mart Stores, Inc., ___ N.C. App _____, _____ S.E.2d _____(2010)

Mr. McLeod suffered an admittedly compensable injury to his back. The defendant-authorized doctor released him at maximum medical improvement, after which he went to a couple of other doctors. The Industrial Commission ordered payment for the treatment by the other doctors and determined that Mr. McLeod's job, which he continued to do through the date of hearing, was not suitable.

The Court of Appeals affirmed, holding that acceptance of the compensability of the claim with a Form 60 raised the Parsons v. Pantry presumption (citing Perez v. American Airlines) that additional medical treatment was related to the compensable injury. The defendant pointed out that the originally authorized doctor had opined that after the time he opined that Mr. McLeod had reached maximum medical improvement, his continued back problems were likely caused by conditions that pre-existed the injury. The Court acknowledged that, but held that when evaluating the issue, the Commission had the power to weigh the evidence and had obviously, though not completely explicitly, chosen to give greater weight to the opinions of the other doctors, so that the defendant did not meet its burden. (**Practice note:** This is not the first

time recently that defendants have argued on appeal that, essentially, production of evidence to counter an employee-favorable presumption is sufficient to shift the burden of proof back to the plaintiff. In those cases, the appellate courts have always held that the Commission did not err in choosing to weigh the evidence in such a way as to decide that the defendants' burden had not been met. That is obviously correct, as I doubt many defendants would agree that a plaintiff need only produce some evidence of, for example, initial causation to shift the burden to a defendant to prove otherwise.)

The Court also held that the Commission's decision that the defendant had failed to prove that the job was suitable was properly supported by the opinions of all three doctors that continuing to do the job would likely cause back problems to get worse. The interesting part in this case is that the Court cited testimony like "the problems would recur," Mr. McLeod "would be at risk for increased pain," and he "would be better off in a management or desk type position," without requiring that the job would do further damage. The Court explicitly endorsed equivalency of "would worsen plaintiff's pain" with "not suitable because Mr. McLeod was "not capable of performing it in light of his limitations." That can be very useful, when faced with a doctor who insists that a claimant is "able" to perform a job that will admittedly cause significant pain.

It appears that Mr. McLeod wished to challenge the Commission's refusal to award compensation for total disability, presumably because he continued to earn his original wage at the unsuitable job through the date of hearing. The Court refused to address the issue, because he had not cross-appealed.

Reaves v. Industrial Pump Service, _____ N.C. App. _____, _____ S.E.2d _____ (2009), _____ N.C. App _____, 696 S.E.2d 548 (2010)

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, from 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)).

On remand, the Commission awarded compensation, deciding that the Pickrell presumption applied and that the defendants had not rebutted it and, in the alternative, that Mr. Reaves' employment subjected him to extreme conditions, but that the lack of training of the co-employee did not significantly contribute to the death. Both parties appealed.

The Court of Appeals affirmed, holding that even though Mr. Reaves' pre-existing coronary artery disease was a cause of his death, the evidence showed that it would have been insufficient to cause death without some arrhythmia, which could have been instigated by heat stress, and that the mechanism of the fatal event was not known, so that the Pickrell presumption was properly applied. That presumption allowed the death to be presumed to be caused by work and to arise out of and in the course of employment, when Mr. Reaves was found dead "under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death." While the discussion is a bit confusing, it appears that the Court also allowed the Commission to find that the death was unexplained, in the face of testimony from a defense expert that could have been interpreted as contrary to that, by deferring to the Commission's power to evaluate and weigh the evidence.

The Court explicitly did not reach the issue of whether the Commission had erred in deciding that Mr. Reaves' death was caused by "extreme work conditions," because it had affirmed with respect to the Pickrell presumption. The plaintiff's cross-appeal was moot.

Hedges v. Wake Cty. Pub. School Sys., _____ N.C. App _____, 699 S.E.2d 124 (2010), disc. rev. denied, _____ N.C. _____, _____ S.E.2d _____.

Ms. Hedges was walking into a workroom at a school, carrying some papers, when she "stumbled" and fell, catching herself on her right arm. She went to an urgent care center, where she was x-rayed, put in a sling and given drugs. She returned for follow-up a few days later and was referred to an orthopedist, who diagnosed a "massive" rotator cuff tear, performed surgery, released her to part-time work, then released her to full time work with restrictions and ultimately assigned a 20% rating of the right arm. In her recorded statement shortly after the accident, Ms. Hedges admitted that there was nothing on the floor and that she "just stumbled." The defendant denied the claim, on grounds that the fall was not a compensable accident, because Ms. Hedges had failed to prove that it arose out of her employment. The Commission awarded benefits and attorney's fees for unreasonable defense, pursuant to N.C.G.S. § 97-88.1.

The Court of Appeals affirmed, citing prior authority for the principle that unexplained falls at work are compensable and drawing a distinction between those and falls that are caused by some factor that is unrelated to work. The Court did not discuss whether the fall in this case really even fit the definition of "unexplained," when Ms. Hedges testified, with contradiction, that she stumbled. In any event, the Court held that the authority supporting the claim was so clear and on point that the defense of the claim was unreasonable.

Discretionary review was denied.