WORKERS' COMPENSATION
CASE LAW UPDATE: JUNE 2006

By Jay A. Gervasi, Jr.
Greensboro, NC

CONTENTS

1. **Disability, including presumption of on-going, with some Peoples/Saums** 1

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

3. **Occupational disease** 6

4. **Credit issues** 7

5. **Third party lien related issues** 10

6. **Presence or lack of an accident.** 11

7. **"Arising out of and in the course of" issues** 12

8. **Liability for medical expenses, including presumptions and procedure** 16

9. **Seagraves issues** 18

10. **Salaam issues** 20

11. **Procedural issues, including sanctions** 21

12. **Proof of disability and other disability issues** 26

13. **Suspension of compensation for incarceration** 28

14. **Causation issues** 28

15. **Qualification for death benefits** 29

16. **Asbestosis specific issues** 30

17. **Singletary case, with multiple issues** 31

18. **Liability after sale of a self-insured employer** 32

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1. Disability, including presumption of on-going, with some Peoples/Saums.

Clark v. Wal-Mart, 360 N.C. 41, 619 S.E.2d 491 (2005)

Ms. Clark injured her back while trying to catch a falling sled. The defendants admitted compensability without an agreement, pursuant to N.C.G.S. § 97-18(b) and paid compensation. Ms. Clark filed for a hearing, claiming compensation for permanent and total disability. The Commission awarded on-going compensation, opining that the burden was on the defendant to prove that she was able to return to work.

The Court of Appeals affirmed, holding that the admission of compensability (along with other factors not mentioned by the Supreme Court, such as on-going payment and stipulations) gave rise to a presumption of continuing disability.

The Supreme Court (undeterred by pitifully ineffective amicus assistance rendered to Ms. Clark on behalf of the Academy of Trial Lawyers—by this author) reversed, holding that in the absence of an agreement to pay compensation approved by the Commission, acceptance of a claim constitutes acceptance only of the compensability of the claim and not of on-going disability. The case was remanded to the Court of Appeals for further remand to the Commission for new findings and conclusions, in accordance with the proper burden of proof.

Montgomery v. Toastmaster, Inc., ____ N.C. App. ____, 620 S.E.2d 685 (2005)

Ms. Montgomery worked for the defendant for 33 years, doing assembly that required repetitive motion of her hands. In January of 1999, her carpal tunnel syndrome got so bad that she was taken out of work and underwent surgery. Compensation was paid pursuant to a Form 21 Agreement. She was released to return to work in May of 1999, with restrictions against strenuous repetitive use of her hands. In June of 1999, she was relased to full duty and returned to her regular job, where her carpal tunnel symptoms returned in less than an hour. The doctor made her previous restrictions permanent and she was moved back into light duty work. After a plant shutdown in July of 1999, Ms. Montgomery retired, at age 62, despite wanting to continue working, because her hands were preventing her from continuing. She has not sought substitute employment. The Deputy Commissioner denied additional compensation for change of condition and awarded compensation for the rating. The Full Commission awarded compensation for on-going total disability.

The Court of Appeals affirmed, holding that since Ms. Montgomery had met her burden of proving disability (presumably, though not explicitly, through the Form 21 Agreement), the burden shifted to the employer to prove employability, which the Commission properly found the

defendant unable to do. The only evidence produced to prove that Ms. Montgomery could work was the light duty employment. The Court held that evidence supported the Commission's decision that the light duty did not constitute evidence of wage earning capacity, when Ms. Montgomery frequently did not have anything to do, the "job" was created by combining tasks that were usually performed by people in regular jobs, that the "job" was performed only by a limited group of employees, all of whom were on work restrictions. In response to the contention that the Commission had failed to give proper consideration to four witnesses, the Court stated that the Commission was not required "to explain its findings of fact by attempting to distinguish which evidence or witness it fids credible" (citing Deese v. Champion Int'l Corp.).

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

Adams v. Metals USA, 168 N.C. App. 469, 608 S.E.2d 357 (2005); 360 N.C. 54, 619 S.E.2d 495 (2005)

Mr. Adams slipped off a ladder attached to a truck and fell, skinning his arm and landing on his hip. Coworkers offered corroborating testimony. He felt pain in his legs, foot and hip at the time but continued to work. He continued to work, without going to a doctor, but the pain in his hip, leg and foot increased. More than three months after the accident, he went to a family doctor, complaining of back pain and his foot going numb, but did not recall a specific injury. After a couple of weeks out of work, he was feeling better, as long as he rested, but activity increased his pain. The employer sent him to another general practice, where he reported the fall off the ladder. An MRI performed about four months after the accident showed a large ruptured disc at L5-S1. Surgery was performed, which helped for a short time. Symptoms then increased. Surgery was not recommended, but treatment for chronic pain was. The Deputy Commissioner denied the claim, apparently accepting that there had been a compensable fall, but citing Mr. Adams' failure to mention back problems for three months in deciding that the fall did not cause the back injury. The Full Commission went the other way, finding that Mr. Adams' testimony about increasing problems associated with his ruptured disc before seeing doctors was credible and that the disc injury was caused by the fall.

On appeal, the defendants argued that the neurosurgeon's testimony was too speculative to support the causation decision. Dr. Kritzer testified that people can have ruptured discs without a specific event to cause it, but that if Mr. Adams had been asymptomatic before his fall and developed symptoms thereafter, he "would certainly believe" that the fall caused the back injury. On cross-examination, he testified that the symptoms do not necessarily appear at the time the disc herniates. He waffled some when presented with a hypothetical that implied no symptoms after the accident, but testified positively when asked to assume that Mr. Adams had experienced symptoms in his leg and foot shortly after. Dr. Kritzer expressed his understanding, in rendering his opinion, that Mr. Adams had initially experienced mild symptoms, which gradually got worse, before the first doctor's visit. The Court reviewed cases in which medical testimony had been held to be too speculative, when doctors had been unable to say more than that causation was "possible, but not likely," (Holley v. ACTS) or an injury "could possibly have been caused by" an

incident (Hodgin v. Hodgin) and distinguished them with long excerpts from Dr. Kritzer's testimony, holding that that testimony, along with other facts in the case, were sufficient to support the Commission's findings and conclusion of causation. Secondarily, the Court held that the finding of ongoing disability was sufficiently supported by evidence that Mr. Adams was permanently unable to lift more than 50 pounds, had been terminated by the employer, had not been offered light duty work or vocational rehabilitation assistance, had worked as a truck loader with few transferable skills and had searched for employment unsuccessfully. The Court also noted the lack of evidence from the employer that suitable employment existed.

In dissent, Judge Tyson opined that Dr. Kritzer had based his opinion only on the temporal relationship between the fall and the injury and the history given by Mr. Adams. He considered that as no different than the opinion in Holley v. ACTS, that a causal relationship was "possible, but not likely." He also opined that the Supreme Court's decision in Holley had overruled Johnson v. Piggly Wiggly, which the majority had cited for the proposition that causation can be proved by a "qualified opinion as to causation, along with an accepted medical explanation as to how such a condition occurs, and where there is additional evidence tending to establish a causal nexus." He noted Dr. Kritzer's testimony that a ruptured disc can be caused by various things other than a fall, without recognizing that Dr. Kritzer had testified that there was no evidence that any of those things caused the injury in this case.

On appeal, the Supreme Court affirmed *per curiam*.

Armstrong v. W.R. Grace & Co., ____ N.C. App. ____, 623 S.E.2d 820 (2006)

Mr. Armstrong suffered elbow problems that he attributed to repetitive motion at work. One doctor supported that theory, and a couple of others did not. The Commission denied the claim.

The Court of Appeals affirmed, holding that the weight to be given to the expert witnesses was for the Commission to decide. The Court explicitly rejected Mr. Armstrong's argument that the Commission had erred by failing to follow a "most advanced specialist" doctrine that, according to him, would have required the Commission to afford more weight to the rheumatologist who supported the claim than to an orthopedist who did not. The Court opined that there is no such doctrine in North Carolina that would impact the power of the Commission to assign weight to testimony and expert opinions.

Avery v. Phelps Chevrolet, ____ N.C. App. ____, 626 S.E.2d 690 (2006)

Mr. Avery fell backwards and struck his back and right shoulder on a concrete block. He was treated initially for his shoulder injury, including a couple of surgeries. He was then evaluated for neck problems. Most of the medical testimony was only that the accident "could or might" have caused the neck problems. One doctor, when presented with full medical records, further testified that the causal connection was "likely." The Deputy Commissioner found against Mr. Avery, opining that a doctor who had refused to testified positively as to cause should be accorded more weight and noting that in 22 years that Deputy had never seen another case in which a doctor had linked an accident to neck problems that first showed up seven months later. The Full Commission reversed.

The Court of Appeals affirmed, holding that the medical opinions were not too speculative to support the award, in that the testimony that the causal connection was "likely" was sufficient. The defendant's contention that evidence had been impermissibly ignored was rejected, as there were several findings of fact related to the doctor that was supposed to have not been properly considered, and there was specific reference to Mr. Avery's failure to mention neck problems earlier in the course of treatment.

Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440 (2005)

Mr. Cannon was a tire builder. In March of 2001, he went to a doctor complaining of blurred vision and tingling in his feet. The urgent care doctor did not diagnose and set up for appointments with a neurologist on April 10, 2001. On April 6, 2001, he was lifting a drum when he felt a sharp pain in his lower back. He also felt tingling numbness in his feet, which he described as different from the prior sensation. He went to the company infirmary and was put on light duty for the rest of the day. The following day, he returned to the infirmary and was sent to a company doctor. He was told to follow up there on April 9 but did not, because the doctor there had not done anything for him. He missed the appointment with the neurologist on April 10 due to illness. He rescheduled that appointment for April18 but was injured in a car wreck on the way. He went to the emergency room and was diagnosed with thoracic, lumbar and cervical strain and knee sprain and was taken out of work for two days, to be followed by five days of light duty. When he finally saw the neurologist on April 23, he was sent for an MRI that showed a bony problem at C4-5. When he saw a neurosurgeon, Mr. Cannon did not mention any of the recent incidents and marked that the visit was not related to an accident. The doctor opined that Mr. Cannon had a kyphotic deformity in his cervical spine that was old and related either to congenital abnormality or a serious car wreck that Mr. Cannon had experienced when he was 16. Surgery was performed to correct the deformity, and Mr. Cannon improved, returning to work on November 26, 2001 with a 20% PPD of the back. The Commission awarded compensation for the time out of work, plus the rating.

The Court of Appeals vacated and remanded, holding that while there was evidence to support the occurrence of an injury to the lower back, the evidence of the relationship between the specific traumatic incident at work and aggravation of the neck condition was too speculative to support causation. The case was remanded for determination of the compensation, if any, that was due for the lower back injury alone. There are two other interesting points in the decision. First, the Court rejected a motion to dismiss the appeal for late filing of the record on appeal, holding that that issue had already been addressed in a prior, identical motion, indicating that when the motion is addressed in the more perfunctory way before argument, it will not be revisited. Second, the Court upheld the Commission's inclusion of the consequences of the car wreck as part of the compensable injury, regardless of whether the trip had been related to treatment for that injury, holding that there was evidence to support findings that the wreck aggravated the compensable injury and that it was not attributable to Mr. Cannon's own intentional conduct.

Perkins v. U.S. Airways, ____ N.C. App. ____, ____S.E.2d ____ (2006)

Ms. Perkins was injured by a lightning strike while helping passengers deplane. Her

claim was accepted, and she was paid compensation for a period of time. After a while, most of her original treating physicians decided that her psychological problems were not related to her injury and that she was able to return to work. Diagnoses shifted around, including an original diagnosis of reflex sympathetic dystrophy that was later abandoned. A form 24 Application to Stop Payment was approved. Ms. Perkins sought treatment at a facility in Maryland that she found through a lightning strike survivor's website. Opinions from the doctors there related her problems to her compensable accident, and she even underwent surgery. On independent medical examination ordered by the Commission, Dr. Elkins assigned a 10% rating to the right arm, which was the originally affected body part, for myofascial pain syndrome that he related to the lightning strike. The Commission denied further compensation.

The Court of Appeals affirmed, for the most part, rejecting Ms. Perkins' contention that the Commission had failed to weight the evidence properly, and particularly that the Commission had failed to take into account that the original doctors, who did not have the specific expertise of the ones in Maryland and were loyal to the employer. A claimed improper *ex parte* communication with one of the doctors was not before the Court, because that issue had not been raised and preserved at the Commission. The Court specifically noted that as with the Commission's weighing of evidence, the Court would not disturb the Commission's reasonable inferences. The evidence also supported the Commission's decision that Ms. Perkins had not proved disability either with medical evidence of total disability (which was disputed) or by showing a reasonable and unsuccessful attempt to find alternative employment, because the only effort she had made was to ask the employer for light duty work, which it did not offer. The case was remanded to the Commission, because it had failed to address the issue of permanent partial disability.

Queen v. Penske Corp., ____ N.C. App. ____, 625 S.E.2d 121 (2005)

Mr. Queen had had some back problems in past years, which got worse when he picked up a tire in July of 2002. He sought medical treatment but missed no time from work, through the date of hearing. His treating neurosurgeon recommended epidural steroid injections and noted the possibility of surgery in the future, if Mr. Queen reached the point that he could not walk. Mr. Queen declined the injections. The claim was apparently denied. The Commission found a compensable injury and ordered payment for medical treatment, including future surgery.

The Court of Appeals affirmed, holding that the treating doctor's testimony was sufficient to support a finding that Mr. Queen's back problems were aggravated by his compensable incident. The order of future medical expenses was specifically authorized by N.C.G.S. §§ 97-25.1 and 97.25. The decision to authorize further treatment was discretionary, and there was no abuse of discretion.

Rogers v. Smoky Mountain Petroleum Co., ____ N.C. App. ____, 617 S.E.2d 292 (2005)

Mr. Rogers claimed an injury while lifting at work. However, the two co-employees working with him did not notice anything, and Mr. Rogers was already undergoing treatment for back problems, including epidural steroid injections that had been scheduled before the alleged injury. His reports to doctors were also inconsistent. The Commission denied the claim on credibility grounds.

The Court of Appeals affirmed, holding that the Commission was the sole judge of credibility and was not required to explain its credibility decisions. The appeal amounted to an attempt, using several different approaches, to challenge the Commission's credibility decisions.

3. Occupational disease

<u>Flynn v. EPSG Mgmt. Services</u>, 171 N.C. App. 353, 614 S.E.2d 460 (2005)

Mr. Flynn was a camera operator who worked a lot of hours and spent 25-30% of his time using a hand-held camera that he rested on his shoulder. He was also required to get into awkward positions to get the proper camera angle. He had been having some tightness and stiffness in his left shoulder for a while when he reached to pick up his camera and felt a sudden stabbing pain, followed by numbness. He was eventually diagnosed with a rotator cuff tear and reactive synovitis. Treatment, including surgery, was not very successful, and he was significantly limited in his ability to use his left arm. Job search was not successful. The claim was made on alternative theories of accident and synovitis as a listed occupational disease, under N.C.G.S. § 97-53(20), The Commission awarded compensation for the rotator cuff tear as an occupational disease.

The Court of Appeals affirmed, holding that the medical testimony supported the Commission's decision, as it showed that the injury was caused by conditions characteristic of and peculiar to the employment and was not an ordinary disease of life. The surgeon testified that Mr. Flynn's overhead activity "placed him at a greater risk for rotator cuff and shoulder problems than the general public."

<u>Chambers v. Transit Mgmt.</u>, ____ N.C. App. ____, 616 S.E.2d 372 (2005)

Mr. Chambers was a bus driver who, after 30 years of driving, began suffering neck and shoulder pain one evening, between 10:00 and 11:00 p.m. He did not know whether his problems were work-related, so he did not fill out an accident report until a couple of weeks later. After seeing orthopedists for a few months, he went to a neurosurgeon, who performed neck surgery. When Mr. Chambers complained that he could not go back to work, nerve conduction studies showed that he also had ulnar nerve neuropathy, for which he had additional surgery. An FCE indicated tat he was able to work at the light to sedentary level, and he was rated at 30% of the left arm. The Deputy Commissioner denied the claim, finding no specific traumatic incident. The Full Commission reversed, finding an injury by specific traumatic incident to the neck and that the ulnar nerve entrapment and cervical degeneration were occupational diseases.

The Court of Appeals affirmed, holding that the neurosurgeon's testimony was sufficient to support the finding that Mr. Chambers' job duties placed him at an increased risk of developing the spinal problems and approving the Commission's findings and conclusions that the work caused or aggravated the neck and ulnar nerve problems and that there was a specific traumatic incident to the neck occurring within a cognizable time period.

In dissent, Judge Jackson opined that while there was sufficient evidence that the ulnar

nerve problem was an occupational disease, that was not true of the cervical condition. She dissected the testimony of the neurosurgeon, opining that it supported only a finding that the bus driving activities placed Mr. Chambers at an increased risk of aggravating the cervical condition, but not a finding that there was an increased risk of developing the condition. As to the specific traumatic incident, she opined that there was uncontroverted evidence of an occurrence within a cognizable time period while performing work activities, but that Mr. Chambers had failed to prove that the neck injury arose out of and in the course of the employment, because the neurosurgeon had testified that "the general abnormality is not considered a work-related event." Finally, she opined that the Commission had failed to make findings necessary to determine disability, because while there was evidence that Mr. Chambers was unable to do any of his previous jobs, there was no evidence that he could not earn wages in other jobs.

Hayes v. Tractor Supply Co., 170 N.C. App. 405, 612 S.E.2d 399 (2005)

Ms. Hayes had a history of sensitivity to respiratory irritants. After a return from vacation, she was exposed to fumes of naphthalene in a snake repellant that had just been placed near her work area and suffered a reaction. She then developed severe hives, for which she was hospitalized. She suffered subsequent reactions at other employments, when exposed to other substances. The Deputy Commissioner awarded compensation for an occupational disease, but the Full Commission reversed.

The Court of Appeals affirmed, holding that the Commission had properly found that Ms. Hayes' reactions to chemicals were the result of personal sensitivity, despite testimony that chemicals in her work environment placed her at an increased risk of developing sensitivity, because there was other evidence that the sensitivity predated the exposure to naphthalene. A mixture of mostly negative medical opinion was also sufficient to support the decision not to find causation, too. The Court rejected specifically in a footnote Ms. Hayes' contention that the Commission had erred by failing to take judicial notice of testimony in other cases in finding that chemical sensitivity is not an occupational disease, reminding the Commission to be cautious about taking judicial notice of "matters of continuing scientific research." That might be helpful in those cases in which defendants cite prior cases of "the same" disease, like fibromyalgia, in arguing for denial.

4. Credit issues.

Meares v. Dana Corporation/Wix Div., ____ N.C. App. ____, 615 S.E.2d 912 (2005)

Mr. Meares suffered an accepted injury to his right knee. He was paid compensation for a couple of months following arthroscopic surgery, then returned to work. He continued to have problems with his right knee, as well as related aggravation of his left knee. About a year after the injury, his job was eliminated and he was offered a severance agreement that paid him full salary for 10 months after termination, based on 29 years of service to the employer. A few months after termination, Mr. Meares underwent replacement of his right knee which, along with complications, rendered him totally disabled. The Commission awarded compensation, which award was not appealed, but allowed a credit to the defendant for the payments made pursuant to

the severance agreement after the surgery.

The Court of Appeals reversed, holding that the Commission did not have discretion to allow a credit pursuant to N.C.G.S. § 97-42 or otherwise, because the severance payments were due and payable when paid. Those benefits were based on time of service, were contractual in nature, were not a replacement for wages, had nothing to do with disability and were not tantamount to workers' compensation benefits. The Court rejected the defendant's unsupported contention that the payments were not due and payable when paid, unless payment could be enforced through a lawsuit.

THE FOLLOWING ARE A SERIES OF THREE CASES THAT ADDRESS PRIMARILY CREDIT ISSUES IN CLAIMS INVOLVING HIGHLY PAID PROFESSIONAL FOOTBALL PLAYERS, WHO HAVE VARYING TYPES OF BENEFITS AND OTHER PAYMENTS THAT EMPLOYERS SEEK TO APPLY AGAINST WORKERS' COMPENSATION BENEFITS. THE SMITH AND SWIFT CASES ARE REPORTED AS THEY WERE IN LAST YEAR'S MANUSCRIPT, BEFORE REHEARING, WITH NOTES AS TO WHAT HAPPENED WHEN THEY WERE REHEARD. RENFRO IS ACTUALLY THE LAST ONE TO BE HEARD IN THE COURT OF APPEALS.

Renfro v. Richardson Sports, Ltd. Partners, ____ N.C. App. ____, 616 S.E.2d 317 (2005)

Mr. Renfro had struggled to make the roster of an NFL team and injured his wrist during training camp, when it was bent at an awkward angle while blocking. The Court of Appeals affirmed the Commission's decision that he had been injured by accident. The Commission's decision to base the average weekly wage on amounts that Mr. Renfro would have earned if he made the team was justified by the short time he had been working for the employer and the reasonable expectation that he would have made the team, in the absence of his injury. That led to an average weekly wage of $2134.61. Mr. Renfro proved partial disability by obtaining substitute employment as a commissioned real estate broker at much reduced wages. The Commission awarded 300 weeks of compensation for partial disability,at the $620 maximum weekly rate for a 2001 injury.

On the more important issue, the Court affirmed the Commission's decision that credit would be given for an injury payment under the collective bargaining agreement on a dollar-for-dollar basis, instead of week-for-week. The Court held that the Commission had properly found that the paragraph of the collective bargaining agreement that provided for the credit, by stating that payments under the contract were to be "deemed an advance payment of workers' compensation benefits" effectively modified the provisions of N.C.G.S. § 97-42 in that regard. The decision in this case led to the revisions of the previous opinions in Smith and Swift below on rehearing before the Court of Appeals.

Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342 (2005); ____ N.C. App. ____, 616 S.E.2d 245 (2005)

This is a case of somewhat limited application but is very important in claims involving highly paid professional athletes. Mr. Smith is a famous football player who suffered a career-

ending injury. He sought and won compensation at the maximum rate for partial disability, after going to work at a radio station for $40,000 per year. The issue is the effect of several types of money that he was paid under his contract, which was further subject to the NFL players' collective bargaining agreement, after he became unable to play. While the facts and opinion of the Court of Appeals are extremely complicated, the highlights are that large amounts of money will, absent a provision of the plan under which they are paid, be credited on a week-by-week basis, pursuant to N.C.G.S. § 97-42, instead of the dollar-for-dollar approach favored by employers and that the players' contracts cannot, under North Carolina law, affect the application of the Workers' Compensation Act. The Commission's decision that the defendants were entitled to credit for only 14 weeks of Mr. Smith's 300 weeks of partial disability compensation, even though millions of dollars were paid, and that certain of the amounts were due and payable when paid, so as not to be eligible to be used as credit were mostly affirmed. However, the Court held that the Commission had failed to receive sufficient evidence to decide the status of some of the payments, so the case was remanded. The Court also emphasized that awarding of the credit was discretionary with the Commission, while also citing appellate cases that held some credits to be mandatory.

ON REHEARING, the Court modified its opinion to remand the case to the Commission to take evidence and make further findings as to whether the provisions of § 97-42 were modified by the collective bargaining agreement, so as to allow the employer to take a dollar-for-dollar credit for the applicable benefits.

Swift v. Richardson Sports, Ltd., 169 N.C. App. 529, 616 S.E.2d 546 (2005); ____ N.C. App. ____, 620 S.E.2d 533 (2005)

This is a case involving a professional football player who suffered a career-ending injury. It is somewhat simpler than Smith v. Richardson Sports, Ltd., which is also reported in this manuscript, because Mr. Swift was not as prominent and had less complicated contractual arrangements. He was paid $325,000 for the season, in 17 weekly installments. As he was rushing from the outside, in attempt to block an extra point, the play broke down, people started scrambling around, and one or two other players landed on his leg, breaking the fibula and tearing ankle ligaments. He received a check for the following week, under an injury protection provision in his contract. He was then paid $30,000 in severance pay. The following season, he was able to catch on with the Jacksonville Jaguars and play one game, for which he received a single check for $22,647, which was slightly more than he received fro the Panthers. Unfortunately, the Jaguars also decided that he was unable to perform due to his injury and cut him. He then worked at a series of jobs, with the most lucrative paying $40,000 per year. His average weekly wage was $6476.90, and the Industrial Commission awarded compensation at the maximum rate of $560 for partial disability, under N.C.G.S. § 97-30, with credit for the one week he was paid for playing for Jacksonville, plus attorney's fees.

The Court of Appeals mostly affirmed, but remanded for findings and conclusions concerning the attorney's fees, to include reference as to whether they were to be a sanction under § 97-88.1 or for an appeal result under § 97-88. The defendants argued that there was no accident, but the Court held that there was evidence to support the Commission's finding and conclusion that having another player fall on him so as to break his leg was unexpected and unusual. The payments made by the employer, under the collective bargaining agreement and

Mr. Swift's contract, were not creditable, apparently because they were due and payable when paid, which rendered moot the discussion as to whether credit would be dollar-for-dollar (which it is not) or week-by-week (which it is). The only "credit" allowed was the absence of the one week of disability, when Mr. Swift played for the Jaguars and made more than his average weekly wage, which does not raise any of the usual "credit" issues. **Bonus practice nugget:** The defendants challenged as hearsay Mr. Swift's testimony as to why he was released by the Jaguars. The Court held that the Commission correctly admitted the testimony, because it was a declaration made at trial or hearing by the declarant, which was based on his personal knowledge as to why he was cut. This decision can be applied to a broad range of cases, in which the injured worker must prove why he was not offered jobs during a search.

ON REHEARING, the Court reversed the Commission's decision that the defendant was entitled only to a week-for-week credit, holding that there was no difference between this case and Renfro, so that the credit must be applied dollar-for-dollar, for the whole amount of the injury protection payment.

5. Third party lien related issues.

Childress v. Fluor Daniel, Inc., ____ N.C. App. ____, 615 S.E.2d 868 (2005)

Mr. Childress won a contested case, receiving compensation for asbestosis and colon cancer caused by asbestos exposure at work. The defendants appealed to the Court of Appeals, contending that the Commission had erred by failing to address distribution of third party settlements. The court had rejected that contention, holding that the Commission did not have jurisdiction to address such issues until a final award was entered. Thereafter, the defendants filed a request for distribution with the Commission, after which Mr. Childress filed a petition for reduction of the lien in Superior Court. The Superior Court Judge dismissed the petition on grounds that he lacked jurisdiction, apparently because there had been a final order filed by the Commission. The Court of Appeals reversed, holding that N.C.G.S. § 97-10.2 (f)(1) requires the Commission to enter an order distributing proceeds, but does not eliminate the power of the Superior Court to adjust the lien under § 97-10.2(j).

Schenk v. HNA Holdings, Inc.; Bell v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689 (2004); 170 N.C. App. 555, 613 S.E.2d 503 (2005)

This is a third party case, in which workers sued the owners of the premises where they had been exposed to asbestos. Most of the case is about the availability of punitive damages, which is outside the scope of this paper. However, there is a detail that concerns workers' compensation. After the jury rendered a verdict for the plaintiff, the trial judge convened a hearing to give a 100% set-off against the verdict for all recoveries the plaintiff's had achieved through settlement with other parties, including workers' compensation. The plaintiffs argued that the comp recoveries were separately for recovery of lost wages, which was different from the recovery in the third party case. In affirming, the Court of Appeals cited cases about preventing double recovery. Notably absent is any discussion of statutory authority for the set-off. N.C.G.S. § 97-10.2 provides that credit can be given against third party recovery for comp benefits paid by a negligent employer, but there must be negligence of the employer found by the jury in order to

allow that. The alternative is that the comp defendants are reimbursed, subject to modification of the lien. It is possible that there was a jury verdict about negligence of the employer, but it does not appear in the opinion. If there was none, then the Court created something new.

On rehearing, the plaintiffs argued consistently with the point above, that § 97-10.2 only allows a set-off for workers' compensation benefits when the issue of employer negligence is pled and litigated to a jury verdict. The Court refused to address the merits of that argument, holding that the plaintiff's had not preserved the issue, as they did not argue it before the trial court or in their original appeal to the Court of Appeals.

Helsius v. Robertson, ____ N.C. App. ____, 621 S.E.2d 263 (2005)

Mr. Helsius, a Durham County sheriff's deputy, was hit by a car while escorting a funeral procession on his motorcycle. He suffered serious injuries, for which workers' compensation benefits were paid in the amount of $53,128.40. The total funds available to cover the third party claim were $30,000 in liability insurance from the negligent driver plus $20,000 under Mr. Helsius' own underinsured coverage. The Superior Court extinguished the County's lien.

The Court of Appeals affirmed, rejecting the employer County's contentions that sovereign immunity prohibited reduction of the lien under N.C.G.S § 97-10.2(j), when the Workers' Compensation Act explicitly applies to counties and their employees—and when the County was attempting to invoke § 97-10.2 to enforce its lien in the first place, that § 97-10.2(j) was unconstitutionally vague and violative of due process, and that that subsection violated the Exclusive Emoluments Clause of the North Carolina Constitution by letting a public employee get a double recovery. The Court further held that the findings of fact in the judge's order, and the evidence supporting it, were sufficient to justify the judge's discretionary act of extinguishing the lien. The Court specifically noted the evidence and findings that the lien exceeded the available funds in the third party case and that payment of the lien would result in Mr. Helsius' not being compensated for the remaining portion of his wages, wages lost in secondary employment, and pain and suffering. The portions of the Superior Court judge's order quoted in the opinion provide very useful material for motions and orders to reduce liens.

6. Presence or lack of an accident.

Bursell v. General Electric Company, ____ N.C. App. ____, 616 S.E.2d 342 (2005)

Mr. Bursell was, apparently inaccurately, suspected of stealing company property. He was fired and escorted off the premises. The following week, the employer called him back in, but put him on "crisis suspension" for a different, relatively minor, offense. He appealed the suspension to a peer review committee and was visibly shaking at the hearing. Though he was exonerated as to the theft suspicion, he was still harassed by co-employees. He began having panic attacks and sleep problems. He was diagnosed with adjustment disorder with mixed features. Another doctor diagnosed major depression with obsessions, prescribed medication, opined that Mr. Bursell would never be able to maintain regular attendance in employment, and pronounced him permanently and totally disabled. The Commission found, consistently with the medical evidence, that being accused of stealing, fired and treated poorly in relation to those

allegations caused Mr. Bursell's psychological problems and disability. It also found that the events were "unexpected and not reasonably designed by plaintiff" but denied the claim on grounds that while the events were unexpected, that did not make them "unusual" or "unforeseen" conditions that would give rise to compensation, citing Woody v. Thomasville Upholstery, Inc.

The Court of Appeals reversed and remanded in part, affirming as to the denial on grounds of occupational disease, but holding that the Commission had erred as to the claim of accident. The Court rejected the defendants' contention that a legitimate (read "not illegal") personnel action can never involve an interruption of the work routine. The case was distinguished from prior cases in which the Commission had found and concluded specifically that personnel-related events had been "routine" or "ordinary." The Court noted that, on the contrary, the Commission had found that Mr. Bursell's events had been sudden and unexpected. However, the case was sent back for the Commission to address specifically whether the personnel action was "normal work routine" or part of an "established sequence of operations." The Court agreed with the defendants that the Commission had erred by finding that Mr. Bursell had been "fired," when he was actually placed on "crisis suspension," but held that that error was not cause for reversal, because the exact nature of the disciplinary action was not determinative of the issue as to whether an accident had happened.

Ferreyra v. Cumberland County, ____ N.C. App. ____, 623 S.E.2d 825 (2006)

Mr. Ferreyra was a sheriff's deputy who was called to help a woman who had stopped breathing. He was trained in CPR, but had never used it in his 8+years as a deputy. After performing 21 sets of five chest compressions, he felt a sharp pain in his head. When it did not go away, he was diagnosed with an aneurysm and underwent surgery. The treating surgeon stated in a letter that the rupture of the aneurysm at the time was most likely caused by an increase in blood pressure due to the stress and excitement while performing CPR. The Commission awarded compensation.

The Court of Appeals affirmed, holding that it was unnecessary for the Commission to find that the activity in which Mr. Ferreyra was engaged was outside his work routine, when the exertion resulting from that activity was unusual. The Court refused to hold that the note from the surgeon was incompetent for being speculative or to overturn the Commission's decision to accord it more weight than was given the defendant's expert.

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

Chavis v. TLC Home Health Care, ____ N.C. App. ____, 616 S.E.2d 403 (2005)

THIS CASE CONTAINS SEVERAL SIGNIFICANT ISSUES.

Ms. Chavis was a home health nurse who generally visited several people each day and was paid only for the hours that she was actually at the patients' homes. She was paid for her mileage, in lieu of wages, for the time spent driving between patients. One day, she arrived at a patient's home and was told by the patient that she had an errand to run that would take about 20 minutes. Ms. Chavis had previously been told that she must not be in a patient's house when the

patient was not there and that if the patient's absence was to be less than an hour or two, she should do something like grabbing a bite to eat. If the absence was to be longer, she was to go on to another patient. When the patient left in this instance, Ms. Chavis drove off to take something to her father. On the way back to the patient's home, Ms. Chavis blacked out and was injured in a one-car accident. The Deputy Commissioner and Full Commission awarded compensation.

The Court of Appeals affirmed, holding that **1)** Ms. Chavis was in the course of her employment, because her work required her to drive and she had completed her deviation for her personal errand at the time of the accident. She was taking the most direct route back to the patient's house, so she had "resumed the direct business route." The Court also held that **2)** the injury arose out of the employment, despite the contention that the black out was caused by an idiopathic condition, because the driving that she was required to do for her work placed her at an increased risk of a wreck, so that the non-compensable black out and the work-related hazard combined to cause the compensable accident. **3)** The mileage reimbursement that Ms. Chavis received was included in her average weekly wage, because she was not paid for the time she spent traveling, and the mileage reimbursement was a substitute for wages during that time. **4)** The award of compensation for total disability for the total time she was out of work was affirmed, despite a release to sedentary duty some time before she returned to work for the employer, because the employer could not accommodate her restrictions during the entire time and she was not required to search for other employment while she was still employed by the employer, and because searching for sedentary work would be futile for someone with her vocational characteristics. It is not clear from the opinion whether the continued employment, by itself, was viewed as relieving the injured worker from the burden of showing a reasonable search for employment. **5)** The Court rejected the defense of failure to give written notice within 30 days, under N.C.G.S. § 97-22, holding that the actual notice to the employer was sufficient to excuse failure to give written notice and that the employer had failed to prove prejudice arising from the failure to give written notice.

In dissent, Judge Tyson opined that the accident had occurred while Ms. Chavis was still on her personal errand and was therefore did not arise out of and in the course of employment. The "going and coming rule" generally does not allow for compensation when an accident happens off the employer's premises, and Ms. Chavis' situation did not qualify for the "traveling salesman exception" to that general rule, because she had fixed hours of work, even if her work location was not fixed. He further opined that the driving she did was no different from driving done by other people, so that the idiopathic condition was the sole cause of the accident.

<u>Munoz v. Caldwell Memorial Hosp.</u>, 171 N.C. App. 386, 614 S.E.2d 448 (2005)

Ms. Munoz worked as a home health nurse. She was injured in a car wreck while going to a patient's house. She had gone a little out of her way, for purposes of dropping off time sheets at the employer's office, but she was injured before she got there. The Commission found that both the "traveling salesman" and "contractual duty" exceptions to the "going and coming rule" applied, so that the accident arose out of and in the course of employment, so compensation was awarded.

The Court of Appeals affirmed, holding that the "traveling salesman" exception applied, despite the fact that she only worked at one patient's home each day, because in her four days of

work, she had worked for three different patients for varying numbers of hours, so there were no fixed place or hours of work. The "contractual duty" exception applied, because the employer paid mileage reimbursement for any work more than a 60 mile round trip from the employee's home, and the job to which she was traveling at the time of injury qualified. The Court distinguished Hunt v. Tender Loving Care Home Care Agency, Inc., in which the nurse worked for the same patient every day and the trip was not long enough to qualify for that employer's similar mileage reimbursement arrangement. The deviation from the most direct route to the patient's house, for purposes of dropping off the time sheets, was affirmed as being insufficiently significant to cause the accident not to arise out of and in the course of the employment, because the office was in the same town as the patient's home and Ms. Munoz was required to drop off the time sheets that day. The defendant argued that the Commission, when applying the methods required by the short length of Ms. Munoz's employment, had erred by basing the average weekly wage on the overall average of hours worked by nurses for the employer, instead of using a weighted average that would accord twice the weight to weeks in which twice as many nurses worked, which would generate a slightly lower average. The Court noted the lack of authority for the defendant's argument and rejected it.

D'Aquisto v. Mission St. Joseph's Health Systems, 171 N.C. App. 216, 614 S.E.2d 583 (2005)

Ms. D'Aquisto was carrying papers from her office to the morgue at the defendant hospital, just after 7:00a.m.. While waiting in front of a staff elevator, she was approached by a man wearing green scrubs. They spoke briefly, after which the man grabbed her breasts roughly and chased her through the hospital, grabbing her and inflicting bruises on her breasts and in her groin area. She burst out of a stairwell into the arms of a co-employee, who testified that there was a man behind her trying to grab her again. The man ran away. A suspect was later arrested, but he was acquitted of criminal assault charges. Ms. D'Aquisto suffered neck and upper back stiffness and far more debilitating psychological problems. The Commission awarded compensation for on-going total disability, as well as attorney's fees as a sanction.

The Court of Appeals affirmed, holding that the assault arose out of the employment, because Ms. D'Aquisto's work required her to go to an isolated place in the hospital, where she was exposed to an increased risk of being assaulted, particularly by someone dressed in hospital attire. The Court rejected a contention that the Commission had erred by disregarding competent evidence, holding that weighing evidence was for the Commission, which was not required to explain its findings by distinguishing which evidence or witness it finds credible. The Court also rejected the contention that testimony of the defendant's psychologist had been mischaracterized. Apparently, that psychologist had testified that the attack may not have happened and might instead have been a "dissociative episode." It was not error to find that the psychologist had admitted that it could not have been such, when she testified that a Commission finding of the event, based on testimony of both Ms. D'Aquisto and the eyewitness, would not constitute a dissociative episode. The Court found no error in sanctions for numerous episodes of abuse in investigation and discovery, including the requirement that there be a hearing at all, when most of the information presented was readily available to the defendant, which essentially ignored everything while claiming a hearing was necessary, because "We don't know what happened," which was apparently based on a contention that they were not required to accept the plaintiff's credibility. Finally, the defendant contended that Industrial Commission Rule 601, which requires a detailed statement of the basis for denial of a claim, impermissibly shifted the burden of

proof to the defendant and denied them due process. The Court held that the rule, having been properly promulgated, was presumed valid, and the defendant failed articulate any specific arguments or cite authority for their position.

Counsel should pay special attention: the Court noted in a footnote that it had ignored any portion of the appellee's brief that exceeded 35 pages, pursuant to appellate Rule 28(j).

Davis v. Columbus County Schools, ____ N.C. App. ____, 622 S.E.2d 671 (2005)

Ms. Davis was already being treated for a frozen shoulder, and was apparently in a sling, when a co-employee grabbed her affected arm and pulled her around to ask her a question. After seeing her family doctor, she was seen by an orthopedist, who diagnosed frozen shoulder and possible reflex sympathetic dystrophy. After several months of treatment, she returned to work, then further improved with additional therapy. The Deputy Commissioner denied compensation, but the Full Commission awarded it.

The Court of Appeals affirmed. The Court first addressed alleged violations of appellate procedure, as to the specificity of assignments of error, holding that they were sufficient to indicate the issues and that, in any event, they were not so severe as to require dismissal of the appeal. The Court then held that there was sufficient evidence to support the findings and conclusions, in that the event originated in the employment and thus arose out of it. There was some discussion of the legal standard for finding causation of injury or aggravation, but there is no specific reference to medical testimony that may have raised an issue.

Frost v. Salter Path Fire & Rescue, ____ N.C. App. ____, 628 S.E.2d 22 (2006)

Ms. Frost was captain of emergency services for the defendant. At the annual Fun Day at a local amusement area, she was injured in a go-cart accident. The Commission awarded compensation.

The Court of Appeals affirmed, with Judge Tyson dissenting. The key to the case was evaluation of factors from the case of Chilton v. Bowman Gray School of Medicine, in determining whether the injury at an employer-based recreational event arose out of and in the course of employment. The majority held that the employer sponsored the event, despite the fact that it was paid for with a special contribution fund, instead of with the employer's regular operating budget. The Court also held that the event benefited the employer beyond simply improving employee morale, in that morale was especially critical to keeping volunteers working, without whom the employer could not function. There was also some evidence that Ms. Frost was at least under some pressure to attend, as her supervisor had specifically asked her to come and that she was to perform duties connected with the work there, as the supervisor had asked her to give a "pep talk" to the other volunteers. The dissent took the opposite view as to the meaning of the evidence on these points. The Court held that the evidence did support the finding of disability up to the point that Ms. Frost was released to sedentary work, but rejected the plaintiff's argument that compensation should have continued beyond that, because the absence of an approved agreement for compensation or a previous award of the Commission left her with the burden of proving disability, including its duration.

8. Liability for medical expenses, including presumptions and procedure.

Clark v. Sanger Clinic, P.A., 142 N.C. App. 350; 542 S.E.2d 668; (2001); 157 N.C. App. 572; 579 S.E.2d 520 (2003); ____ N.C. App. ____, 623 S.E.2d 293 (2005);____ N.C. App. ____, ____S.E.2d ____ (2006)

Ms. Clark suffered an admittedly compensable back injury. She suffered falls that were related to the back injury and which caused injuries to her knee and teeth. After a hearing, the Commission ordered compensation for permanent, total disability and payment of all related medical expenses, including the dental and knee problems. Ms. Clark also had a lot of other medical problems, which were the subjects of additional litigation. In this case, the Commission denied payment of certain medical expenses and attorney's fees.

The Court of Appeals affirmed. The Court first held that the Commission had properly refused to place the burden of proof regarding treatment of arthritis in knees on the defendants, holding that unlike the situation in Parsons v. Pantry, Inc, in which the headaches the defendants refused to pay for were the same as they had already been ordered to cover, Ms. Clark's arthritis was a different condition from the traumatic meniscal tears that were the subject of the previous order. Assuming that the burden was on the plaintiff, evidence that falling would likely aggravate pre-existing arthritis was immaterial, in the absence of any evidence that she had pre-exisitng arthritis. There were also alternative causes of her arthritis, including her obesity. Similarly, the dental problems at this stage were excessive cavities, potentially caused by a number of things, including dry mouth related to medication, as opposed to the prior acute injuries, and there was evidence to support the Commission's refusal to find cause. The same was true for esophageal reflux, constipation and nausea. Attorney's fees for failure to comply with prior orders of the Commission were properly denied, because evidence supported that the circumstances of the failure to comply did not show unreasonable refusal.

Thompson v. Federal Express Ground, ____ N.C. App. ____, 623 S.E.2d 811 (2006)

Ms. Thompson suffered an admittedly compensable back and neck injury at work on December 16, 2000. She was sent, apparently by the employer, to one facility, which referred her to Dr. Orenstein, who recommended conservative treatment, including chiropractic care, and returned her to modified work. Her condition got worse. In the absence of radiographic findings, Dr. Orenstein recommended an interdisciplinary pain program. She was seen by Dr. Sanitate, who opined that her pain was psychological and she required only a short course of chiropractic treatment, at which point the defendant refused to authorize the pain treatment. Dr. Orenstein refused to refer Ms. Thompson to an osteopath, so she found one on her own, Dr. Motyka. Dr. Orenstein disagreed with Dr. Motyka's diagnosis of fibromyalgia, but opined that the treatment rendered by him from April 24 through June 26, 2001 was not necessarily inconsistent with the chiropractic treatment that he recommended. Ms. Thompson moved for approval of Dr. Motyka's treatment by the Commission on May 15, 2002, more than a year after the treatment started. The Full Commission warded compensation for total disability and ordered payment of Dr. Motyka's bills, but only through June 26, 2001, and ordered that neither Dr. Orenstein nor Dr. Motyka were authorized treating physicians.

The Court of Appeals affirmed, holding that while an employer does not have the power to direct medical treatment until it formally accepts a claim, which cannot be done simply by paying medical expenses, an injured worker is still required to request approval of his or her choice of physicians from the Commission within a reasonable time. Therefore, the Commission did not err in dismissing the request that was eventually filed more than a year after Ms. Thompson started treatment with Dr. Motyka. She could not rely on referral by Dr. Orenstein, an authorized treating physician, because he did not refer her to Dr. Motyka, and the Commission awarded the treatment for the time period Dr. Orenstein ratified after the fact.

Fontenot v. Ammons Springmoor Assocs., ____ N.C. App. ____, 625 S.E.2d 862 (2006)

Ms. Fontenot hurt her back lifting a patient and was sent to company doctors, who did no MRI, diagnosed a pulled muscle and returned her to work with no restrictions. She continued to have pain upon returning to work, which became worse and spread into her right hip and leg. She went to an emergency room more than a year later with pain and numbness in her right leg. An MRI revealed a large herniated disc at L5-S1, for which she eventually had successful surgery. She filed a Form 18 Notice of Accident to Employer and Claim of Employee almost two years after the original injury, stating the injury as "HNP L5-S1, full extent unknown, aggravation of and/or change of condition from accepted injury." Some months later, the defendants filed a Form 61 denying the claim on grounds that her condition was unrelated. The Form 33R stated defenses as the lack of relationship and that she did not go to the authorized treating physician or seek approval for unauthorized treatment within a reasonable time. On testimony from some of the doctors, including the company-authorized orthopedist who had sent her back to work so quickly, that the herniated disc was caused by the original incident, the Commission awarded compensation.

The Court of Appeals affirmed, for the most part. Most significantly, the Court held that the evidence allowed the Commission to find that the request to the Commission for approval of medical treatment was made within a reasonable time, when Ms. Fontenot went to the emergency room in November of 2000, saw three different doctors between then and February of 2001, requested authorization via the Form 18 filed on January 23, 2001, was formally advised of denial by the defendants via the Form 61 filed on September 21, 2001 and filed the Form 33 "only" five months later, in March of 2002**. Despite the holding in favor of the injured worker, it should be noted that the Court made several statements indicating a relatively strict view of the requirements for obtaining treatment form unauthorized doctors.** The Court explicitly criticized plaintiff's counsel for using a Form 18 to request the authorization, instead of a Form 18M, but let that misstep slide. In a footnote, the Court noted that it was not holding that a Form 18 is always sufficient to constitute a written request for additional treatment and focused in this case instead on the Form 33 for that purpose. The defendant's contention that a Form 33 is never sufficient to request authorization was rejected, but apparently only because of the specific wording that was used on the Form 33 in this case. The Court took seriously the defendants' contention that Ms. Fontenot was subject to a two-year time limit to request additional medical treatment—in a case that she probably contended was open for all purposes pursuant to the filing of the Form 18—but rejected the contention that she had failed to file on time, because the Form 33 was filed more than two years after the last payment for medical expenses, but only because the Form 18 that was inartfully filed by plaintiff's counsel was marginally sufficient to constitute

the filing necessary to beat the clock.

The defendants' contention that the Commission's causation decision was not supported by competent evidence, apparently based on alleged speculativeness, was rejected. The Court remanded for correction of the Opinion and Award to delete reference to an award of future benefits to which Ms. Fontenot might become entitled, because she had returned to work with a new employer for more money and there were no findings concerning future disability. Finally, the Court held that the failure of the Commission to state in its award that the medical benefits were subject to the two-year limitation in N.C.G.S. § 97-25.1 would not require remand, but that it is better practice to include that, so that the Commission should do so, because the case was remanded, anyway.

9. <u>Seagraves</u> issues.

<u>Silva v. Lowe's Home Improvement</u>, ____ N.C. App. ____, 625 S.E.2d 613 (2006)

Mr. Silva suffered an admittedly compensable accident, when he lost his footing and struck his chest on a shelf. He suffered an exacerbation shortly thereafter and was given lifting restrictions. He continued to work. Several months after the injury, his supervisors started leaning on him about his performance in keeping merchandise neat in his area. After one discussion, Mr. Silva arranged a meeting before work to "get some closure" with his assistant store manager concerning a recent discussion of his job performance. The assistant manager arranged for someone from personnel to be at the meeting. The meeting became heated, with the assistant manager and Mr. Silva each testifying that the other became aggressive, and Mr. Silva was terminated, ostensibly for insubordination. The Deputy Commissioner decided that Mr. Silva had been fired for insubordination (the alleged last straw was when he yelled at the assistant manager to "shut up") in a way that any other employee would have been, that he had therefore constructively refused employment and that he was not entitled to compensation for disability. The Full Commission reached the opposite conclusion, finding Mr. Silva more credible.

The Court of Appeals affirmed, for the most part, rejecting each of the defendant's contentions that the Commission had failed to handle factual decisions properly. Specifically, the Commission properly placed the burden on the defendant to prove that the firing was unrelated to the injury and that there was evidence to support findings that there was no evidence of modifications of Mr. Silva's job to account for his restrictions and that the assistant manager had anticipated disciplining or terminating Mr. Silva before the meeting and before he had had an opportunity to tell her to shut up. There was evidence that personnel people were to be brought in to any meeting in which an employee was to be disciplined, which undercut the defendant's credibility in claiming that the firing was inspired by events at the meeting. In general, the defendant challenged the Commission's findings on credibility and inferences from evidence, which the Court held could not be disturbed on appeal, when there was any competent evidence to support them. The case was remanded for additional findings, because the Commission had made only a conclusory finding that Mr. Silva had been unable to earn any wages since his termination, without any explanation of the legal basis for that finding, which prevented the Court from evaluating whether the finding was adequately supported.

Workman v. Rutherford Electric Membership Corp., 170 N.C. App. 481, 613 S.E.2d 243 (2005)

Mr. Workman was an electrical lineman who suffered admittedly compensable injuries when a utility pole felon his abdomen. He underwent two surgeries and returned to work about 11 months after his accident, at dramatically reduced wages. The job description submitted to the treating doctors for approval did not include some strenuous activities. The physical demands of the job were causing him increasing problems, including some time out of work for blood in his urine. He was also becoming frustrated with the defendant's failure to pay medical bills and delays I paying compensation. That frustration caused him to call a South Carolina lawyer, who suggested that the only remedy was to "whip his ass and it will cost you $500 to do that." Mr. Workman and the lawyer laughed about that, and Mr. Workman told the "joke" to several other people. Due to his increasing frustration, the rehab nurse assigned to his case arranged for psychological treatment. While awaiting an appointment, Mr. Workman told the nurse the "ass-whipping" joke, and she promptly repeated it to the employer, which immediately terminated Mr. Workman for "workplace violence." The Commission awarded on-going compensation, payment of medical expenses for urological problems and vocational rehabilitation services.

The Court of Appeals, Judge Tyson writing, affirmed, mostly, holding that the Commission had correctly found that the defendant had failed to prove constructive failure to accept employment, because it had produced no evidence that other employees would have been terminated for the same behavior. The Commission properly found inapplicable evidence of another employee who was fired, then rehired, after participating in a fight on company time, because Mr. Workman's alleged offense did not involve any physical violence. The Commission's erroneous admission of an affidavit from the South Carolina lawyer about the joke, so that the defendant had no opportunity to rebut or discredit it, was essentially harmless error, when exclusion of that evidence still left plenty of evidence to support the findings. The Court rejected the defendant's contention that the decision of the Employment Security Commission that Mr. Workman was disqualified from receiving unemployment benefits due to misconduct (making "threatening remarks") was *res judicata*on or collaterally estopped the Commission to re-litigate the issue, because the benefits at stake were different before the two fora. There was sufficient, non-speculative medical evidence to prove the causal connection of the urological and psychological problems, but the case was remanded for findings and conclusions on the issue of proof of disability. The medical evidence indicated significant restrictions but did not contain an opinion that Mr. Workman was unable to work at any employment that would satisfy the first prong of the test from Russell v. Lowes Product Distribution. Therefore, the Commission needed to address whether the evidence showed failure of a reasonable job search or futility of a job search, under the second and third prongs, respectively, as well as whether the defendant effectively rebutted that evidence.

In concurring, Judge Wynn opined that remand on the issue of disability was unnecessary, despite the Commission's error in failing to make sufficient findings and conclusions, because all evidence in the record indicated that Mr. Workman had attempted to find work and had been unsuccessful, so that the second Russell prong was satisfied.

10. <u>Salaam</u> issues.

<u>Mayfield v. Parker Hannifin</u>, ____ N.C. App. ____, 621 S.E.2d 243 (2005)

Mr. Mayfield suffered a back injury and was paid compensation. He reported to a neurosurgeon that his back pain had resolved, but he still had symptoms in his leg. Conservative treatment that was not successful, the neurosurgeon opined that surgery would not be appropriate and he released Mr. Mayfield from care. The rehabilitation nurse steered Mr. Mayfield to an internist who opined that he did not see an obvious reason for the leg symptoms but that it might be related to the back. Dr. Bartko, a physical medicine specialist, stated that it was unusual for leg symptoms to persist in the absence of continuing back problems and speculated that they might be caused by a mini-stroke or diabetes. Dr. Bartko assigned restrictions to sedentary or light work. Upon the return of back symptoms, Dr. Bartko stated that Mr. Mayfield was not a surgical candidate, found maximum medical improvement and released him with a 3% rating of the back, further stating that the leg problems were not related and that Mr. Mayfield was unlikely to be able to return to even sedentary work, due to his leg symptoms. 10 months after the injury, the defendant filed a Form 60, accepting liability for a back strain and acknowledging that Mr. Mayfield had been receiving compensation. As the case was approaching hearing, the defendant set up an appointment for Mr. Mayfield with Dr. Bartko, two days after notifying him of the appointment. The day before the appointment, at 6:38 p.m., defense counsel faxed a letter to Dr. Bartko, which it asked to be delivered before the appointment the following day, asking pointed questions designed to separate the effects of the back symptoms from those of the leg symptoms and get opinions based on that separation. A copy was faxed to plaintiff's counsel at the same time. After the hearing, the Commission granted Mr. Mayfield's request for a defense-paid evaluation by another neurosurgeon, Dr. Roy, who opined that the leg symptoms were related to the back injury. The Deputy Commissioner refused to exclude Dr. Bartko's testimony, gave it more weight than Dr. Roy's and awarded compensation for about seven months of total disability related to the back alone. The Full Commission excluded Dr. Bartko's opinions after the letter that was sent to him, on grounds that those opinions had been tainted by improper communication, then assigned more weight to Dr. Roy's opinions and awarded on-going compensation.

The Court of Appeals affirmed, mostly, holding that the evaluation of the propriety of the communication with Dr. Bartko was based not on whether it was *ex parte*, but whether it was conducted through a method that was statutorily authorized, such as formal discovery. The Court noted that the fax used in this case did not fit any approved method, so it was improper and grounds for excluding the testimony. A challenge based on constitutional equal protection was rejected, on grounds that the confidential relationship between the injured worker and the doctor placed his lawyer in a different position from that occupied by the opposing lawyer. The decision that the leg condition was caused by the compensable incident was sufficiently supported by Dr. Roy's opinion, and the specific reference to the contrary opinions of other doctors indicated that the Commission had not failed to consider those opinions. The case was remanded for correction of some of the conclusions of law to agree with the findings of fact and award. It appeared that the Commission, in modifying the Deputy Commissioner's Opinion and Award, failed to change some details, such as the duration of compensation.

11. Procedural issues, including sanctions.

<u>Perry v. N.C. Department of Correction</u>, ____ N.C. App. ____, 625 S.E.2d 790 (2006)

This case involves outrageous behavior by a defendant, which is rendered worse by the fact that the behavior has been abetted by attorneys in the Attorney General's office.

Mr. Perry was injured in an admittedly compensable motor vehicle accident and was paid compensation pursuant to a State salary continuation plan. Eventually, the defendant filed a Form 24 application to Stop Payment based on the allegation that Mr. Perry could return to work, then withdrew it. However, the defendant stopped paying compensation, which it had not resumed as of the time of the Court of Appeals opinion over two years later. It also never filed another Form 24. A few months after the Form 24 was withdrawn, Mr. Perry filed a motion to reinstate benefits and sanctions for stopping compensation without Commission approval. A month later, the Executive Secretary entered an order to reinstate, with a 10% penalty on payments that were more than 14 days past due. A week after the filing of the order, the Key Risk adjuster wrote the Executive Secretary, informing her that Key Risk had not gotten the plaintiff's motion before the order was entered and asking for reconsideration, including medical records and other documents that the defendant contended were indicative of Mr. Perry's ability to return to work. The defendant also asked for an evidentiary hearing. Mr. Perry argued that benefits should continue, pending the hearing. The Executive Secretary granted the defendant's motion to reconsider, based on the lack of notice, but then reaffirmed the order that compensation was to be resumed. About 10 days later, the defendant filed for an expedited hearing and requested a stay of the order reinstating the compensation. On the date of the hearing, the Executive Secretary denied the request for a stay, obviating the issue before the Commission as to whether the defendant could continue to withhold payment while the request for a stay was pending. The Deputy Commissioner stated that he trusted that the defendant would comply with the order reinstating compensation, noting that the proper procedure to address continued failure to comply would be a motion to show cause before the Chief Deputy Commissioner and that the Deputy Commissioner would reconvene the hearing to address the other issues when the failure to comply had been resolved. The defendant then filed another motion for stay, after which Mr. Perry filed a motion for an order to show cause why the defendant should not be held in contempt. The defendant made an informal request that the Deputy Commissioner recuse himself, on purported grounds that his continued handling would deprive the defendant of a true *de novo* hearing. A few weeks later, the Chairman of the Industrial Commission filed an order denying the request for a stay of what was by then three administrative orders. The defendant appealed the refusal to grant the stay to the Court of Appeals.

The Court of Appeals dismissed the appeal, holding that the order refusing to grant the stay was interlocutory, despite the defendant's contention that it would be irreparably harmed if it was required to pay compensation pending hearing of its attempt to stop it, because it would be practically impossible to recover payments made, in the event the defendant was successful. The Court noted that the same problem arises in every case in which the employer seeks to stop compensation and does not prevail at the hearing of a Form 24 and that the mere payment of money pending litigation does not justify an interlocutory appeal. The availability of a credit for

overpayment was sufficient protection.

Watts v. Borg Warner Auto., Inc., ____ N.C. App. ____, 613 S.E.2d 715, 360 N.C. 169; 622 S.E.2d 492 (2005)

Mr. Watts claimed back injuries at three separate times. He did not inform his employer of the injuries for about 20 months, at which point he had been terminated for missing too much time from work, presumably due to his back injuries. He also did not inform his doctors of the incidents and stated on four separate benefit forms that the problems did not come from a work injury. The Deputy Commissioner denied the claims. The Full Commission reversed and awarded compensation.

The Court of Appeals remanded for more specific findings of fact concerning the excuse for failure to notify the employer as required by N.C.G.S. § 97-22, the lack of prejudice to the defendants and causation. The majority noted that Mr. Watts had testified that he had not reported his injury to supervisors, because he feared retaliation, having been moved to a less desirable job after filing a claim some years earlier, and did not foreclose the possibility that the Commission could find that to be a sufficient excuse, in the proper circumstances. The Court held that while prior cases had always involved either a belief on the part of the injured worker that the employer already knew about the injury or the worker's lack of recognition of the nature or severity of the injury, the decision on the reasonableness of the excuse was fact specific and was not limited to those two situations.

Judge Tyson dissented, opining that there was no need for a remand, because the excuses for failure to give timely notice were limited to the two cited above from prior cases, the delay in this case was prejudicial as a matter of law, because it deprived the defendants of the opportunity to investigate the claim and manage medical treatment, and that there was no non-speculative medical evidence to support causation.

On appeal, the Supreme Court affirmed *per curiam*.

Perez v. American Airlines/AMR Corp., ____ N.C. App. ____, 620 S.E.2d 288 (2005)

Ms. Perez fell in July of 1998, suffering an admittedly compensable back injury. She was paid compensation for total disability, including for a flare-up. The defendant filed a Form 28B reporting compensation for total disability through June 21, 2000 and medical compensation through September 18, 2000. After September 11, 2001, Ms. Perez quit her job as a flight attendant and, in January of 2002, took a job as a bank teller. A couple of months later, her back problems increased. In July of 2002, she went to a chiropractor who, suspecting a herniated disk, referred her to a surgeon, who performed microdiskectomy at L5-S1. Ms. Perez returned to part-time work as a teller at the end of August and full time at the end of September. She filed a Form 18M seeking additional medical coverage on August 29, 2002 and a Form 33 requesting a nearing as to additional compensation for disability. The Commission awarded compensation for temporary total and temporary partial disability, compensation for a rating, and additional future medical benefits.

The Court of Appeals affirmed, holding that the claims for additional benefits were not

barred by the two year period in N.C.G.S. § 97-47, because payment of compensation under § 97-18(b), with a Form 60, did not constitute the prerequisite "final award" necessary to apply that time limitation. The Court cited Beard v. Blumenthal Jewish Home, for the proposition that even a Form 21 Agreement does not constitute a final award, when it does not resolve permanent disability. The Court noted that the Form 60 constitutes only an acceptance of compensability. The Commission's decision on causation was sufficiently supported by medical testimony, despite the speculative nature of the opinions expressed by one of the doctors. Further, with respect to the claim for medical coverage, the Commission had properly placed the burden on the defendant to prove that the additional treatment was not related to the original injury, due to the defendant's admission of compensability in the Form 60, citing Parsons v. Pantry, Inc.. The defendant offered no evidence to rebut the presumption.

Branch v. Carolina Shoe Co., ____ N.C. App. ____, 616 S.E.2d 378 (2005)

This case is a procedural mess, though the specific holding at this stage is fairly straight-forward. After an accepted foot injury, the Commission determined that Ms. Branch had failed to comply with medical instructions to be more active and had thereby contributed to the worsening of her condition, including reflex sympathetic dystrophy. The Full Commission ordered that in order to reinstate suspended benefits, she would have to follow a specified graduated return to work schedule. She did not do that and filed an application for additional benefits due to a change of condition, plus a new claim for upper extremity problems that were also claimed to be related to the foot injury. The Deputy Commissioner refused to hear the change of condition claim, because the Full Commission's order was still in effect, and set the new claim for hearing. On appeal to the Full Commission, the case was remanded to the Deputy Commissioner for hearing of the specific issues as to whether 1) she had complied with the prior Full Commission order in the original case, 2) the she had had a new injury in the second claim and 3) she was entitled to benefits on either theory. Medical evidence was presented at hearing that indicated that she had developed upper extremity problems from Complex Regional Pain Syndrome. The Deputy punted the case to the Full Commission, which decided that evidence of change of condition was irrelevant, due to the limited issues in the case, but that the evidence taken at the most recent hearing made it obvious that Ms. Branch was unable to work, due to the compensable problems with her lower extremity and the non-compensable problems with the upper extremity. Accordingly, compensation was awarded from the point that total disability was proved, based on an unapportioned combination of compensable and non-compensable causes.

The Court of Appeals reversed and remanded. It rejected the defendant's argument that the Commission was limited in the issues it could consider by its prior interlocutory order, since *res judicata* did not apply to that interlocutory order. However, remand was required, because the defendant had not been given proper notice that the issues of change of condition and ability to comply with the previous order were going to be addressed at the hearing, which was required as due process.

Haley v. ABB, Inc., ____ N.C. App. ____, 621 S.E.2d 180 (2005)

Mr. Haley suffered a knee injury for which he underwent surgery. Things got worse, so that he eventually was diagnosed with reflex sympathetic dystrophy/complex regional pain

syndrome and severe internal scarring that required additional surgery and resulted in his needing crutches permanently and being restricted to sedentary employment. He also was diagnosed with debilitating depression, with suicidal thoughts, and underwent an unsuccessful trial with a spinal cord stimulator, which left him with back problems. He returned to a "created" job, in which he did only the paperwork part of a position that usually also required loading trucks and attaching labels. The light duty paid less, and the defendant paid compensation for partial disability for a time, after which it terminated that compensation without Commission approval. The defendant was ordered to resume the partial disability compensation but did not. The resulting money problems caused an increase in Mr. Haley's psychological symptoms. Mr. Haley eventually ended up out of work again, and it is not clear from the appellate opinion whether the defendant voluntarily resumed compensation. The Commission awarded compensation for partial disability and total disability, as well as attorney's fees as a sanction for refusal to comply with the order to resume compensation for partial disability, and ordered that Mr. Haley was not required to subject himself to vocational rehabilitation.

The Court of Appeals affirmed, holding that the sanctions were within the Commission's discretion under N.C.G.S. § 97-88.1, because the need for a hearing to order compliance with the prior order was based on unfounded litigiousness. The defendant had argued that the Commission improperly decided the case without allowing it to obtain a medical examination under § 97-27(a), but the Court rejected that, holding that the Commission had discretion to deny a request for such an examination. The Court also rejected the defendant's contention that the average weekly wage should be adjusted, on grounds that the year before Mr. Haley's injury had involved an unusual amount of available overtime and that Mr. Haley's reduced wage was the result of economic conditions, not partial disability. The Court noted evidence that there was still overtime available to workers in Mr. Haley's prior employment and that Mr. Haley had been moved to a position in which it was not. The denial of forced vocational rehabilitation was also within the Commission's discretion, in light of testimony that Mr. Haley, who had not reached maximum medical improvement, was physically restricted to sedentary work and psychologically totally disabled.

<u>Lewis v. Beachview Exxon Service</u>, ____ N.C. App. ____, 619 S.E.2d 881 (2005); _____N.C. _____; _____S.E.2d _____ (2006)

Mr. Lewis suffered a compensable hernia, for which he promptly underwent successful surgery. However, shortly after release for the hospital, he developed pneumonia and was eventually permanently and totally disabled by chronic obstructive pulmonary disease. Mr. Lewis had suffered asthma as a child and smoked his entire adult life. The first pulmonary specialist to whom the defendants referred Mr. Lewis opined that the pneumonia was related to the hernia operation and had exacerbated COPD. The defendants paid compensation for total disability for a couple of years. Then, the defendants obtained opinions from two other pulmonary doctors that the COPD exacerbation was not related to the hernia surgery. The Deputy Commissioner awarded continued compensation, but the Full Commission reversed.

On appeal, the majority held that the case should be remanded, because the Commission had failed to address the issue, which was clearly presented, of whether the defendants were prevented, by waiver and estoppel, from challenging the compensability of the pulmonary condition. Mr. Lewis contended that payment of compensation for more than 90 days (in this

case three years), with filing of a Form 60, constituted acceptance of compensability pursuant to N.C.G.S. § 97-18(d) that could not be later disturbed. The Court declined to address the merits of that argument.

In dissent, Judge Steelman agreed with the remand as to the waiver and estoppel issue, but opined that the remand should be limited to that issue, instead of allowing reconsideration of the entire case, because the Commission's findings and conclusions that the pulmonary condition was not related were properly supported by the evidence.

On appeal to the Supreme Court, the decision was reversed *per curiam* for the reasons stated in the dissent, so that the case was remanded to the Commission for addressing of the limited issue of waiver and estoppel.

<u>McGhee v. Bank of America Corp.</u>, ____ N.C. App. ____, 618 S.E.2d 833 (2005)

Ms. McGhee, an assistant vice president for the employer bank, worked out of an office in Virginia. In august of 19987, she suffered injuries, most significantly to her had, in an automobile accident in North Carolina, while traveling home from a business trip to Florida. The employer was based in North Carolina. From the time of injury to August of 2000, her medical bills were paid by the defendants and she was paid either short term disability benefits when she was out of work or her full salary when she was working at a make-work job. The Commission awarded compensation for on-going total disability.

The Court of Appeals affirmed. The defendants first contended that the claim had not been timely filed, because the Form 18 was not filed until August of 2001, three years after the accident. The Court cited N.C.G.S. § 97-24, which allows filing within two years of the accident <u>or</u> within two years of the last payment of medical bills, when only medical bills have been paid. It did not matter that the employer thought it was paying under Virginia law. The payments of salary and short-term disability benefits did not constitute "other compensation" that would render the case not one in which only medical bills had been paid, because the "other compensation" was defined as being compensation under the Workers' Compensation Act. The Court found evidence to support the finding of on-going total disability, in the form of medical testimony that Ms. McGhee was totally disabled. The defendants' argument that Ms. McGhee had failed to produce sufficient evidence that the activity she performed at the employer after her accident was "make-work" instead of "other employment," and their contention that the Commission had improperly applied a standard from North Carolina law to a Virginia employment were rejected. The Court also, somewhat derisively, rejected the defendants' argument that medical treatment after August of 2000 was not compensable as tending to lessen disability or provide relief, because it did not work. Finally, the award of attorney's fees was held not to be an abuse of discretion.

<u>Roberts v. Wal-Mart Stores, Inc.</u>, ____ N.C. App. ____, ____S.E.2d ____ (2005)

Ms. Roberts hurt her back lifting at work. She told co-employees but not her supervisor, because of a contest between stores for the longest time between workplace accidents. Her pain increased and she stopped working for the employer but continued her other job as a school bus driver. She told management that she was quitting to take care of her mother. She had surgery

within a few weeks. Less than two months later, she returned to her doctor with different back symptoms that were determined to be unrelated to her injury at work. She underwent four more surgeries. She filed her Form 18 about six months after the incident at work. The Deputy Commissioner found that Ms. Roberts had experienced a compensable specific traumatic incident but denied the claim for failure to give proper notice pursuant to N.C.G.S. § 97-22, which failure prejudiced the defendants, since surgery had occurred before notice. Ms. Roberts appealed to the Full Commission, but failed to file a Form 44 or brief. The defendants did not file a motion to dismiss the appeal. The Full Commission then filed an order indicating that it would decide the case without briefs or arguments. The defendants moved to be allowed to present briefs and arguments on any issues the Commission was planning to address on appeal. The Commission did not respond to that motion, instead issuing an Opinion and Award granting compensation for total disability from the date of injury until the appearance of the new symptoms (about two months) and finding that disability thereafter was caused by an unrelated pre-existing condition.

The Court of Appeals vacated, holding that the Commission's decision to consider the appeal, while denying the defendants' request to file briefs and argue, was a violation of its own rules. While the Commission had the power to waive the requirement of a Form 44, it could not waive the requirement that the grounds for appeal be stated with particularity, because to do so would deprive the appellee on review of notice as to what was to be addressed at the Full Commission.

12. Proof of disability and other disability issues.

Terasaka v. AT&T, ____ N.C. App. ____, 622 S.E.2d 145 (2005)

Ms. Terasaka developed wrist problems after a particularly intensive three-day training session that involved a lot of typing. Her job had involved a significant amount of typing for several years. She was diagnosed with carpal tunnel syndrome and underwent surgery on both wrists. Her pain continued, though her nerve conduction tests were normal. A neurosurgeon she saw after her surgery opined that she should not have surgery, in the absence of electrical findings, and that she would be unable to engage in any work that involved repetitive hand and wrist motion. The Commission awarded on-going compensation for total disability.

The defendant appealed as to all issues. The majority of the Court of Appeals reversed, addressing only the issue of whether Ms. Terasaka had proved disability and holding that the evidence that she could not return to work involving repetitive motion was insufficient to support the Commission's decision, under the first prong from the Russell v. Lowes Product Distribution case, that she could not return to work in any employment. The odd part was that the Court then reversed the case, without allowing remand, holding the Commission to the single theory it had chosen—the first Russell prong—and finding no medical evidence to support a positive finding under that prong.

In dissent, Judge Geer did not disagree with the majority's decision that the evidence did not support the conclusion that the first Russell prong had been satisfied, but opined that the Commission's finding/conclusion that Ms. Terasaka was unable to work in any capacity, which

the majority had analyzed only under the first prong, was supported by a finding that she had looked extensively for other work and received no job offers, which proved disability by an unsuccessful job search, under the second Russell prong, and which was supported by evidence of about 500 attempts to find jobs, using the internet, newspapers and telephone. Judge Geer also addressed the defendant's other arguments, opining that there was evidence to support the findings of increased risk and the relationship of the symptoms to the compensable occupational disease, noting that the defendant's argument amounted to a requirement that the neurosurgeon's testimony be ignored.

Lewis v. Craven Regional Medical Center, ____ N.C. App. ____, 621 S.E.2d 259 (2005)

Mr. Lewis, illiterate and poorly educated, hurt his back in 1990, was paid compensation for total disability, and then signed a Form 26 agreement for compensation for a 15% rating of his back. He apparently never returned to work. In 1992, before the Court of Appeals' decision in Vernon v. Steven L. Mabe Builders that allowed setting aside of such agreements for the Commission's failure to review them properly for fairness, Mr. Lewis attempted to start compensation for total disability again, on grounds of change of condition. The Commission rejected that, holding that his allegation of total disability was not credible. On appeal, the Court of Appeals held that the findings of fact supported the conclusions of law and affirmed, in 1996, after the opinion in Vernon. Mr. Lewis' contention that the Form 26 should be set aside pursuant to the Vernon rubric was not addressed by the Court of Appeals, in the absence of a motion to the Commission. In response, Mr. Lewis immediately filed for a hearing to challenge the Form 26 on grounds that it was not fair at the time it was made and that it had been improvidently approved. The Commission, applying Vernon, set aside the agreement. On appeal, the Court of Appeals reversed. On grounds of lack of competent evidence of total disability and collateral estoppel, based on the previous Commission finding that Mr. Lewis had wage earning capacity. On this third bite at the apple, the Commission determined that the compensation paid for the rating under the previous Form 26 Agreement was less favorable than compensation for partial disability based on wage loss, pursuant to N.C.G.S. § 97-30, and awarded the additional amount that was generated by comparing the average weekly wage to the federal minimum wage.

The Court of Appeals affirmed, holding that a return to work was not a necessary prerequisite to compensation under § 97-30, as such compensation is based on wage earning capacity and failure to allow compensation would render meaningless prior Court decisions denying compensation for partial for failure to return to lower paying substitute employment. Use of the federal minimum wage was permitted, when that was a measure of the lowest amount Mr. Lewis could have earned, when the evidence showed that he was unable to work at all. The Commission's findings that Mr. Lewis was unable to earn more were supported by evidence of his illiteracy, prior manual employment history, work restrictions and on-going pain, which really amounted to evidence that he could not work at all. It appears that the confusion in this case was generated by the Commission's failure to set aside the improvidently approved Form 26 in the first stage of litigation, when it had been approved despite Mr. Lewis' inability to work. The Court appeared reluctant to allow the prior deprivation of compensation for total disability to work the further injustice of blocking at least some additional compensation.

13. Suspension of compensation for incarceration.

Easton v. J.D. Denson Mowing, ____ N.C. App. ____, 620 S.E.2d 201 (2005)

Mr. Easton had already been out of work and receiving compensation for eight years when he was incarcerated for a probation violation for about eight months. The Commission approved a Form 24 Application to Stop Payment of the period in question, which was upheld.

The Court of Appeals affirmed. Mr. Easton, through able counsel, tried to get the Court to overrule or distinguish the Parker v. Union Camp Corp. case, which held that compensation is not due when totally disabled recipients are incarcerated, but that didn't work. The Court also held that the Commission did not err in ordering a $100 reduction in weekly compensation after Mr. Easton was released, to allow the defendants to recover the amount that was paid before they found out about the incarceration. N.C.G.S. § 97-42 did not require that credit for overpayment be taken by reducing the duration of compensation, because that was impracticable in a case of on-going, and likely permanent, total disability.

14. Causation issues.

Taylor v. Carolina Rest. Group, Inc., 170 N.C. App. 532; 613 S.E.2d 510 (2005); 360 N.C. 173; 622 S.E.2d 492 (2005)

Ms. Taylor banged her right knee while working for the defendant employer in July of 1994. Her claim was accepted, and she was paid compensation. Ultimately, she required knee replacement, which did not yield a very good result. She was working for a subsequent employer when she fell on some ice and struck her left knee. Arthroscopic surgery was reasonably successful, but the right knee, with the replaced joint, continued to deteriorate. She settled her claim for the slip on the ice, apparently on a clincher agreement. Her claim for additional compensation was heard, with the cases associated with the two accidents consolidated. The Deputy Commissioner decided that the disability due to the increasing problems with the right knee after the second injury was the result of the second injury, found that Ms. Taylor had settled her claim for that injury and denied further benefits. The Full Commission found and concluded that the disability after the second accident, or at least after the problems with the left knee had been essentially resolved, was caused by the original injury to the right knee.

The Court of Appeals affirmed, with the majority holding that there was expert medical testimony sufficient to support either decision. The Court noted evidence, from Ms. Taylor and her treating surgeon, that the left knee had resolved sufficiently that she would have been able to resume her job with the employer where she fell on the ice, but for the increased problems she was having with her right knee.

In dissent, Judge Tyson focused on evidence that the injury to the left knee, by increasing the load on the right knee, had aggravated the pre-existing right knee injury, so that the second employer was liable—or would have been if the second claim had not been settled. Implicit in the dissenting opinion is the idea that the disability must be assigned to one injury nor the other and cannot be legally caused by both. There was no discussion in either opinion of the cases in

which aggravation of a compensable injury in a subsequent accident, when that accident was not intended by the injured worker, has been held to be compensable in the original case. Judge Tyson (and Commission Chairman Lattimore, who dissented below) seemed motivated by a concern that Ms. Taylor had settled her claim for the second injury, then obtained overlapping compensation for the same disability through the first claim.

The Supreme Court affirmed *per curiam*.

15. Qualification for death benefits.

<u>Nicholson v. Edwards Wood Products</u>, ____ N.C. App. ____, 625 S.E.2d 562 (2006)

The deceased employee's death was accepted as compensable, and the issue for hearing involved the entitlement to benefits of a non-biological minor child who had been raised by the decedent and his widow and was dependent on the decedent at the time of his death. The defendant cared, because the child in question was young enough that he would receive more than 400 weeks of compensation, if he were to be paid until age 18. In the process of litigation, the parties entered into a consent order that the child was entitled to 400 weeks of compensation. After signing that consent order, the Commission proceeded to find that the child was a "dependent child" and entitled to compensation until he was 18.

The Court of Appeals reversed, holding that the Commission was bound by the previously entered consent order, to determine that the child was entitled to 400 weeks of compensation, despite the Commission's statement in its Opinion and Award that the consent order established the compensation over which there was no dispute, and that the issue before the Commission was whether the child was entitled to further compensation until age 18.

<u>Rhodes v. Price Brothers</u>, ____ N.C. App. ____, 622 S.E.2d 710 (2005)

Richard Kelly was killed in an admittedly compensable accident. His mother contended that his father, from whom she was divorced, was excluded from compensation, because he had abandoned Richard after the divorce. The Deputy Commissioner denied the father benefits, pursuant to N.C.G.S. § 97-40, on grounds of abandonment. The Full Commission reversed, finding and concluding that the evidence indicated that the father had not abandoned.

The Court of Appeals affirmed, holding that the findings were supported by evidence that the father had sent cards and gifts on a regular basis for holidays and birthdays, had visited and contacted by phone regularly and had expressed affection. The Court also mentioned that the father had made child support payments properly and maintained a health insurance policy for Richard. The findings were not overcome by evidence that for a period of several months when Richard was 15, he had refused to visit his father, due to a dispute with the father's new wife, but the two had communicated weekly by e-mail. The mother contended that the Commission had erred in refusing to allow her to introduce a separation agreement and child support records during the appeal to the Full Commission, but the Court held that the Commission had acted within its discretion.

16. Asbestosis specific issues.

<u>Payne v. Charlotte Heating & Air Conditioning</u>, ____ N.C. App. ____, 616 S.E.2d 356 (2005)

Mr. Payne made a claim for compensation for asbestosis. After the hearing, but before the close of the record, he died. His wife, as administratrix, was substituted as plaintiff and notified the Deputy Commissioner and defendants that she was pursuing death benefits. On disputed medical evidence, the Deputy Commissioner found and concluded that Mr. Payne had not contracted asbestosis and had not suffered any disability due to exposure to asbestosis and sustained the defendants' objection to her addressing the issue of death benefits, noting tht death benefits were barred by N.C.G.S. § 97-61.6, anyway. The plaintiff appealed to the Full Commission, specifically assigning error to the Deputy's refusal to address the death issue, among other things. The Full Commission found and concluded that Mr. Payne did contract asbestosis and awarded compensation for a period of total disability and death.

The Court of Appeals affirmed, holding that the issue of death benefits was properly before the Commission. The Court stated that despite notice that the plaintiff was seeking death benefits, the defendants had made a tactical decision to rely on their position that the issue could not be heard and, in so doing, had foregone opportunities to request from the Deputy and the Full Commission leave to take additional evidence. Having made that decision, the defendants had no argument. The Court implied that the Commission's refusal to allow the taking of additional evidence would have been reversible error. The Court also affirmed the Full Commission's decision that Mr. Payne had compensable asbestosis, noting medical evidence to support the decision, that there was no requirement of scientific evidence to prove the presence of asbestos when there was plenty of lay testimony, and that the Commission was not required to accept the definition of "asbestosis" developed by the American Thoracic Society, especially in the absence of any expert testimony about that definition or application of it to Mr. Payne's disease. The Court noted in a footnote that the lone doctor who testified contrary to Mr. Payne's claim, and the one upon whom the Deputy Commissioner exclusively relied, had testified that he was a radiologist and could not refute the diagnosis of a pulmonary specialist who testified in favor of the claim.

Perhaps most significantly, the Court held that N.C.G.S. § 97-61.6, which required claims for death related to asbestosis or silicosis to be filed within two years or last exposure or 350 weeks of last exposure when the injured worker is entitled to compensation for disability, was a violation of Constitutional equal protection, because it created different treatment for those who die of those two diseases, compared to those who die of any other latent occupational disease and are thus similarly situated. Specific reference was made to mesothelioma, an asbestos related and generally fatal cancer, with an implication that the Court recognized that the time limitation would practically bar almost all asbestosis or silicosis death claims, because those diseases typically do not even arise until much more than six years after exposure.

17. <u>Singletary</u> case, with multiple issues.

<u>Singletary v. N.C. Baptist Hospital</u>, ____ N.C. App. ____, 619 S.E.2d 888 (2005)

Ms. Singletary claimed a back injury in October of 2001, when a heavy patient rolled onto her arm and upper back. She received medical treatment for back pain (entirely from employees of the employer hospital), being referred from employee health to an orthopedist and then to Dr. Irwin, who she first saw in January of 2002. After a brief period of light duty, she was taken out of work and remained that way, with compensation being paid until December 3, 2001, when the defendant filed a Form 61 denying liability. Medical bills were paid through the January 17, 2002 appointment with Dr. Irwin. On that date, Dr. Irwin diagnosed fibromyalgia, ordered tests and wrote Ms. Singletary out of work until May of 2002. (This part is not in the opinion of the Court of Appeals. When Ms. Singletary returned to Dr. Irwin in February of 2002, she was turned away by office staff, because they had been informed that the workers' compensation department was no longer covering treatment. She did not see Dr. Irwin again.) The Commission awarded compensation for total disability, but only through May 2, 2002, and medical benefits. (Also not in the Court of Appeals opinion—the Full Commission's decision was essentially the same as the Deputy Commissioner's, except that he had awarded sanctions under N.C.GS. § 97-88.1, because had denied the claim at hearing when there was no question as to what had happened.)

Both parties appealed, and the Court of Appeals affirmed. As to Ms. Singletary's appeal, the Court held that 1) the Commission did not err in finding that she had not proved disability after May 2, 2002, when there was no medical opinion keeping her out longer and the Commission could determine that other evidence was not credible (actually, the Commission found that there was no evidence of disability after the stated date, which was clearly incorrect and indicated that it did not consider Ms. Singletary's testimony), 2) the award of compensation for disability up to May 2, 2002 did not create a presumption of on-going disability thereafter, because the award was not made in a <u>prior</u> proceeding (a rule that popped up in several other cases in this manuscript that have been categorized as to other issues), 3) the defendant effectively revoked its payment without prejudice under N.C.G.S. § 97-18(d), even though the Form 61 did not state one of the grounds for such revocation, because one could tell what the defendant intended (the Court viewed Ms. Singletary's argument as being that the stated grounds were not sufficiently detailed, when the actual contention was that the stated grounds did not fit those that allowed revocation under the statute), and 4) the Commission did not err by refusing, in its discretion, to deny sanctions for unreasonable defense. The defendant argued on appeal that Ms. Singletary had failed to prove that her fibromyalgia was caused by her compensable accident, attempting to equate Dr. Irwin's testimony to that of the doctor in <u>Young v. Hickory Business Furniture</u>, in which the opinions were held to be too speculative to prove causation. The Court rejected that argument, holding that while Dr. Irwin based his opinion in part on the temporal relationship between the accident and the condition, he also had considered, tested for and excluded all the other available potential causes. The Court also held that Dr. Irwin's opinion that Ms. Singletary was unable to work until May 2, 2002 was sufficient to support the Commission's finding to that effect.

18. Liability after sale of a self-insured employer.

Goodson v. P.H. Glatfelter Co., ____ N.C. App. ____, 615 S.E.2d 350 (2005)

This is a messy case about liability for benefits and insured status. Mr. Goodson was injured and started receiving compensation, while the defendant employer was qualified as a self-insurer. The employer then sold the division for which Mr. Goodson had worked to RFS Ecusta. The plan was to sell workers' compensation liabilities along with the assets. The employer inquired of the Department of Insurance and was apparently informed that it could do that, as long as the purchasing company assumed the bond to cover claims. About a year after the sale, RFS Ecusta filed for bankruptcy. The Commission determined that the employer remained liable for the benefits, because it had not effectively transferred liability to RFS Ecusta, despite the assurances to the contrary from the employee of the Department of Insurance. The Court of Appeals affirmed in a complicated holding, reversing only as to the Commission's order regarding handling of a certificate of deposit that had been given to the Department of Insurance to secure payment, over which the Commission did not have jurisdiction.