WORKERS' COMPENSATION
CASE LAW UPDATE: OCTOBER 2003

By Jay A. Gervasi, Jr.
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1. Effect of maximum medical improvement on compensation for total disability.

Knight V. Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434 (2002), aff'd, 357 N.C. 44, 577 S.E.2d 620 (2003)

This is a very important case, which is in the process of becoming more important.

Mr. Knight claimed a back injury when he missed a step on a ladder and fell, aggravating pre-existing condition. He underwent surgery and attempted to return to work with the employer on several occasions, always claiming failure due to pain. His doctor testified that return to work slips were, bearing various restrictions, were intended to allow him to attempt to return to work, that there was no objective reason he could not do certain of the jobs, but that his condition produced pain and, while Mr. Knight's pain reports were more severe than those of most people with similar conditions, the doctor had no doubt that they were genuine. The doctor also testified that it was difficult to assign a time of maximum medical improvement, because Mr. Knight never really improved, a date a few months before the hearing was reasonable. The Commission awarded compensation for on-going temporary total disability.

The Court of Appeals affirmed, holding among other things, that Mr. Johnson had satisfied his original burden of proving disability and that maximum medical improvement was immaterial to the duration of compensation for total disability. The Court acknowledged that Mr. Knight had not met the requirements of the last three ways of proving total disability under the framework announced in Russell v. Lowes Product Distribution but held that there was evidence to support the decision that he had satisfied the first test, by providing medical evidence of total disability. In so holding, the Court included in the medical evidence Mr. Knight's reports of pain and inability to work as a result thereof. Purported evidence to the contrary was found not actually to be contrary, as the treating physician had testified that pain could have prevented Mr. Knight from working and that the pain was real.

On the issue of the effect of maximum medical improvement, the Court held that it is only material, and that distinctions between temporary and permanent disability only matter, when an injured worker claims compensation for permanent partial disability under N.C.G.S. § 97-31. The Court acknowledged case law from the Court of Appeals that attached significance to MMI in determining the duration of compensation for total disability and in reorganizing

presumptions and burdens. The Court then explicitly disregarded those cases, opining that they were contrary to statute and established case law from the Supreme Court.

The Court also held that there was evidence to support the Commission's decision that the defendants were liable for detoxification and that the Commission was allowed, by its own mediation rules, to decide not to order Mr. Knight to reimburse the defendants for half of the mediator's fee.

Judge Bryant dissented with respect to the significance of maximum medical improvement, not disagreeing with the majority's opinion but forcing the Supreme Court to resolve the direct conflicts in the opinions of different panels of the Court of Appeals on that subject.

The Supreme Court affirmed per curiam.

Walker v. Lake Rim Lawn and Garden, 155 N.C. App. 709, 575 S.E.2d 764 (2003).

This case contains a very important principle regarding maximum medical improvement. Mr. Walker suffered an admittedly compensable knee injury and was treated to a "hard ball" approach to vocational rehabilitation. After surgery, his medical treatment was shifted to Dr. Szura, a doctor far from his home, who further referred him to Dr. Sanitate. The assigned vocational rehabilitation specialist, Ted Sawyer, prepared hypothetical job descriptions, without any input from the potential employers, and procured approval of them from Dr. Szura. By this process, Mr. Walker was placed in a minimum wage j ob at a gas station, which required activity beyond the restrictions given by Dr. Szura. Mr. Walker complained of increased pain and spoke with Dr. Szura, who expressed an inability to help and suggested that Mr. Walker speak with his employer at the gas station. When he did so, in an attempt to obtain some accommodations, he was terminated. The defendants refused to resume compensation after the failed attempt to return to work, filing one of four Form 24 Applications to Stop Payment. Later, another minimum wage job, as a part-time dining room attendant at McDonald's, was offered and accepted. However, the job was withdrawn when Mr. Walker showed up for work. The Commission awarded on-going, indefinite compensation for temporary total disability from the time Mr. Walker was terminated from the gas station job, plus a 10% penalty for late payment, and removed the vocational rehabilitation specialist.

The Court of Appeals, Judge Hudson writing, affirmed. The defendants argued that the Commission had erred by finding that Mr. Walker had not reached maximum medical improvement when the doctors opined that he had done so. The Court held that MMI, a purely medical determination, was immaterial, when the plaintiff continued to have a total loss of wage earning capacity. Further, even if MMI was material, there was evidence to support the Commission's finding that Mr. Walker continued to need pain treatment and vocational rehabilitation. Since vocational rehabilitation is a form of medical treatment under N.C.G.S. **§** 2(19), the healing period does not end until the injured worker has reached maximum vocational recovery.

The Commission's failure to find that Mr. Walker had unjustifiably refused suitable employment was supported by the evidence, as the supervisor at the gas station testified that the j ob description presented to Dr. Szura was materially inaccurate, and the j ob at McDonald' s was never actually made available.

Arnold v. Wal-Mart Stores, Inc., 154 N.C. App. 482, 571 S.E.2d 888 (2002).

Ms. Arnold suffered a compensable back injury. About two months later, she was released to return to light duty work, but the employer did not allow her to return. She returned to work about a year after the accident. The Commission awarded compensation for temporary total disability for the year out of work, plus compensation for a 10% rating of the back.

The Court of Appeals, Judge Tyson writing, vacated and remanded, holding that when compensation is claimed for permanent partial disability under N.C.G.S. § 97-31, compensation for ttd is only payable during the healing period, the end of which is defined by maximum medical improvement, after which compensation for ppd can be paid. Wage earning capacity and the date of return to work were "irrelevant." Since the Commission had made no finding as to the date of MMI, the award was improper. The award of Little v. Penn Ventilator-style indefinite future medical expenses was affirmed as being within the discretion of the Commission.

The effect of this decision, in light of the Supreme Court decision in Knight v. Wal-Mart (affirming the Court of Appeals per curiam. reported above), is unclear. While the Knight Court held that the duration of compensation for total disability was not affected by maximum medical improvement, it mentioned that MMI could be relevant when an injured worker is seeking compensation for permanent partial disability, under N.C.G.S. § 97-3 1 . However, the Knight Court also held that wage earning capacity, and not MMI, was the determining factor as to the duration of total disability. Any distinction will be significant only when an injured worker returns to work after MMI and the defendants ask for credit for weekly compensation for total disability paid after MMI against compensation for a rating. Particularly when the injured worker reaches MMI and requires a long time to find substitute employment, perhaps undergoing extensive vocational rehabilitation, the effect of the approach taken in this case would be to eliminate compensation for permanent damage to the body.

2. Disability, including presumption of on-going.

Devlin V. Apple Gold, Inc., 153 N.C. App. 442, 446, 570 S.E.2d 257, 261 (2002).

Mr. Devlin suffered an admittedly compensable knee injury while working as an assistant manager at an Applebee's restaurant. He reached maximum medical improvement in November of 1996, with a 25% rating of the leg. Around that time, he started a gutter business with a neighbor, in which he did the management work but not the physical work. The defendants filed a Form 24 Application to Stop Payment in August of 1997, which was approved, retroactively to January 16, 1997. On appeal of the Form 24 approval, the deputy commissioner essentially affirmed, awarding compensation for the rating, subject to credit for all compensation paid since

January 16, 1997. The Full Commission affirmed, with Commissioner Ballance dissenting, on grounds that the evidence did not prove the ability to obtain employment in the general marketplace or the ability to earn wages equal to or greater than those earned prior to injury.

The Court of Appeals reversed and remanded, holding consistently with Commissioner Ballance's points. The Commission had properly found something equivalent to Mr. Devlin's being actively involved in the business, but there were no findings concerning whether his skills were competitively marketable. Further, while there were findings about the gross revenues of the gutter business and some references to expenses, there were no specific findings as to post-injury wage earning capacity, other than that he had some and was probably being compensated.

Guerrero v. Brodie Contractors, Inc., _____ N.C. App. _____, 582 S.E.2d 346 (2003).

Mr. Guerrero suffered an admittedly compensable injury when he fell down an elevator shaft and broke his neck. After a confusingly long delay, he was paid compensation without prejudice, pursuant to N.C.G.S. **§** 97-18(d), and a Form 63 was filed. After surgery and other treatment, a case manager provided a j ob description to the treating physician, who opined that Mr. Guerrero was able to do the job. He made several attempts to return to work, but the jobs were not as described. The doctor, when advised of the actual demands of the job, wrote a note to the effect that Mr. Guerrero was unable to do it. The defendants filed a Form 24, claiming a refusal to accept suitable employment, which was approved. The deputy commissioner awarded compensation until maximum medical improvement, followed by 30 weeks of compensation for a 10% rating to the neck. The Full Commission modified to award indefinite compensation for total disability.

The Court of Appeals mostly affirmed. The defendants' argument that the Commission had erroneously granted the plaintiff a presumption of on-going disability, in the absence of a Form 2 1 Agreement or other award of the Commission was not addressed, on grounds that it was not material to the Form 24 decision. The evidence supported the Commission's decision that the job had been justifiably refused. The issue as to whether the Commission had erred in awarding compensation for total disability after maximum medical improvement was resolved by the Knight v. Wal-Mart case. The contention that Mr. Guerrero had waived his right to contest the limitation on the duration of his total disability compensation by accepting the compensation awarded by the deputy commissioner was rejected as having no basis in law. The Court did remand for application of a credit for the 30 weeks of compensation that had been paid for permanent partial disability, as the Full Commission had only given credit for the total disability compensation received under the deputy's award. The plaintiff's cross-assignments of error were either contingent on decisions the Court did not make or, in the case of fees under **§§** 97-88 and 88.1, rejected.

Cialino V. Wal-Mart Stores, _____ N.C. App. _____, 577 S.E.2d 345 (2003).

Ms. Cialino took a third shift job unloading boxes from trucks and moving the products around. Her hands, wrists and arms started hurting shortly thereafter, and she reported her symptoms about four months after starting work. She was sent to the company doctor, where a physician's assistant diagnosed a repetitive motion disorder and rendered restrictions. Wal-Mart offered first shift greeter work, which Ms. Cialino could not accept, due to child care problems.

She also rejected a temporary job in the fireworks tent during Fourth of July weekend. Wal-Mart then fired her. She was referred to an orthopedist, who diagnosed de Quervain's Tenosynovitis and mild bilateral carpal tunnel syndrome. As time passed, those symptoms subsided, and she started showing more diffuse and inconsistent symptoms. The orthopedist opined that the initial symptoms were caused by work and that the plaintiff was exposed to an increased risk of developing the conditions. However, he was "not sure" whether the symptoms after about six months out of work were caused by the work exposure. He referred the plaintiff to a neurologist, who opined that all of the conditions were related to the work, but under the apparent misapprehension that all symptoms had arisen at the same time. The deputy commissioner awarded indefinite compensation for temporary total disability. The Full Commission decided that disability after the point when her initial conditions subsided was not compensable. Greater weight was given to the orthopedist's testimony, because he was a doctor (unlike the physician's assistant) and based his opinion on an accurate foundation (unlike the neurologist). The Full Commission also awarded compensation only for partial disability, because Ms. Cialino had apparently gotten a part-time job at a health club. Both parties appealed.

The Court of Appeals mostly affirmed, holding that there was evidence to support the Commission's decision. The Commission had noted the conflicting testimony on the cause of Ms. Cialino's problems at different times and assigned greater weight to some. The plaintiff argued that she was entitled to a presumption of on-going total disability, but the Court held that she had not shown the prerequisite of a prior award of the Commission or a Form 21 or 26. The Court implied that the "prior award" had to be from a previous proceeding, which is an argument that defendants sometimes present. Please note that that may not be consistent with some of the seminal cases involving the accrual of the presumption, and that there is an argument that the "prior award" can be a decision in the same. hearing proceeding of disability at a time prior to the period to which the plaintiff seeks to apply the presumption. However, that detail may not have been essential to this case, and the Court may not have intended to imply that the award must be from a prior proceeding.

The defendants argued that there was no evidence to support the finding and conclusion of an occupational disease and disability. The Court rejected that argument, citing evidence to support the Commission's decision. The defendants apparently conceded that there was evidence to prove aggravation of symptoms by work exposure but not that the underlying disease was caused by the exposure. As with the presumption issue, the Court did not clearly address that distinction, but did note evidence that Ms. Cialino did not have symptoms before the exposure.

The Court remanded for the Commission to address the plaintiff's claim for an attorney's fee as a sanction for unreasonable defense, pursuant to N.C.G.S. **§** 97-88. 1 . There was no discussion of whether there was evidence to support such a sanction, but the Commission was required to consider it, and there was no decision mentioned in the opinion and award.

Watts v. Hemlock Homes of Highlands, Inc., ____ N.C. App. ___, 584 S.E.2d 97 (2003).

Mr. Watts suffered an admittedly compensable injury. He was paid compensation at the rate of $320.01 per week. The defendants later asserted that his average weekly wage had been miscalculated and started paying less. Mr. Watts moved in Superior Court that payment be made pursuant to the original Form 60. The Superior Court judgment was vacated by the Court of

Appeals. The defendants then filed a Form 24, alleging that Mr. Watts had been working. The Special Deputy was unable to make a decision, and the claim was assigned for hearing. The deputy commissioner refused to stop the compensation and ordered that it be increased to $320.01 again. The Full Commission affirmed the decision not to stop the compensation, but sent the case back for re-evaluation of the average weekly wage.

The defendants appealed the refusal to stop compensation. The appeal was dismissed as interlocutory, because there had been no decision as to exactly what Mr. Watts would get, in that the average weekly wage issue remained undecided.

Drakeford v. Charlotte Express, _____ N.C. App. _____, 581 S.E.2d 97 (2003).

Mr. Drakeford slipped and fell at a truck stop and suffered an admittedly compensable back and neck injury. He improved somewhat over the next few months, but then got worse. Several doctors had difficulty finding an objective reason for his on-going symptoms. Eventually, he was diagnosed with Chronic Inflammatory Demyelinating Polyneuropathy (CIPD). The Form 24, based on a superceding cause of disability, was denied. At hearing, the medical evidence supported the Industrial Commission's decision that Mr. Drakeford had pre-existing CIPD, that that condition was not aggravated by his compensable fall, that he had suffered a back injury that disabled him for a period of time and that disability after that time was caused entirely by the CIPD. The Court of Appeals affirmed. The Commission mentioned in its conclusion that since compensation (which began in May of 1 995) was started without a Form 21 Agreement (or any other documentation), Mr. Drakeford retained the burden of proving the nature, extent and cause of his disability. The Court of Appeals did not mention that.

3. Asbestos-specific issues.

Hatcher v. Daniel Int'l Corp., 153 N.C. App. 776, 778, 571 S.E.2d 20, 22 (2002).

Mr. Hatcher developed asbestosis and lung cancer and died of the cancer. Medical opinion was clear that both were caused, at least in part, by exposure to asbestos in employment and that the exposure created an increased risk that Mr. Hatcher would develop the diseases, compared to the general population, not so employed. The Commission found and concluded that the defendants in this case were not liable for benefits, because last injurious exposure was with a subsequent employer.

The Court of Appeals affirmed, holding that the evidence supported the Commission's findings and conclusions. The plaintiff had contended that there was insufficient evidence to prove that exposure at the subsequent employer was injurious. The Court allowed the Commission to reach the opposite decision, by inferences drawn from the evidence. The case highlights the difference between asbestosis, in which last injurious exposure is governed by a specific statutory framework, and other asbestos-related diseases, such as lung cancer, which are subject to the general rules concerning last injurious exposure in occupational disease.

4. Occupational disease, other than asbestos-related.

Hale V. Novo Nordisk Pharmaceutical Industries,,Inc., 153 N.C. App. 272, 569 S.E.2d 724, (2002).

Mr. Hale was required to use a calculator repetitively. He claimed that it hurt his hand but did not report that to anyone until after he was terminated for unrelated reasons. He engaged in subsequent employment and hobbies that involved use of the hand and caused discomfort and reported an automobile accident prior to the claimed work exposure that caused hand problems. His neurologist opined that Mr. Hale had carpal tunnel syndrome caused by his work activity with the defendant employer and treated Mr. Hale conservatively. The Commission denied his claim.

The Court of Appeals affirmed. It appears that there was no expert opinion evidence in the record, other than the neurologist's opinions that were favorable to the plaintiff. The Commission apparently based its decision on its own evaluation of the circumstantial evidence. The Court approved of that approach, citing the same evidence. The finding that Mr. Hale was not disabled by his carpal tunnel syndrome was supported by evidence that he worked and engaged in other activities that involved use of the hand.

Hobbs v. Clean Control Corp., 154 N.C. App. 433, 571 S.E.2d 860, (2002).

Ms. Hobbs worked as a sales person for the employer, demonstrating cleaning products at a store. The job required her to spill various things, then spray the employer's products on them and clean them up, after which she would give a sales talk. She developed carpal tunnel syndrome. The Commission denied her claim on grounds that she had failed to prove that her work exposed her to an increased risk of developing carpal tunnel syndrome.

The Court of Appeals affirmed. Ms. Hobbs argued that the uncontroverted medical evidence supported her claim. The Court of Appeals pointed out that while the testifying doctor had opined favorably, he did so on the foundation of the plaintiff's reports that she used a spray bottle constantly. He testified otherwise when presented with the defendants' hypothetical, which was based on hearing testimony that the use of the spray bottle had been much less frequent. The Court pointed out that the case was really about the credibility of the lay testimony, and the Commission is the sole judge of weight and credibility.

Futrell v. Resinall Corp., 151 N.C. App. 456, 566 S.E.2d 181 (2002), 357 N.C. 158, 579 S.E.2d 269 (2003).

Mr. Futrell developed carpal tunnel syndrome. At hearing, he did not produce any evidence that his work had exposed him to a greater risk of contracting CTS than the risk to which the general public, not so employed, was exposed. The Commission denied the claim of occupational disease.

The Court of Appeals affirmed, citing the same lack of evidence. It also affirmed the Commission's refusal to remand the case to the Deputy Commissioner to allow Mr. Futrell to take more evidence on the issue of increased risk. In dissent, Judge Greene opined that the

majority had applied the wrong standard by requiring proof that Mr. Futrell's work increased his risk of contracting CTS, when the proper inquiry was whether the evidence showed an increased risk that pre-exiting CTS would be aggravated by the work, when the claim was based on aggravation. In response, the majority opined that whether a claim is for complete causation or aggravation is material only to the causation prong of establishing an occupational disease, not the increased risk prongs, which require proof of a greater risk of contracting the disease. In any event, the majority held that the issue of aggravation had not been preserved by the plaintiff.

The Supreme Court affirmed per curiam.

Smith-Price v. Charter Pines Behavioral Center, ____ N.C. App. ____584 S.E.2d 881 (2003).

Ms. Smith-Price testified to working in terrible conditions at a psychiatric hospital. There had been a highly publicized death of a young patient, subordinate employees were extremely hostile to her, her supervisors did not support her, and she ultimately broke down. She was diagnosed with post-traumatic stress disorder, and the expert testimony was very persuasive. The deputy commissioner denied compensation, and the Full Commission reversed, with Commissioner Mavretic dissenting.

The Court of Appeals conducted an exhaustive review of the pertinent cases and ultimately held that the evidence was sufficient to support the Commission's findings and conclusions. The Court focused primarily on the nature of nursing in a psychiatric hospital in general and did not appear to rely on the problems Ms. Smith-Price was having with co-employees.

5. Credit issues.

Cox v. City of Winston-Salem, N. C. App. _____, 578 S.E.2d 669 (2003).

Mr. Cox fell into an open manhole while working. He was placed on light duty restrictions, but missed no work initially. After some medical referrals, he was diagnosed with subluxation of the sternoclavicular joint. During surgery, he was found to have a fracture of the cortex of the clavicle and a solid cartilaginous tumor, called an intraosseous chondrosarcoma. In another surgery, the tumor was successfully removed. Mr. Cox attempted to return to work, with substantial restrictions, but he suffered aggravation of his condition. Ultimately, the City decided that it could not accommodate the increased restrictions, and his doctor wrote him out of work indefinitely. He began to receive disability retirement benefits from the State Local Governmental Employees Retirement System. The defendant acknowledged the accidental event, but denied that there was disability caused by it. The Commission awarded compensation and denied the credit the defendant claimed for the disability retirement benefits.

The Court of Appeals affirmed in part and remanded in part. The Court held that medical testimony supported the Commission's decision that the tumor had been aggravated and accelerated by the accident, despite the testimony of the defendant's expert to the contrary. The issue as to the credit was remanded. The Court did not mention that the question as to whether

payments after the Commission's award were "due and payable when paid" under N.C.G.S. **§** 97-42, focusing instead on whether the employee contributed to the fund. The City took the position, backed by testimony of a City employee accounting manager that the Retirement System benefits were funded entirely by the employer until the employee reached age 65, that it was entitled to credit against workers' compensation for those benefits until Mr. Cox reached that age. However, after the Commission filed its opinion and award, Mr. Cox filed a motion for reconsideration with an affidavit from the Deputy Director of the Retirement Systems Division of the Department of the State Treasurer to the effect that the disability benefits were a combination of employee contributions, employer contributions, and investment earnings. The Court held that this direct conflict, which was apparently not addressed by the Commission, required remand.

Denial of the plaintiff's motion for attorney's fees was supported by evidence that the defense was not unreasonable **(§**97-88.1) and that the defendant was partially successful on its appeal to the Full Commission **(§**97-88). The calculation of average weekly wage was remanded, because the numbers did not add up, and the parties agreed that the Commission had erred in failing to award post-hearing interest.

Rice v. City ofWinston-Salem, 154 N.C. App. 680, 572 S.E.2d 794 (2002).

Mr. Rice suffered an admittedly compensable injury and was paid compensation for periods of total disability. Eventually, he was placed on the defendant's disability retirement program. While the employee had contributed to the program, the program was arranged so that he would be paid by the employer first and through employee contributions after age 62. The defendant sought credit for the disability retirement benefits against compensation and unilaterally stopped paying when the disability retirement became effective. The Commission awarded compensation for indefinite total disability.

The Court of Appeals vacated in part and remanded, holding that while the disability retirement benefits were "due and payable when paid," the defendant could still get credit, if the disability retirement was found to be a wage-replacement benefit equivalent to workers' compensation. The Commission had made no findings as to the nature of those benefits.

6. Specific traumatic incident.

Zimmerman v. Eagle Electric Manufacturing Co., 147 N.C. App. 748, 556 S.E.2d 678 (2001), disc. rev. improvidently allowed, 356 N.C. 425, 571 S.E.2d 587 (2002).

Ms. Zimmerman worked as an electrical parts assembler. On June 19, 1996, while doing a particularly fast job, she felt a stiff neck and right arm and shoulder pain. She reported the problem and was moved to a lighter job for two months. On September 1 6, 1 996, while working, she felt tingling from her right shoulder down to her thumb and index finger. The company doctor treated for four months, with no improvement. Her family doctor diagnosed a herniated disc in January of 1 998 and referred her to a surgeon, who performed neck surgery on March 16, 1998. She got some better, but her family doctor placed her on restrictions, and she was unable to find work. The doctors opined that Ms. Zimmerman's condition was the result of her working position and was due to causes and conditions characteristic of and peculiar to her

work. The Commission awarded continuing compensation for total (and apparently permanent) disability, until she returned to work at her pre-injury wage or Commission order.

The Court of Appeals affirmed, holding that the evidence that Ms. Zimmerman suddenly experienced pain at judicially cognizable times, on two occasions, was sufficient to support the Commission's decision that there was a specific traumatic incident. There was no need for an inciting event. The Court also found evidence to support the finding that Ms. Zimmerman's job increased her risk of injury above that of the general public. The finding of permanent and total disability was supported by medical evidence of her limitations and lay evidence of her unsuccessful attempts to obtain employment.

7. Standard of review of Commission decisions.

Holley v. ACTS, Inc, 152 N.C. App. 369, 567 S.E.2d 457 (2002), 357 N.C. 228, 581 S.E.2d 750 (2003).

Ms. Holley was a nursing assistant who injured her left lower leg when she turned and her foot caught on carpeting. She was out of work for about a week. Almost two months later, she had the onset of pain and swelling in her same lower leg, that was diagnosed as deep venous thrombosis (DVT). The deputy commissioner denied her claim for significant periods of disability, on grounds that the DVT was not proved to be related to the compensable accident. The Full Commission reversed, with Commissioner Mavretic dissenting, and awarded compensation for temporary total disability and $20,000 for organ damage, under N.C.G.S. § 97-31(24).

On the most significant issue, the Court of Appeals held that the evidence supported the Commission's findings and conclusion that the DVT was caused by the accident, despite the fact that the medical opinions were stated with no greater certainty than "possibility," taking into account all of the circumstances. The Court held that the evidence was competent, and the Commission could base its decision thereon. Judge Tyson, in dissent, opined that the evidence as a whole showed that the doctors' opinions were nothing more than speculation. The opinions provide useful case citations for difficult causation cases.

The Court remanded, because it was unclear whether the Full Commission had considered whether Ms. Holley had a ratable injury to her lower leg, which would preclude compensation under § 97-3 1 (24). The Court affirmed as to some inconsistency between the evidence and the specifics of the accident stated in the opinion and award, holding that despite the lack of evidence to support the specifics, there was evidence to support the general compensability of the event, and the defendants did not really contend that the event was not compensable.

The Supreme Court reversed, holding that while "could or might" testimony from a doctor is competent and admissible, it is not sufficient to support a Commission decision on complicated medical causation. The evidence as a whole was seen as mere speculation.

Martin v. Martin Bros. Grading, _____ N.C. App. _____, 581 S.E.2d 85 (2003).

Mr. Martin worked for his son's grading company when he was struck in the head by a tree limb. He had subdural hematoma, in addition to a gash in his scalp. After the accident he started showing psychological symptoms that were diagnosed as arising from closed head injury. He went back to very light duty. Within a month, he suffered another injury to his head, when he rolled a piece of equipment. There was some indication of pre-existing small vessel disease that one doctor saw as an unrelated cause of the symptoms. However, Mr. Martin saw some other doctors who opined that the accidents caused his symptoms. The deputy commissioner and the Full Commission awarded compensation.

On appeal, there was an implication of a defense argument that some f the medical opinion had not been sufficiently certain as to support causation. The Court of Appeals noted the difference between admissibility of evidence that is couched in terms of possibility and sufficiency of evidence that requires a higher standard of certainty. The Court noted that there was evidence to support the Commission's decision, so that the decision must stand, despite some contrary evidence..

Whitfield v. Laboratory Corp. of America, _____ N.C. App. _____, 581 S.E.2d 778 (2003).

Ms. Whitfield worked collecting specimens. On one of her trips, she slipped on some water, twisted and almost fell, injuring her back. She was sent to a succession of doctors by her employer, each of which dismissed her complaints as she felt more pain. After about 40 days, her medical treatment was cut off and she was fired for missing work. She got a job driving a bus part time and went to a pain doctor at Duke, who thought she was having real pain. She was unable to afford to see him as often as she should or to buy some of the medicines he prescribed. The deputy commissioner found her not to be credible and awarded nothing. The Full Commission reversed.

The Court of Appeals emphasized the standard of review in rebuffing the defendants' arguments, which were essentially variations on the complaint that the Commission had assigned greater weight to the doctor Ms. Whitfield chose than on the doctors they chose. The Court did remand for findings on the reasonableness of the timing of her seeking authorization for her doctor from the Commission. Ms. Whitfield cross-appealed regarding attorneys' fees. The Court held that the Commission had erroneously failed to address the issue of unreasonable defense for penalty fees under N.C.G.S. § 97-88.1 and ordered the Commission to determine the amount of the fee for the appeal, pursuant to § 97-8 8.

Smith v. Housing Authority of Asheville, ____ N.C. App. ____, ____S.E.2d ____ (2003).

Ms. Smith fell to the floor when a chair rolled out from under her. She apparently did not suffer a serious injury. Shortly thereafter, the safety coordinator came around to talk to her about her accident report. His manner was reportedly arrogant, and Ms. Smith somehow got the idea that he was accusing her of suing the employer. The encounter upset her, and a few months later, she developed a panic disorder. Her psychologist linked it to the fall, but on closer examination,

could only link it to her reaction to the investigation of her accident. The Commission denied her claim, concluding that reactions to legitimate personnel actions are not compensable.

The Court of Appeals emphasized that there is no difference in principle between psychological and physical ones, then held that the psychologist's difficulty in connecting the symptoms to something other than the injury itselfwas sufficient to support the Commission's decision.

Hodgin v. Hodgin, d/b/a Hodgin Carpet, ____ N.C. App. _____, 583 S.E.2d 362 (2003).

Mr. Hodgin had suffered from chest discomfort that felt like trapped gas and other symptoms of upper digestive problems. On a specific date, he was lifting an unusually heavy chest of drawers at work, when he felt more severe pain. Shortly thereafter, he was diagnosed with a paraesophageal hernia. The Industrial Commission found and concluded that his hernia had occurred suddenly at the time he felt the increased pain.

The Court of Appeals reversed, holding that the expert testimony linking the hernia to the time of the increased symptoms was too speculative to support a positive finding.

Holcomb v. Butler Mfg. Co., _____ N.C. App. ____ 580 S.E.2d 376 (2003).

Mr. Holcomb claimed an injury to his back. He did not tell anyone about it for months, despite seeing doctors. He mentioned instead an episode while on vacation. He claimed that he did not want to tell anyone, because he was afraid that he would get in trouble, if he cost the employer an award for avoiding work injuries. The Full Commission denied the claim, with a dissent. The Court of Appeals affirmed, citing evidence to support the Commission's decision and case law requiring the appellate courts to limit their review to that issue. This is a strange case to be reported, as it seems to be a simple credibility case.

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

Alford, et al. v. Catalytica Pharmaceuticals, 150 N.C. App. 489, 564 S.E.2d 267 (2002), 357 N.C. 169, 580 S.E.2d 358 (2003).

This case was reversed by the Supreme Court on appeal. Several employees sued a third party and their employer over a chemical leak that caused serious injury. The Woodson claim against the employer was dismissed by the trial court as barred by the one-year statute of limitations in N.C.G.S. **§** 1-54(3). N.C.G.S. **§** 1-54(3), as it existed at the time of the injuries giving rise to this case, applied to "libel, slander, assault, battery, or false imprisonment," not to intentional torts in general. On interlocutory appeal, the Court of Appeals, Judge Tyson writing, characterized **§** 1-54(3) as applying in general to intentional torts, held that Woodson claims are for intentional torts, and affirmed dismissal. In dissent, Judge Thomas opined that since the Supreme Court has defined Woodson claims as not being quite intentional torts, the limitations on intentional torts should not apply. The Supreme Court reversed per curiam, "[f]or the reasons stated in the dissenting opinion."

In the absence of the reversal, the Court of Appeals decision would still have been of limited duration in its effect. As the majority noted, § 1-54(3) has been amended, in 2001 , to apply only to libel and slander.

Whitaker v. Town of Scotland Neck, 154 N.C. App. 660, 572 S.E.2d 812 (2002), 356 N.C. 696, 579 S.E.2d 104 (2003).

The plaintiffs' decedent worked on a garbage truck for the employer. One time, when the truck was lifting a dumpster, the dumpster became detached from the mechanical arm and swung down, crushing the decedent to death. The company's investigation revealed a defective latch. OSHA found five "serious" violations, including failure to train, supervise or inspect and operation of unsafe equipment in an unsafe manner. The plaintiffs filed a Woodson suit. The Superior Court judge compared the forecast of evidence to other post-Woodson appellate cases and dismissed.

The Court of Appeals reversed, citing particularly conflicting evidence as to whether supervisory personnel had been advised of the defect weeks before the accident and failed to address it. The Court cited Wiggins v. Pelikan, Inc, 132 N.C. App. 752, 513 S.E.2d 829 (1999), which "analyzed the cases following Woodson and created a list of six factors to use when defining substantial certainty," then held that summary judgment is generally inappropriate when a case requires balancing of factors.

9. Seagraves issues.

McRae v. Toastmaster, Inc., ____ N.C. App. _____, 579 S.E.2d 913 (2003).

Ms. McRae, who carriers an IQ of 59 and functions at a fourth grade level, started work for he employer sticking TJPC codes to boxes. After about six months, she started assembling clocks. Over the course of a year, she developed carpal tunnel syndrome. Her claim was accepted. She was released to return to work with restrictions that the employer promptly violated. On her subsequent attempt to return to work, she was placed back on the label sticking job. The employer scrutinized her performance, found that she had missed some of the boxes, wrote her up and fired her. The Commission treated her failure as misconduct under the Seagraves analysis and decided that she had constructively quit suitable employment. Her inability to work was due to refusal of employment, not her compensable injury. Commissioner Bolch dissented, finding that the inability to do the job resulted from her carpal tunnel syndrome.

The Court of Appeals affirmed, with a dissent. The Court of Appeals actually went a little farther than the Commission, in holding that failure to perform the labeling, which was not related to her compensable injury, was in itself misconduct that permitted termination without resumption of compensation. The Court stated, without record reference, that "A worker's failure to perform required tasks for employer results in reprimands and eventual termination. There is no indication that employer treated plaintiff' s misconduct differently than that of other employees in deciding to terminate her employment." The Court thereby 1) indicated that an employee on a light duty job, that she simply lacks the skills to do, can be terminated and 2)

overruled the part of the Seagraves that imposed upon the employer the burden of proving that other employees would have been terminated.

In dissent, Judge Wynn opined that the majority had erroneously expanded Seagraves to apply to cases of negligent failure to perform substitute employment.

10. Intoxication.

Willey, et al. v. Williamson Produce, 149 N.C. App. 74, 562 S.E.2d 1 (2002), reversed, 357 N.C. 41, 577 S.E.2d 622 (2003).

Mr. Mullins was killed in a truck accident, while driving for the employer. Two eyewitnesses testified that thy had seen him driving erratically for about 45 minutes before the truck left the road and slid down an embankment. His urine contained indications of cocaine and marijuana. Dr. Arthur Davis testified that Mr. Mullins was impaired by cocaine at the time of his accident and that the impairment caused the accident. He also testified that the threshold level established by the federal government of 300 nanograms per milliliter is sufficient to cause impairment. Dr. Arthur McBay testified that it was impossible to determine whether Mr. Mullins was impaired, or even if he had consumed drugs in the 12 hours before his death, from the drug screen or any other information that was in evidence. The Deputy Commissioner considered the testimony of the eyewitnesses in placing greater weight on Dr. Davis' testimony and denying the claim, on grounds that Mr. Mullins was impaired and that his impairment caused his accident. The Full Commission reversed, with one Commissioner dissenting, noting that a person can test positive for cocaine metabolites for three or four days after use and for marijuana metabolites 20 days after. Dr. Davis' opinion was explicitly given no weight, while Dr. McBay's opinion was given much. The Commission pointed out that Dr. McBay had extensive experience in forensic toxicology and had served as Chef Toxicologist at the Office of Chief Medical Examiner in North Carolina.

The Court of Appeals reversed, holding that the Commission had failed to evaluate the medical testimony properly, in that there was no evidence that the height, weight or medical history of the injured worker would make any difference in intoxication, announcing a rebuttable presumption of impairment that is created by proof of the use of a non-prescribed controlled substance, and holding that the defendants had produced sufficient evidence to establish that Mr. Mullins' impairment caused his wreck.

Judge Greene dissented, opining that the majority had misapplied the standard of review by focusing on what the defendants had produced, instead of evaluating whether the Commission's decision was supported by competent evidence. Judge Greene found sufficient evidence in the testimony of Dr. McBay, even if the record contained other evidence to the contrary.

The Supreme Court reversed per curiam, for the reasons stated in the dissent.

11. Proving cause and compensability of unexplained injuries.

Rackley v. CoastalPainting, 153 N.C. App. 469, 570 S.E.2d 121 (2002).

Mr. Rackley was painting for the employer, which required him to stand on a ladder and lean back while painting eaves, when he fell from the ladder and suffered a neck injury that resulted in quadriplegia. He did not remember how the fall happened. He was also epileptic and had experienced seizures within the years prior to his fall. The Commission awarded benefits for permanent, total disability. The Full Commission also ordered an $800 fee for the Full Commission appeal and as a sanction for unreasonable defense.

The Court of Appeals affirmed, holding that there was evidence to support all of the Commission's decisions. Most importantly, the Court noted that the Commission could decide that the fall was compensable when the cause of it was "unclear," despite the defense expert doctor's testimony that Mr. Rackley "probably" fell because of an epileptic seizure and lay testimony that he may have been shaking when he was on the ground. On the other hand, the leaning back while holding onto an cave for balance allowed the inference that he might have lost balance. Also, he did not show some of the signs of epileptic seizure, such as voided bowels, a bitten tongue and an inability to remember other things during the day before the event. The Court further held that even if Mr. Rackley had experienced a seizure, the Commission could find compensability, because the position in which Mr. Rackley worked contributed to his injury. That is, if Mr. Rackley had suffered a seizure while walking on the ground or sitting a desk, he would not have suffered severe injury. However, his work required him to be on a 32-foot ladder, which would dramatically increase the damage resulting from a fall. The award of fees was within the Commission's discretion, but did not discuss the propriety of a sanction, because the entire fee could have been awarded for the defendants' unsuccessful appeal to the Full Commission, pursuant to N.C.G.S. **§** 97-88.

12. Third party lien related issues.

Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711 (2002).

Mr. Holden suffered an admittedly compensable injury, when he was rear-ended by a third party. He ultimately settled his workers' compensation claim on a clincher agreement, which brought the total outlay of compensation and medical expense to about $56,000. In the clincher, the parties agreed that the employer and carrier would be paid $24,1 5 1 .00 out of any third party recovery, which amount was not subject to reduction for cost of recovery or by judicial reduction of the lien, pursuant to N.C.G.S. **§** 97-10.2(j). The third party case shriveled and was settled for $30,000 at mediation. During the negotiation, the workers' compensation carrier refused to reduce its entitlement further. After the third party settlement was reached, the plaintiff petitioned a judge to reduce the lien, which the judge did.

The Court of Appeals reversed, holding that the Commission's approval of the clincher agreement could not be overridden by a judge and that the only approach available to the plaintiff

was to seek to have the approval of the clincher set aside for fraud, misrepresentation, undue influence or mutual mistake, under N.C.G.S. § 97-17. The Court noted that affirming the judge's decision would undermine the authority of the Commission to approve settlement agreements and would leave parties with no confidence in settlements containing resolution of lien issues.

13. Employment status, including subcontractor issues and coverage.

Robertson, v. Hagood Homes, Inc., ____ N.C. App. _____, 584 S.E.2d 871 (2003).

Hagood Homes was the general contractor for several houses in the same subdivision. Hagood subcontracted the framing to Schuette, who subcontracted it to McGirt. McGirt hired Mr. Robertson, who was injured in a fall from a ladder. When Hagood contracted with Schuette regarding the first house that fell under the arrangement, Hagood asked for and received a certificate of insurance. On subsequent houses, including the one at which Mr. Robertson was hurt, Hagood did not ask separately for certificates. In the meantime, Schuette was withholding $1000 from McGirt, supposedly to pay for workers' compensation insurance. However, Schuette allowed his policy to lapse for nonpayment ofpremiums. The Commission awarded compensation from all defendants and ordered Hagood's carrier to pay.

The Court of Appeals affirmed, with a concurrence. Hagood contended that the provisions of N.C.G.S. § 97-19 apply only when the target employer has a direct subcontract with the employer of the injured worker. The Court cited several provisions that would make no sense, if the General Assembly had intended that result. Hagood also claimed workers' compensation liability for it would be unjust when it was subject to third party liability. The Court responded that statutory employer status would include exclusive remedy protection. The Court further held that the protection of a certificate of insurance must be obtained for each separate subcontract, even if they are connected like the ones in this case were. If several houses were to be built under a single contract, then one certificate would cover them all. But when there is a separate contract for each house, the upstream contractor is only safe with a certificate of insurance for each house.

Judge Tyson concurred, generally agreeing with the majority, but taking issue with the use of out-of-state statutes and case law.

Smith v. First Choice Services, _____ N.C. App. _____, 580 S.E.2d 743 (2003).

Mr. Smith was an officer of a small, family owned insurance restoration company. While trying to reach some boxes, he fell from a ladder and broke his wrist and femur. His claim was denied on grounds that he had been excluded from the employer's policy. Mr. Smith's wife testified that officers had been excluded from coverage to save money, but that she had spoken with the State Farm agent about including the officers. The agent did not have any recollection of the conversation, but his hard copy and computer information for the period during which the accident occurred both indicated that officers were included, and premiums had increased by more than 50% for that year. State Farm's information also indicated that officers were included, but they claimed it was a clerical error. The Commission awarded compensation.

The Court of Appeals affirmed, holding that there was evidence to support the Commission's decision not to reform the policy based on mutual mistake, particularly when there was plenty of evidence of unilateral mistake. The Commission was not required to make detailed findings about every document involved in the insurance application and policy. The Court also affirmed denial of credit for money that was paid by the employer, both because the payments were payable, in that the employer had accepted the claim as compensable and, somewhat surprisingly, because N.C.G.S. 97-42 allows the employer, and not the carrier, to receive credit for payments made by the employer.

Harris v. Thompson Contractors, Inc., 148 N.C. App. 472, 558 S.E.2d 894 (2002), aff'd, 356 N.C. 664, 576 S.E.2d 323 (2003).

Mr. Harris, who was serving a life term in prison for murder, was working at a work release job at a quarry when a crane fell over on him, seriously injuring him. The defendants . denied the claim. The Commission awarded compensation, to be paid to the Department of Corrections for distribution under its rules.

The Court of Appeals affirmed. The defendants' contention that Mr. Harris was barred from receiving compensation while in prison was rejected, on grounds that his injury occurred while he was in prison, which distinguished his case from Parker v. Union Camp, in which an injured worker receiving compensation was subsequently incarcerated, thereby removing himself from the work force for reasons independent of his injury. Mr. Harris was not a prisoner "being worked by the State," because he was working for a private company, without direct supervision by the State. There was no evidence of intentional self-injury, and Mr. Harris' negligence in trying to move his crane while the ball was raised was not so direct a violation of the employer's instructions as to move him outside the scope of employment.

On discretionary review, the Supreme Court affirmed p~ curiam.

14. Presence or lack of an accident.

Harrison v. Lucent Technologies, 156 N.C. App. 147, 575 S.E.2d 825 (2003), disc. rev. denied, 357 N.C. 164, 580 S.E.2d 365 (2003).

Ms. Harrison suffered pain in her shoulder after lifting a box on one occasion and moving some binders on another. She also had some degeneration of her neck. In addition to her family doctor, she saw a company doctor and an orthopedist at the request of the employer. Her relationship with her supervisor deteriorated and she was ultimately terminated, after which she suffered psychological problems. The Commission found and concluded that the shoulder problems arose during normal work activity and, therefore, were not caused by a compensable "accident." Some benefits were awarded for treatment of the neck, and the defendants were ordered to pay the bills of the doctors to whom they had referred Ms. Harrison, because treatment by those doctors had been authorized by the defendants.

The Court of Appeals affirmed, holding that the evidence supported the finding of no accident. Ms. Harrison contended that the defendants' actions in directing medical treatment estopped them to deny compensability. The Court rejected that argument, holding that the holding in Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785 (2000), that defendants must accept a claim before they have a right to direct medical treatment, does not imply that direction of treatment constitutes an acceptance of the claim.

Griggs v. Eastern Omni Constructors, _____ N.C. App. _____, 581 S.E.2d 138 (2003).

Mr. Griggs, an electrician for 22 years, was sent with one other employee to remove wire from a piece of machinery without damaging it, so that it could be reinstalled. He told the employer that the time frame demanded would require more employees. The employer was unable to provide any help, because it was "very short on personnel." In testimony, Mr. Griggs described standing awkwardly and feeding the removed wire into conduit. He also mentioned that running removed wire was generally not necessary, as the wire being removed could simply be cut off. He also said that he had not had to perform the procedure he did, in the way he did, in his 22-year career. At some point, he felt a pop in his right shoulder required surgery to fix the rotator cuff, remove a bone chip and repair ligaments. The employer presented witnesses who testified generally that Mr. Griggs' job normally required pulling wires in awkward positions and that there was nothing unusual about the activity in which Mr. Griggs was engaged at the time if• his injury, though they admitted that they were not present. The Commission denied benefits on grounds that there was no accident, stating that pulling wire was a normal part of the job, as was working in awkward positions. Commissioner Mavretic dissented.

The Court of Appeals, Judge Tyson writing, remanded for further findings, holding that the Commission had not gone deeply enough into the analysis of whether the specific activity in which Mr. Griggs was engaged at the time of his injury was outside the work routine. The Court pointed out that Mr. Griggs had not testified simply that he was pulling wire in an awkward position. He had said that "he was pulling old wire, under an accelerated time frame, without additional help, twenty-five feet above the ground, and attempting to salvage the wire to reuse." The Court noted that there was no contrary evidence presented on those specifics. The Court's decision invited the Commission to take additional evidence, if necessary, as to whether "under the totality of the circumstances, plaintiff was performing 'usual tasks in the usual way'."

Landry v. U.S. Airways, Inc., 150 N.C. App. 121, 563 S.E.2d 23, reversed, 356 N.C. 419, 571 S.E.2d 586 (2002).

Mr. Landry was unloading a small plane with his supervisor. The supervisor was inside the plane passing items out, and Mr. Landry was receiving the items. As he received a bag of mail, he injured his shoulder. Mr. Landry testified that the bag was heavier than he had expected it to be, because it contained processed photos, instead of regular mail. He could usually estimate the weight of a bag by sight, but he admitted that he never knew the actual weight before he touched a bag. His job involved handling items that ranged in weight from a couple of pounds to 400. The Commission decided that the injury was the result of normal work routine and denied benefits, for lack of an accident.

The Court of Appeals reversed, holding that the undisputed testimony that the bag was heavier than anticipated required a finding and conclusion of accident. The Commission's finding that mail bags were often heavier or lighter than anticipated was not supported, as Mr. Landry had testified only that the bags were sometimes overweight, not that excessive weight was generally anticipated.

Judge Hunter dissented, opining that the majority had focused inappropriately on a single sentence of testimony and that the evidence as a whole was sufficient to support the Commission's decision that there was nothing unusual about an overweight mail bag.

The Supreme Court reversed per curiam, for the reasons stated in the dissent.

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

Arp v. Parkdale Mills, Inc., 150 N.C. App. 266, 563 **S.E.2d 62 (2002),** 356 **N.C. 657, 576 S.E.2d 326 (2003).**

This case was reversed by the Supreme Court. Mr. Arp left work near the end of his shift, though there was conflicting evidence as to whether he left a few minutes early. Employees had the choice of leaving through the front or rear, passing either way through parking lots owned and maintained by the employer. Mr. Arp left through the rear. When he arrived at the back gate, just outside of which his mother was waiting for him in her car, he found the gate locked. Unable to squeeze through, he tried to climb the gate, which was seven feet tall, with barbed wire on top. In the process, he fell and injured himself. The Deputy Commissioner found that he had left early, but concluded that he had sustained a compensable injury by accident, arising out of and in the course of his employment. The Full Commission reached the same conclusion, but found in accordance with other evidence that Mr. Arp had left work around the time of the usual end of his shift.

The Court of Appeals affirmed, holding that the evidence was sufficient to support that the accident arose out of and in the course of employment, under the exception to the "coming and going" rule for injuries occurring on the employer's premises, despite the fact that Mr. Arp had made a foolish decision when he tried to climb the fence, instead of taking the extra few minutes to go through the front exit and around the plant to his ride. The decision to climb the fence was viewed as a minor deviation and not a violation of direct instructions. The Court also cited Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 41 1 (1998) in rejecting the defendants' contention that the Full Commission had improperly weighed evidence differently from the Deputy Commissioner. According to Adams, the Full Commission, not the Deputy Commissioner, is the ultimate finder of fact, and there is no requirement that the Full Commission explain decisions to weigh evidence differently.

Judge Tyson, in dissent, opined that Mr. Arp's decision to climb the fence was so unreasonable that the action taken in climbing the fence was not sufficiently connected to the employment for the injury to arise from the employment. Particularly with the focus on the term "unreasonable," it is difficult to separate the defense propounded by the dissent from contributory negligence.

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

Hunt v. Tender Loving Care Home Care Agency, Inc., 153 N.C. App. 266, 569 S.E.2d 675 (2002), disc. rev denied, 356 N.C. 436, 572 S.E.2d 784 (2002).

Ms. Hunt worked as a nursing assistant, serving one patient during fixed hours in the patient's home. She was injured in a wreck on the way home from work one day. The deputy commissioner denied the claim, on grounds that the travel during which the accident occurred was "going and coming." The Full Commission applied the "traveling salesman" and "contractual duty" exceptions to the "going and coming" rule and awarded compensation.

The Court of Appeals reversed, holding that neither of the exceptions cited by the Commission applied, so that Ms. Hunt was simply driving home, so that her injury did not arise out of and in the course of employment. The "traveling salesman" exception applies when employees travel to different places at different times, as a feature of their jobs. Ms. Hunt worked fixed hours at the same location. The "contractual duty" exception applies when employees have a right to have transportation provided or paid for. The employer had a policy of paying for mileage in excess of 30 miles in a day, on the theory that its employees lived an average of about 1 5 miles from the patients they served, so mileage in excess of 30 would likely be for errands.

MeGrady v. Olsten Corp, ____ N.C. App. _____ 583 S.E.2d 371 (2003).

Ms. McGrady was a nursing assistant, caring for an elderly woman in the woman's home. She helped with meals, bathing, housekeeping, shopping, driving and the like. One day, she took the lady's dog out to walk and noticed that a pear tree had borne fruit. In the process of climbing the tree in an attempt to get the pear, so that she and her patient could share it, Ms. McGrady fell, injuring her back to the extent that she will never be able to work, even at light duty. The defendants denied the claim on grounds that the injury did not arise out of and in the course of he employment. The deputy commissioner denied, but the Full Commission awarded compensation, with a dissent, concluding that the attempt to get the pear was within Ms. McGrady's job duties, or was at most not a serious deviation.

The Court of Appeals affirmed, holding that the liberal construction intended to be given to the Workers' Compensation Act requires the injured worker to be given the benefit of the doubt, so that compensation will be awarded for injuries that are fairly traceable to the employment as a contributing cause or if any reasonable relationship to employment exists. Since the unchallenged findings of fact included that Ms. McGrady regularly served fruit to her patient and that she intended the pear for both her and the patient, trying to get the pear was in the course of employment.

Deseth v. LensCrafters, Inc., _____ N.C. App. _____, _____S.E.2d _____ (2003).

Mr. Deseth was crossing a mall parking lot, near the employer's store, on his way into work, when he was struck by a vehicle driven by a co-employee and killed. The Industrial Commission denied compensation, and the Court of Appeals affirmed.

The Court held that the case was governed by the general rule that employees "coming and going" to or from work are not in the course of employment, relying on the string of cases that have held that the exception for injuries occurring on the employer's premises does not apply when the parking lot is a common area shared by more than one business. Such shared lots are viewed as not being sufficiently under the employer's control as to be part of the workplace. The plaintiff, represented by defense lawyer Clay Custer, made several interesting arguments, contending that the decedent had already started work off-site by carrying work-related materials required to open the store, that he was on a special errand, that he should be treated as a traveling employee and that his employment placed him at an increased risk ofbeing injured, because the empty condition of the lot made it more dangerous, the employer failed to instruct or require the other employee to park away from the store, and the employer condoned horseplay that resulted in the accident. The Court was unimpressed.

Dodson v. Dubose Steel, Inc., _____ N.C. App. _____, 582 S.E.2d 389 (2003).

Mr. Dodson was driving a truck for the employer. As he approached a disabled vehicle that occluded his lane, he pulled into the lane to his left, forcing one Campbell into a left turn lane. Campbell responded by blowing his horn repeatedly, and the two men exchanged words and gestures. At the next traffic light, Mr. Dodson got out of his truck and approached Campbell's car, striking the hood with his fist and inviting Campbell tio get out of his car. Campbell started forward and struck Dodson, knocking him to the ground. Mr. Dodson died of the resulting head injury. The Commission awarded compensation.

The Court of Appeals affirmed, with Judge Steelman dissenting. The majority analyzed the case like a workplace assault, holding that the injury was compensable, because the root cause of the altercation was a dispute over how Mr. Dodson was driving his truck, which was work-related activity. The evidence was sufficient to support the Commission's decision that the defendants had failed to prove that his death resulted from his "willful intention to injure or kill himself or another," which is a bar to compensation under N.C.G.S. § 97-12(3).

In dissent, Judge Steelman opined that he workplace assault cases did not apply, because the assault was by a non-employee and did not occur in the workplace. The cases cited, though involving non-employee assailants, all involved personal disputes that were unrelated to work. There was no explanation as to why the identity of the assailant should be a distinguishing characteristic of the case, when the origin of the altercation was work-related activity. Judge Steelman also rejected the argument that Mr. Dodson's employment placed him at an increased risk of such traffic disputes, viewing the job instead as merely providing "a convenient opportunity" for exposure to "road rage." After discarding the workplace assault analysis and viewing the "increased risk" argument as nothing more than "positional risk," Judge Steelman opined that the case should be denied, because the activity of getting out of the truck and confronting another driver was not an authorized activity that was calculated to further the

employer's business. Judge Steelman agreed that the evidence was insufficient to require the Commission to find and conclude that the case was barred on grounds of willful intention to injure or kill oneself or another.

Jacobs v. Sara Lee Corporation, _____ N.C. App. _____, 577 S.E.2d 696 (2003).

Mr. Jacobs was a salesman for the employer, who won a trip to a trade show as a reward for good performance. He had an itinerary and was to attend some business-related functions, but he was also allowed to have fun. While on the trip, he decided to attend a baseball game. He left early, planning to attend a sponsored party, but fell and injured his leg while walking down a ramp at the ballpark. Mr. Jacobs conceded that the baseball game was a personal deviation from his business trip, but contended that he had returned to his work route when the accident happened. Deputy Commissioner Pfeiffer agreed, but the Full Commission decided against him, with Commissioner Mavretic dissenting.

The Court of Appeals affirmed, holding that the evidence supported the Commission's decision that Mr. Jacobs had not yet returned to his "work route" when he fell.

Williams v. Levinson, 155 N.C. App. 332, 573 S.E.2d 590 (2002).

Ms. Williams was injured in a car wreck that was allegedly due to the negligence of defendant Levinson. Williams also sued Levinson's employer, alleging liability through respondeat superior. The Superior Court dismissed the claim against the employer and certified the issue for immediate appeal.

A majority of the Court of Appeals affirmed. At the time of the accident, Ms. Levinson was on her way to a company Christmas party. The office had been closed early, to allow people to go, and everyone was paid for a full day, regardless of whether they attended the party. The Court held that Ms. Levinson was not in the course of her employment at the time of the wreck, primarily because she was not compelled to attend the party. Other factors were also considered, but most of them centered on whether the employee or employer would suffer if she failed to go. Certification for interlocutory appeal was held to be appropriate, because reversal would have required a second trial, if the case had proceeded against the employee before the appeal was addressed.

Judge Greene dissented, noting that while the defendant employer's evidence was that no one was compelled to go to the party, attendance was expected, every employee went, and one of the activities was a group picture. Judge Greene opined that this evidence presented an issue of material fact.

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

Palmer v. Jackson d/b/a Jackson's Farming Company, N.C. App. ____, 579 S.E.2d 901 (2003).

Mr. Fuentes suffered a heat stroke and ended up in a persistent vegetative state. The case was denied, and Mr. Fuentes prevailed, apparently over tremendous obstacles. His accrued wage compensation was about $24,000, but his medical bills were over $400,000. The Commission awarded a fee in the amount of 25% of wage compensation, to be paid by the defendants as a sanction for unreasonable defense, under N.C.G.S. § 97-88. 1 . Plaintiff's counsel, recognizing that the fee was inadequate for the huge amount of work required, appealed the fee to Superior Court. The Superior Court, impressed that the medical providers were going to get an enormous windfall of money that they never expected to see, owing to the unusual efforts expended by the plaintiff's lawyers, ordered that Mr. Fuentes' lawyers would get 25% of the medical bills, deducted from the amount paid to the medical providers.

The Court of Appeals reversed, holding that the medical bills could not be reduced for attorneys' fees and citing statutory authority for full payment that distinguished this case from those in which credit for non-workers' compensation disability benefits is reduced to give lawyers more incentive to handle small cases. The Superior Court's order also impermissibly invaded the province of the Commission, which had already decided, in its opinion and award, that the medical providers would be paid. However, the Court did state that on remand to the Superior Court, the judge could continue consideration of the penalty fee under N.C.G.S. § 97-88. 1 and could base the fee assessed against the defendants on the medical benefit.

Hunt v. North Carolina State University, N.C. App. _____, 582 S.E.2d 380 (2003).

Ms. Hunt suffered a compensable injury and attempted to prove permanent, total disability. After the hearing of lay testimony before the deputy commissioner, but before briefs were filed before the Full Commission, Ms. Hunt's condition apparently deteriorated, and she was approved for long-term disability benefits by the State Treasury Department.

The Full Commission found and concluded, as had the deputy, that Ms. Hunt had failed to prove permanent and total disability. Ms. Hunt appealed, contending that she had met her initial burden of proving permanent, total disability and that the Commission had erred by refusing to accept additional evidence that would have proved permanent and total disability.

The Court of Appeals affirmed, with a dissent. The Court held that the evidence of permanent total disability was weak, with one doctor giving an equivocal opinion and Ms. Hunt continuing to work at her regular job. The Court also rejected the contention that the Commission erred in refusing the new evidence, characterizing it as equivalent to forcing the Commission to accept any new evidence that is submitted between the hearing before the deputy commissioner and the hearing before the Full Commission. The Court acknowledged the plaintiff's concern that since the evidence indicated that there had been a change of condition during that period, and additional benefits can only be claimed for changes of condition after the Commission's final award, she may be practically precluded from pursuing those additional

benefits. However, having acknowledged that concern, the majority did not present any way to deal with it.

Judge Wynn, in dissent, opined that the Commission had operated under a misapprehension of law, when it decided not to accept the new evidence on grounds that the issue of change of condition was not properly before the Commission. Judge Wynn viewed the decision on accepting he evidence as within the discretion of the Commission and thought that the Commission had not recognized that it had that discretion.

Lemly v. Colvard Oil Company, _____ N.C. App. 577 S.E.2d 712 (2003).

Mr. Lemly suffered an admittedly compensable injury and was paid compensation. There was a mediation, apparently ordered during the pendency of a hearing filed for renewed compensation for total disability, during which he agreed to settle his claim for an additional $40,000, and a memorandum of settlement was signed. Thereafter, he refused to sign the clincher and filed for a hearing over medical treatment. The defendants filed a Form 24 Application to Stop Payment and a motion to enforce the settlement agreement, as memorialized on the document signed at mediation. The deputy commissioner denied the motion to enforce the agreement and ordered additional compensation for temporary total disability for over a year, followed by 75 weeks of compensation for a rating of permanent partial disability. The Full Commission concluded that the agreement signed at mediation was "not enforceable as a Compromise Settlement Agreement" and awarded on-going, indefinite compensation for total disability.

The Court of Appeals reversed, holding that the agreement signed at mediation was a "valid compromise settlement agreement," which complied with the requirements of Commission rules and could be considered for fairness by the Commission. The opinion is a bit confusing, in that the Court first stated that it agreed with the defendants that the Commission erred in not allowing stoppage of compensation and in failing to enforce the agreement, but later held that the agreement was subject to Commission consideration as to whether it was "fair and just and in the best interest of all parties." Thus, on remand, it appears that the Commission, though required to consider the agreement, could reject it.

Atkins v. Kelly Springfield Tire Co., 154 N.C. App. 512, 571 S.E.2d 865 (2002).

Ms. Atkins suffered an admittedly compensable injury in November of 1 995 . She was paid for a 10% rating of her arm on a Form 21 Agreement, which was approved on August 19, 1996. At the time of submission of the Form 21 to the Commission for approval, the only medical document accompanying it was a Form 25R, which stated the rating. For about three years, she did not have significant problems with her arm. In July of 1 999, she returned to her treating physician, who performed surgery. In October of 1999, she filed a Form 18. After a hearing, the Deputy Commissioner refused to set aside the Form 21 . The Full Commission agreed.

The Court of Appeals reversed, holding that the Form 21 had been approved without compliance with the statutory requirement, in N.C.G.S. § 97-82(a), that complete medical

records be considered with it. The Commission had acknowledged that "it substituted the Form 25R for the statutorily required 'full and complete medical reports." On remand, the Commission was to consider all records that existed at the time of the original submission and determine whether the Form 2 1 Agreement was "fair and just."

The defendants' petition for discretionary review has been granted.

Handy v. PPG Industries, 154 N.C. App. 311, 571 S.E.2d 853 (2002).

Mr. Handy worked on machines for the defendant and was required to perform repetitive movements overhead. He also engaged in recreational weight lifting. He began to feel pain in his shoulder that was diagnosed as rotator cuff tendonitis. He missed no work. He never hired a lawyer. When he filed his Form 33 Request for Hearing, he claimed an injury by accident on a specific date, when he had noticed a sharp pain. At hearing, he presented no medical evidence and otherwise had no idea what he was doing. Deputy Commissioner Chapman changed the theory of his case to one of occupational disease, ordered that evidence be taken from the treating orthopedist (which the defendant requested to be by deposition), and prepared a hypothetical question set, to be presented to the doctor at his deposition. Defense counsel read the deputy commissioner's questions, objected, then cross-examined. The doctor testified that Mr. Handy's condition was caused by work exposure that increased his risk of developing the condition, and the deputy commissioner decided in his favor. The Full Commission decided the same way.

The Court of Appeals affirmed, holding that the defendant's due process rights had not been violated. There was no evidence of personal bias on the part of the deputy commissioner, the hypothetical question set was couched neutrally, and the Commission had the power to order testimony. The change in theory of the case was not improper, since the Workers' Compensation Act does not require a statement of the theory.

Trivette v. Mid-South Management, Inc., 154 N.C. App. 140, 571 S.E.2d 692 (2002).

Ms. Trivette suffered a back injury. The defendants admitted that there had been a compensable event and liability for medical expenses, but not for disability. The Commission awarded compensation for a couple of weeks of total disability. On the first appeal, the Court of Appeals affirmed the Commission's decision that Ms. Trivette was not entitled to compensation for total disability for aggravation of a pre-existing condition but remanded for consideration of whether she was entitled to compensation for permanent partial disability. On remand, the Commission awarded compensation for about 30 months oftotal disability following some surgery, plus 1 5 weeks of compensation for a 5% rating of the back.

The Court of Appeals affirmed, holding that the Commission had inherent power to set aside its own previous decision concerning the extent of compensable total disability and that the evidence supported the findings of total disability. Disability was the result of a combination of the compensable low back injury and non-compensable multiple sclerosis.

Carroll v. Living Centers Southeast, Inc., _____ N.C. App. _____, 577 S.E.2d 925 (2003).

Mr. Carroll's case was accepted and ultimately settled by clincher agreement. The attorney's fee was received within 14 days of the order approving the clincher, but none of the payment to Mr. Carroll was received until 36 days after approval. The Commission denied a motion for the 10% penalty on late payments, contained in N.C.G.S. § 97-1 8(e), citing Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E. 2d 816 (1998), disc. rev. denied, 350 N.C. 94, 527 S.E.2d 666 (1999), which had calculated a 39-day period before the penalty would accrue. The Felmet Court had added the 1 5-day period to appeal a decision to the Full Commission, a due date of 10 days after expiration of the time to appeal, and the accrual of penalty 14 days after the due date.

The Court of Appeals reversed and remanded for assessment of the mandatory penalty, holding that the 2001 change to N.C.G.S. 97-17, that provided that there would be no review of Commission decisions to approve settlement agreements, eliminated the initial 15 days in the Felmet calculation, leaving only 24 days to pay.

Chavis v. Thetford Property Management, Inc., 155 N.C. App. 769, 573 S.E.2d 920 (2003).

Mr. Chavis fell and hurt his knee at work. Deputy Commissioner Stephenson awarded compensation for temporary total disability for an initial period of a couple of months, then for a period starting about three months after the first period ended, and running indefinitely through the time of hearing and beyond. The deputy commissioner's opinion and award noted a stipulation reached immediately before hearing, that the defendants had informed her that they would accept the case. Inexplicably, the defendants filed for review by the Full Commission, refusing to pay. The Full Commission repeated the deputy' s decision, adding a $ 1000 fee to plaintiff's counsel for the appeal, pursuant to N.C.G.S. § 97-88, and a fee of 25% of all compensation, over and above the amount awarded to the plaintiff, as a penalty for unreasonable defense, pursuant to § 97-88.1.

The Court of Appeals affirmed, holding that the Commission had not abused its discretion. The defendants did not cite any evidence to support a reasonable defense, apparently arguing only that the fee under N.C.G.S. § 97-88. 1 was an abuse of discretion, because they did not appeal the Commission's award of compensation to the Court of Appeals. There is mention of weak testimony from a vocational rehabilitation specialist, which was accorded little weight by the Commission, as well as of the financial hardship suffered by Mr. Chavis. The Full Commission opinion and award states that the voc person testified about a labor market survey that was prepared without medical records (using a summary prepared by the adjuster), an FCE, job search, review of specific jobs, or any indication that the theoretically available jobs would actually have been available to Mr. Chavis.

Lakey v. U.S. Airways, Inc., 155 N.C. App. 169, 573 S.E.2d 703 (2002), disc. rev. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Ms. Lakey was a flight attendant for the employer. She suffered an admittedly compensable back injury, was treated by physicians chosen by the defendants and was paid

appropriate compensation. The doctor authorized by the defendants gradually returned her to full time work. Shortly thereafter, she suffered additional back pain, when she was thrown around in turbulence. At some point, she switched to her own doctors. The defendants started paying compensation, but at the relatively low rate applicable to her original, 1992 injury. The Commission found a new injury and awarded compensation at a higher rate, based on her wages at the time of the second injury, and approved the treatment from her chosen doctors.

The Court of Appeals affirmed, holding that there was evidence to support the finding of a new injury, instead of the change of condition urged by the defendants, and that approval of the plaintiff's chosen doctors was a valid exercise of the Commission's discretion, particularly in light of the defendants' doctor's statement that he had exhausted his treatment options. The defendants argued that Ms. Lakey had failed to give proper notice. The Court rejected that argument, holding that the record showed that the employer had actual notice of the injury and supported the Commission's decision that the defendants were unable to show any prejudice arising from the failure to give written notice within 30 days. The Court did not require a separate showing of a good excuse from the plaintiff as to why she did not give the written notice, when there was actual notice and no prejudice.

Parker v. Wal-Mart Stores, Inc., 156 N.C. App. 209, 576 S.E.2d 112 (2003).

Ms. Parker claimed an injury to her back. The Commission awarded compensation after a hearing. The Court of Appeals remanded, holding that the Commission had failed to make sufficient findings of fact as to her disability. The Commission had found that she had not been released to return to work by a treating doctor and that she had certain restrictions, but had not made specific findings about disability.

17. Average weekly wage and effect of post-injury wages.

Derosier v. WNA, Incorporated/Imperial Fire Hose Company, 149 N.C. App. 597, 562 S.E.2d 41, aff'd 356 N.C. 431, 571 S.E.2d 585 (2002).

Ms. Derosier suffered an admittedly compensable injury to her back. When she was ultimately released to return to work with permanent restrictions, she was unable to return to her job as a floater. Her rating was 2%. She returned as a lab technician, at the same hourly rate of pay. However, she was able to work less overtime than she had as a floater before her injury, so her overall wage was lower. She was paid compensation for partial disability for about five months, while she worked part-time. Thereafter, the defendants refused to pay additional compensation, contending that her reduction in weekly wage was the result of an economic downturn in the fire hose industry and not the result of her injury. The Commission awarded compensation under N.C.G.S . § 97-30.

The Court of Appeals remanded, holding that the Commission did not have sufficient evidence in the record to compare effectively any difference in wage earning capacity before and after the injury. The Court pointed out that there is a difference between the amount of earnings and wage earning capacity. In this case, the Court wanted to compare the number of hours of

overtime available to the current floater and to Ms. Derosier in her current position as a lab tech. Since there was not clear evidence to provide that comparison in the record, the case was remanded, apparently for purposes of getting that evidence.

Judge Greene dissented, pointing out that the majority had accepted the defendants' position that Ms. Derosier experienced a drop in overtime hours due to an economic downturn. However, the evidence of a drop in wages was sufficient to raise a presumption that the drop was indicative of a decrease in wage earning capacity. Since the Commission found implicitly that the defendants had failed to overcome that presumption, there was no need to get involved in the comparison required by the majority.

The Supreme Court affirmed per curiam.

Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48 (2002).

Mr. Gordon worked as a fireman for the defendant and also as a self-employed electrical contractor. While fighting a fire, an electrical panel exploded, and the bright flash temporarily blinded him. His vision returned to normal, and he completed his shift. Beginning shortly thereafter, he started having intermittent visual problems. Several doctors gave varying opinions on the nature and cause of the condition, centered around diagnosis of a type of migraine that was either caused by the flash or arose at the same time by coincidence. The deputy commissioner denied the claim, but the Full Commission went the other way, awarding indefinite compensation for total disability, subject to credit for the limited wages earned in the self-employment.

The Court of Appeals, Judge Tyson writing, affirmed, holding that there was evidence to support the finding of causation. The employer's contention that Mr. Hale had refused suitable employment was rejected, in the face of evidence that he was placed on light duty and was ultimately given the choice of taking medical retirement or being fired. The Court also affirmed the Commission's approach to dealing with the income from pre-existing secondary employment. Please note that this may be inconsistent with prior case law that required a decision from the Commission as to whether the injured worker was partially disabled, in which case he would receive compensation under N.C.G.S~ **§** 97-30, or totally disabled, which would lead to compensation under **§** 97-29, without credit. The approach used in this case also allows for the "whipsaw effect" of having the average weekly wage calculated only on the earnings from the employment of injury, but then having the compensation reduced on account of wages from other employment that existed at the time of injury. Furthermore, the Commission did not order compensation at the rate of two-thirds of the difference between pre-injury and post-injury wages as for partial disability, which would have the effect of giving credit of two-thirds of the secondary income. It ordered "credit," which would reduce the compensation by **~ll** of the secondary income. In this case, the implication is that the secondary income was not very large, so these issues may not be significant.

18. Salaam issues.

Terry v. PPG Industries, Inc., _____ N.C. App. _____, 577 S.E.2d 326 (2003), disc. rev. denied, 357 N.C. 256, 583 S.E.2d 290 (2003).

Ms. Terry suffered an admittedly compensable injury to her Achilles tendon and was paid compensation for periods out of work. She eventually ended up in a light duty job on a long term basis. She then saw a psychologist, who diagnosed her with depression and took her out of work. The deputy commissioner decided that Ms. Terry was entitled only to a 1 0% rating of the foot and that the defendants were not required to pay for the psychologist. The Full Commission decided that she was entitled to on-going compensation for total disability and approved the psychologist as an authorized medical provider.

The Court of Appeals affirmed. The defendants argued that the Commission improperly excluded certain testimony and records of a company doctor, after that doctor had improper ex parte communication with the employer's safety manager to discuss surveillance videotape that showed Ms. Terry walking in a way that was allegedly inconsistent with her reports to the company doctor. The defendants contended that the usual Salaam restrictions did not apply, because the doctor was not a treating physician and the person who made contact was not an attorney. The Court rejected both arguments, noting that the doctor had seen Ms. Terry more than 20 times for her condition and had a practice outside the company. The Commission's exclusion of the videotape from evidence was proper, because of the improper use and the Commission's finding that the tape was misleading. The Court also held that the psychologist was competent to testify about the psychological problems, though the defendants contended that his testimony should be given no weight, because he was not the authorized treating physician at the time of the testimony. The causal connection between the injury and the depression was held to be supported by the psychologist's testimony and testimony from the company doctor that chronic pain like that suffered by Ms. Terry tended to cause depression. The defendants' contended that she had become depressed due to harassment by co-workers and managers while she was on light duty, suggesting that she was faking her injury. Approval of the psychologist as a treating physician was within the Commission's discretion, especially when the only authorized doctor was the company doctor, whose treatment had proved ineffective.

19. Standard for entitlement to future medical coverage.

Taylor v. Bridgestone/Firestone, mc, ____ N.C. App. ____, 579 S.E.2d 413 (2003).

Mr. Taylor suffered an admittedly compensable shoulder injury, had surgery, and was returned to work with permanent restrictions. Over the next couple of years, he went back to the surgeon a couple of times for examination and anti-inflammatory medication. Mr. Taylor filed a Form 18M, seeking an order of future medical coverage. The Form 18M contained the doctor's certification that Mr. Taylor had a substantial risk of requiring future medical treatment for his injury. The defendant resisted the Form 1 8M. In deposition, the doctor expressed some misunderstanding of Mr. Taylor's current job duties and waffled about how certain the need for future treatment was, noting that the likelihood would vary, depending on what Mr. Taylor did

with the shoulder. He was going to have a "moderate" risk, unless he was made completely sedentary. The Commission refused to grant the order for future medical coverage. The rationale is a bit confusing, but it appears that the Commission was operating on the theory that Mr. Walker would be unable to prove that future medical treatment would be related to the original injury, when the doctor opined that the magnitude of the risk would depend upon the level of his activity.

A majority of the Court of Appeals reversed, holding that the Commission had committed an error of law, by failing to apply the Parsons presumption that treatment was related to the compensable injury, which can be rebutted. According to the Court, the Commission should have expressed a two-part inquiry, deciding first whether there is a substantial risk of future treatment and then whether the defendant can prove that the treatment is not related. The Commission erred by blending the two parts, then placing the burden on the plaintiff as to both.

Judge Hunter dissented, opining that there was evidence to support what he perceived to be the Commission's decision that there was not a substantial risk, so that the issue of causation was never reached, and the issue of presumptions did not arise.