North Carolina Workers' Compensation Case Law Update

August 1, 2019 – August 31, 2020

Table of Contents

I. N.C.G.S. § 97-2 – Injury by Accident/Arising Out of/in the Course and Scope of Employment

A. *McGuine v. Nat'l Copier, LLC*, ___ N.C. App. ___, 841 S.E.2d 333 (April 2020) (Brook, J.) (Joint employment versus lent employment; implied contract of employment; right to control employee)

FACTS:

This case deals with the doctrines of joint and lent (special) employment. Defendant Thomas Prince set up two corporations: National Copier, which contracted with equipment dealers to move office equipment to and from clients; and NCL Transportation, essentially a payroll service for National Copier. The NCL location in Ohio was essentially a hub/warehouse with no employees where drivers would pick up equipment, put equipment in, and take equipment out. NCL was set up in Ohio to obtain workers' compensation at a lower cost of coverage and in order to limit National Copier's liability.

Plaintiff was injured in Ohio while working as a driver for one or both companies. He applied for work and was hired by National Copier, but his W2, pay statements, I-9, and payroll authorization for auto draft listed NCL as the employer. Plaintiff filed claims in Ohio and North Carolina.

In Ohio, Prince and NCL were determined to be Plaintiff's employer, though an appeal was pending. In North Carolina, the Deputy Commissioner determined Plaintiff was employed by both National Copier and NCL, but the Full Commission reversed because Plaintiff's W-2, pay statements, I-9, and payroll authorization for auto deposit listed NCL as the employer. The Full Commission remanded to determine if NCL was insured on the date of injury. Ultimately, National Copier had workers' compensation coverage in North Carolina on the date of injury, but NCL did not. Shortly thereafter, Prince transferred payroll of the truck drivers employed by NCL to National Copier's payroll, obtained a North Carolina workers' compensation policy, and NCL ceased operation. Plaintiff appealed and argued he was not employed solely by NCL, but also National Copier. Plaintiff also argued National Copier and NCL had a contractor-subcontractor relationship under N.C.G.S. § 97-19, but the majority declined to reach the issue.

ISSUE:

Whether Plaintiff was jointly or specially employed by National Copier.

HOLDING:

Yes. An employee can operate as an employee of two employers simultaneously, in which case both can be liable for workers' compensation, using two doctrines: joint employment; and lent employee. Joint employment occurs when a single employee simultaneously performs the same or similar services for two employers, while under contract with and under the simultaneous control of both employers. Lent employment is a related doctrine, which holds that, when a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if the employee contracted (expressly or impliedly) with the special employer, the work being done was essentially that of the special employer, and the special employer has the right to control

the details of the work. Both doctrines require a contract, control, and overlap of work.

The majority determined Plaintiff had an implied contract with National Copier because they hired him, trained him, and supervised him. Plaintiff performed their work, traveled to their office in Charlotte to apply for work, was told by the manager he would be working for National Copier, and the preprinted job application listed National Copier as the prospective employer. National Copier's dispatcher gave drivers route directions and controlled where drivers went on their routes. National Copier paid NCL, which in turn, paid the drivers for the work they completed for National Copier.

The majority also held that National Copier controlled the details of Plaintiff's work for the following reasons: National Copier supplied the materials and tools required for the job, which were branded with National Copier's name, logo, and US DOT number; Plaintiff delivered equipment to its' customers; Plaintiff was given work assignments only from a National Copier employee; and the sole purpose of NCL Transportation was to pay out drivers of NCL and obtain workers' compensation insurance in Ohio.

The work sufficiently overlapped because Plaintiff's job was to drive trucks labeled "National Copier Logistics" to deliver equipment for customers of National Copier. He never performed work for NCL that was not also the work of National Copier. NCL was merely a payroll service for National Copier's truck drivers.

DISSENT (Tyson, J.):

Judge Tyson argued that the majority misapplied the standard of review and reweighed evidence to substitute and imply its preferred, but wholly unsupported, outcome to reverse the Commission's Opinion and Award. He noted that competent evidence in the record supported the Commission's finding and conclusion that Plaintiff failed to prove he was an employee of National Copier using the contract, control, and overlap factors.

Judge Tyson outlined that the majority found an implied contract by disregarding facts found by the Commission and reweighed evidence. No evidence in the record supported Plaintiff's burden to show joint employment under any theory of implied contract. While the majority found that National Copier hired, paid, trained, and supervised Plaintiff, the evidence (W2, pay statements, I-9, and payroll authorization for auto deposit) suggested NCL hired, paid, trained, and supervised Plaintiff. Judge Tyson would have found that Prince's choice to organize the businesses this way was completely legitimate.

Judge Tyson also would have further addressed the N.C.G.S. § 97-19 issue regarding whether National Copier and NCL had a contractor-subcontractor relationship. The Commission held National Copier was not a statutory employer and that no contractor-subcontractor relationship existed. Judge Tyson likewise did not believe the statute was triggered because NCL was a separate company and National Copier used its' service to assist them in the performance of their contracts. Additionally, NCL had valid Ohio workers' compensation coverage during Plaintiff's employment in Ohio at the time of his injury in Ohio. The Ohio Workers' Compensation Board concluded Plaintiff had a compensable claim and that NCL was liable for his injuries.

B. *McSwain v. Indus. Com. Sales & Serv., LLC,* ___ N.C. App. ___, 841 S.E.2d 345 (April 2020) (Dillon, J.) (Arising out of; in the course of; slip and fall; traveling employee; increased risk; personal errand)

FACTS:

Plaintiff alleged entitlement to workers' compensation benefits when he slipped and fell as he walked through the lobby of the hotel where he was staying while out of town working on a project for his employer. Plaintiff was walking to retrieve his laundry from the hotel laundry room. Plaintiff was part of a work crew who flew to California to work on a project for Defendant-Employer, but they finished the job a day early. In order to avoid the costs associated with arranging different return flights, Defendant-Employer told the crew to keep their original schedule, giving them a free day in California. During his free day, Plaintiff started a load of laundry in the hotel and visited with other coworkers on the hotel patio consuming alcohol while he waited for his laundry to finish. As he walked through the lobby to retrieve his laundry, Plaintiff slipped and fell on a wet spot.

Plaintiff's claim was denied both by the Deputy Commissioner and the Full Commission, because Plaintiff failed to prove a causal relationship between walking through the hotel to check on his laundry and his employment. Plaintiff argued the Full Commission: (1) failed to conclude his fall did not arise out of employment; and (2) abused its discretion by refusing to consider certain medical evidence. Defendant cross-appealed, arguing there were other grounds upon which the Commission could have also based its denial, which it failed to do.

ISSUE:

Whether the Full Commission's determination that Plaintiff's fall was not compensable was supported by the findings of fact.

HOLDING:

Yes. Competent evidence supported the Full Commission's conclusion that Plaintiff's fall was not compensable. To qualify for workers' compensation benefits, the injury must occur in the course and scope of employment and arise out of employment. An employee is deemed to be "in the course" of employment when he is on the job doing something which directly or indirectly benefits his employer. An injury which occurs in the course of employment is deemed to "arise out of" employment if the employment exposed him to an increased risk of injury. Under *Brewer v. Powers Trucking*, a traveling employee is in the course of employment "during the trip, except when a distinct departure on a personal errand is shown." 256 N.C. 175, 123 S.E.2d 608 (1962). Under *Bartlett v. Duke Univ.*, a traveling employee is in the course of employment during the entire trip generally, but still must establish the "arising out of" requirement, which requires the risk of injury have its origin in a risk connected with the employment. 284 N.C. 230, 200 S.E.2d 193 (1973).

The court went through numerous traveling employee cases. An off-duty traveling employee injured while traveling to a restaurant from the hotel to eat generally is compensable because the risk was from traveling to eat, which arose from being away from home. *Martin v. Georgia-Pacific Corp*., 5 N.C. App. 37, 167 S.E.2d 790 (1969). However, based on *Bartlett*, if that employee is injured when he

chokes on food at the restaurant, the injury is not compensable because eating at a restaurant did not increase the risk that the employee would choke on his meal. Injuries sustained by an off-duty traveling employee who was robbed while getting ice from the hotel ice machine to make lunch for the next day generally is compensable because the hotel created an "increased risk" of robbery that the employee would not have faced had he been in his own kitchen preparing his lunch for the next day. *Ramsey v. N.C. Indus.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006).

A traveling employee injured in a traffic accident while returning to the hotel from purchasing soft drinks and beer, but not a meal, is not compensable because the trip, unlike traveling to get a meal, was a personal errand that did not directly or indirectly further his employer's business. *Sandy v. Stackhouse, Inc*., 258 N.C. 194, 128 S.E.2d 218 (1962). Also, a night watchman injured while washing his own car while on the job on his employer's worksite was not covered because he was engaged in an act that was in no way connected with this work and there was no causal relationship between his employment and injury. *Bell v. Dewey Bros.,* Inc., 236 N.C. 280, 72 S.E.2d 680 (1952).

Here, the Commission found that Plaintiff was injured while retrieving his personal belongings and upheld the Commission's denial of the claim. It did not matter that Plaintiff was injured on the hotel premises. Even though eating and sleeping can be covered because an employee has to eat meals and sleep in order to function on the trip, washing laundry is not always a necessity for an off-duty traveling employee. Further, the Commission made no finding to suggest the act of doing laundry was necessary to further, directly or indirectly, the business of the employer.

Defendants also cross-appealed arguing Plaintiff's claim was barred under an alternate theory of his intoxication causing the fall pursuant to N.C.G.S. § 97-12. Based on the Court's conclusion that Plaintiff's fall did not occur within the scope of his employment, the additional issues raised by Defendants were moot and Defendants' cross-appeal was dismissed.

Related Unpublished Cases

NOTE: *An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

C. *Whisnant v. Laurels*, No. COA 19-774 (February 18, 2020) (Tyson, J.) (Causation; pre-existing condition)

Plaintiff worked as a licensed practical nurse for Defendant-Employer. Prior to her employment with Defendant-Employer, she suffered an injury to her right thigh after slipping on paper at her home. She sought medical treatment at an urgent care facility. She started work with Defendant-Employer approximately two months after this injury. She continued treating with an orthopaedist for right hip pain and was diagnosed with femoral head avascular necrosis with subchondral collapse and osteoarthritis, and the doctor recommended a total hip replacement. Approximately six months later, Plaintiff became tangled up in medical tubing and tripped and fell onto her left side. Plaintiff filed a claim, which Defendants denied upon filing of a Form 61. The Commission denied Plaintiff's claim with one Commissioner dissenting. Plaintiff appealed to the Court of Appeals arguing that the

Commission relied too heavily on one medical expert in order to deny her claim. That expert provided the opinion that he would not expect workers' compensation to cover the total hip replacement due to the pre-existing nature of the condition. The Court affirmed the Commission's holding, citing Plaintiff's failure to challenge the binding nature of the Commission's findings of fact on appeal given that they were supported by competent evidence.

D. *Cunningham v. Principle Long Term Care, Inc.,* No. COA 18-1275, 2020 WL 1026168 (March 3, 2020) (McGee, C.J.) (Injury by accident; unusual event)

Plaintiff was a certified nursing assistant with Defendant-Employer. Plaintiff suffered a cervical spine injury when helping a patient move from a shower chair to a wheelchair. As the patient was being transferred, the shower chair cracked and Plaintiff had to grab the patient's pants to keep him from falling. Later that day, Plaintiff woke up from a nap with a swollen cyst on her neck. She saw an ENT specialist, who concluded she had a recurring cyst due to Hashimoto's Thyroiditis. To treat the cyst, Plaintiff underwent a thyroidectomy, which removed her entire thyroid. The surgery caused Plaintiff to miss work for less than three weeks, after which she returned to her normal duties. Plaintiff filed a claim, and Defendants denied the claim, arguing Plaintiff's condition did not arise from her employment. The Deputy Commissioner found for Plaintiff, concluding Plaintiff presented sufficient evidence to demonstrate that her thyroid condition arose out of the accident at the care facility. The Full Commission reversed, finding that the accident did not cause her injury. Plaintiff appealed. The Court disagreed with the Commission's finding of fact that, since preventing patients from falling was a routine part of Plaintiff's job, the accident did not cause an injury. The Court determined this finding was unsupported by competent evidence because the Commission did not consider evidence regarding how the crack in the chair might have created a unique circumstance capable of giving rise to Plaintiff's injury and did not consider the expert medical testimony of Plaintiff's ENT specialist corroborating Plaintiff's contention. Because this finding of fact was not supported by competent evidence, the Court reversed the Commission, vacated the opinion, and remanded for further findings.

E. *Martin v. WakeMed*, No. COA 19-213, 2020 WL 1685829 (April 7, 2020) (Bryant, J.) (Causation)

Plaintiff worked as an EMT worker driving an ambulance. On April 13, 2016, he was driving on I-440 in Wake County when he was involved in an accident. Immediately after the accident, Plaintiff reported low back and right knee pain to his supervisor, but denied hitting his head or losing consciousness. After seeking medical treatment, an otolaryngologist determined Plaintiff had hearing loss in both ears with no visible signs of trauma on his head. Defendants initially filed a Form 63, but then filed a Form 61 denying the claim. Plaintiff filed a Form 33 hearing request, and the Deputy Commissioner ordered Defendants to pay for medical treatment for Plaintiff's compensable head, low back, and right knee injuries. Plaintiff's claim for injury to his ears was denied. Both parties appealed to the Full Commission, and the Full Commission found Plaintiff's claims for post-concussive syndrome and hearing loss not compensable, but found he was entitled to additional medical treatment for the low back and right knee injuries. Plaintiff appealed to the Court of Appeals. The Court affirmed, upholding

the denial of the hearing loss claim based on the lack of evidence of a loud noise during the automobile accident, which the otolaryngologist testified would be required for there to have been hearing loss in this situation. The Court found no basis upon which to reverse the Commission's decision, and therefore, affirmed the Commission's decision.

F. *Bache v. TIC-Gulf Coast*, No. COA 18-788, 2019 WL 3936258 (August 20, 2019) (Stroud, J.) (Course and scope; coming and going)

Plaintiff was hired as a heavy equipment operator by Defendant-Employer, an industrial construction company. Plaintiff relocated from Florida to Wayne County, North Carolina for the project. He was paid a per diem for his duplicate living expenses. He originally lived in a motel for two weeks, then moved in with a co-worker. Approximately one month after starting his job, Plaintiff went to look at rental properties with a co-worker after work. They then went to dinner, where Plaintiff consumed alcohol. On their way home from dinner, they were involved in a car accident that paralyzed Plaintiff from the chest down. Plaintiff's BAC was .10. Plaintiff filed for workers' compensation benefits. The Deputy Commissioner found that Plaintiff was not in the course and scope of his employment at the time of the accident and denied his claim. Plaintiff appealed, and the Full Commission affirmed. Plaintiff appealed again.

The Court of Appeals affirmed. The Court held that, regardless of the fact that Plaintiff was paid a per diem for living expenses, this per diem did not separately compensate him for travel to and from work; and therefore, Plaintiff was not a traveling employee. In addition, because Plaintiff's work for Defendant-Employer was fixed at one job site, and did not require him to travel away to other locations, Plaintiff was not a traveling employee. The Court further held that Plaintiff was not traveling to or from the job site, as he had made stops to look at rental properties and to have dinner after leaving the job site on the day of the accident.

G. *Macias v. BSI Associates, Inc., d/b/a Carolina Chimney*, No. COA 19-299, 2019 WL 5726810 (November 5, 2019) (Young, J.) (Employee; independent contractor)

Defendants appealed the Full Commission's decision that Plaintiff was an employee, rather than an independent contractor, and therefore entitled to benefits. Plaintiff initially worked for Carolina Chimney until 2013, when he sustained an on-the job accident. As part of the settlement of that claim, Plaintiff was precluded from returning to work with Carolina Chimney. In 2014, Steve Sterling, owner of Carolina Chimney, devised a way to get around the agreement by having Plaintiff start his own company, purchase necessary insurance policies, and continue to work for Carolina Chimney as an "independent contractor." Sterling assured Plaintiff he would provide the vehicles, tools, and supplies, and that he would arrange for Plaintiff to secure insurance. Thereafter, Plaintiff obtained an insurance policy indicating he had zero employees and excluded himself from coverage. Plaintiff then resumed working for Carolina Chimney.

Plaintiff's day-to-day undertakings were essentially identical to his first period of employment. He was given the keys to the company's office and two credit cards to purchase supplies; his job title remained the same; he was required to report to work from 8:00 a.m. to 5:00 p.m.,

Monday through Friday; he was provided specific instructions on where to work and the specific work to perform each day; he was furnished vehicles, tools, equipment, and supplies; he was given "Carolina Chimney" business cards to hand out; was required to wear "Carolina Chimney Crew" clothing; and was required to introduce himself by saying, "Hi, my name is Jorge. I'm here with Carolina Chimney." He was instructed on how to perform the work, when to take breaks, and was paid regular paychecks in a set amount, even when he missed work for illnesses, vacation, or leave.

In April 2016, he fell from a scaffold and ruptured his spine. Defendants denied his claim on the grounds that no employee-employer relationship existed. The case went to a hearing before a Deputy Commissioner, who concluded Plaintiff was an employee, rather than an independent contractor, and awarded benefits. The Full Commission affirmed, and Defendants appealed to the Court of Appeals, who held that under the *Hayes* factors, Plaintiff was an employee rather than an independent contractor. *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). The Court was unpersuaded by Defendants' argument that Plaintiff was an independent contractor because he reaped tax benefits associated with holding himself out as an independent contractor and there was no legal authority holding that his tax returns were a relevant factor. Simply holding "himself out as an independent contractor" was also not a factor. The Court was similarly unpersuaded by Defendants argument that Plaintiff he was an independent contractor because of his specialized skill and knowledge, the fact that he was not paid as an hourly employee, was free to work with other businesses, and could choose his own schedule.

Under *Hayes*, an independent contractor must not be in the regular employ of Defendant Employer. The Commission found Plaintiff worked every day, exclusively for Carolina Chimney, never advertised he was a business for himself, and never had his own logo, clothing, or business cards (all of which were Carolina Chimney's). Carolina Chimney also set Plaintiff's schedule, another of the *Hayes* factors supportive of the Commission's determination. The Court affirmed. However, Defendants also challenged an Order approving attorney's fees entered by the Full Commission after Defendants had noticed appeal to the Court of Appeals. The Court ruled that, during the pendency of the appeal, the Full Commission lacked jurisdiction to enter such an award and vacated it.

II. Average Weekly Wage

A. *Nay v. Cornerstone Staffing Solutions*, ___ N.C. App. ___, ___ S.E.2d ___ (August 2020) (Murphy, J.) (Average weekly wage)

FACTS:

Plaintiff worked for Defendant-Employer, an employment staffing agency, on August 25, 2015. A significant amount of Defendant-Employer's employees sought work placement with companies that offered full-time employment with the goal of becoming a permanent employee of that company. These positions are called "temp-to-perm" in the industry. Defendant-Employer's CEO estimated at least 95% of the positions filled by his company were temp-to-perm.

On November 24, 2015, Plaintiff injured his back while working in a placement as a landscaper with FieldBuilders as an employee of Defendant-Employer. He went out of work and returned to work and obtained placement with another company for approximately three weeks in June and July 2016, still as an employee of Defendant-Employer. On July 21, 2017, Plaintiff filed a Form 33 hearing request alleging disagreement with the unilateral modification of TTD benefits by Defendants upon filing of a Form 62. Defendants contended Plaintiff had been provided all benefits to which he was entitled under the Act. Plaintiff was earning $11 per hour and earned $5,805.25 prior to his injury over the course of 25 weeks between August 25 and December 7, 2015.

The Deputy Commissioner concluded Plaintiff's average weekly wage should be calculated using Method 5 under N.C.G.S. § 97-2(5), which divided gross wages by 52 weeks and yielded an average weekly wage of $111.64 and compensation rate of $74.43. Plaintiff appealed to the Full Commission, arguing that Method 3 should be used instead of Method 5, which resulted in an average weekly wage of $419.20 and compensation rate of $279.48. The Commission affirmed the Deputy Commissioner's use of Method 5 to calculate average weekly wage. Plaintiff appealed.

ISSSUE:

Whether the Commission erred in applying Method 5 of calculating average weekly wage under N.C.G.S. § 97-2(5) when application of Method 3 produced fair results for both Plaintiff and Defendants.

HOLDING:

Yes. The Court held the Commission erred in using Method 5 to calculate average weekly wage. The Court rejected that Method 3 would be unfair to Defendants by producing an inflated average weekly wage. The Court relied on *Conyers v. New Hanover Cnty. Sch.* to note "[t]he dominant intent of [N.C.G.S. § 97-2(5)] is to obtain results that are fair and just to both employer and employee." 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008). The Court further noted fair and just would be to most nearly approximate the amount the injured employee would be earning, if not for the injury, in the employment he was working at the time of the injury.

The Court rejected Defendants argument that Plaintiff's wages should be calculated over a 52-week period based on the temp-to-perm model of the company. The Court, instead, highlighted the fact that Plaintiff lacked a definite employment end date with Defendant-Employer, and although the end goal was for Plaintiff to obtain full-time employment with FieldBuilders, that did not occur. The Court concluded that calculating Plaintiff's average weekly wage using Method 3 over the time period during which Plaintiff actually worked would most fairly approximate what he would have earned but for the injury. The Court pointed out that, although Plaintiff could have continued to earn money working for Defendant-Employer indefinitely, and as a result a Method 5 calculation could be fairer than a Method 3 calculation, this did not negate the fact that the Method 3 calculation was still fair and should therefore be used under the hierarchical approach of N.C.G.S. § 97-2(5).

The Court distinguished this case from *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 173, 767 S.E.2d 98, 102 (2014), where the Court concluded a Method 3 calculation was unfair. The Court emphasized

that the plaintiff in *Tedder* had a definite end date for employment given that he was hired to fill in for a full-time delivery driver scheduled to undergo surgery, and he was hired for a set seven-week period. Using Method 3 in this situation would unfairly overestimate average weekly wage because Tedder would not have earned any wages after that seven-week period. In this case, the Court highlighted the fact that, although Plaintiff and Defendant-Employer may have anticipated Plaintiff would be hired by FieldBuilders, thus continuing his wage earning capacity as to make Method 3 unfair, this was not guaranteed. As a result, The Court held Method 3 was a fair and just way of calculating average weekly wage, and was to be used pursuant to N.C.G.S. § 97-2(5).

Related Unpublished Case

NOTE: *An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

B. *Wilkins v Buckner*, No. COA 19-567 (August 4, 2020) (Tyson, J.) (Average weekly wage)

Plaintiff sustained an injury by accident to his left eye while installing hardwood flooring for Defendant-Employer and he lost the vision in his eye a result of the injury. Prior to a hearing, the parties entered into a consent order stipulating that Plaintiff suffered a compensable injury and Defendants agreed to pay for medical treatment. The only issue for determination by the Deputy Commissioner was computation of Plaintiff's average weekly wage. The Deputy Commissioner and Full Commission calculated Plaintiff's average weekly wage at the time of the injury at $260.64 with a weekly compensation rate of $173.77. Plaintiff appealed to the Court of Appeals.

The Full Commission used Method 3 to calculate Plaintiff's average weekly wage. Plaintiff earned $7,000 and worked 26.857 weeks with Defendant-Employer. Plaintiff's injury occurred on November 4, 2016. Plaintiff began working part time for Defendant-Employer in May of 2016, but began working full time in September 2016, and he argued that Method 3 was not fair and just to both parties because Plaintiff's work hours and responsibilities for Defendant-Employer changed significantly when Plaintiff began working full time. Plaintiff argued that his wages should have been calculated based upon his full-time wages starting in September 2016 until the date of injury. It also appeared that Plaintiff earned wages from another employer while working part time with Defendant-Employer prior to September 2016. The Court reaffirmed that Plaintiff could not include wages earned from another flooring company in the calculation of his average weekly wage. However, Plaintiff argued the Commission should have used Method 5, utilizing only his full-time wages with Defendant-Employer beginning in September 2016 until the date of injury, instead of Method 3. The Court of Appeals rejected this argument and found that Method 3 was fair and just to both parties. The Court of Appeals relied on the evidence that the work with Defendant-Employer would come in "bunches" and other witnesses testified that the flooring business provided work "mostly five days a week, sometimes six or seven" in the summer, with "good weeks" before Christmas.

Consequently, the Full Commission properly found that Plaintiff would work "whenever he

was needed" and could not find as a fact how long Plaintiff's work was going to last. Therefore, the Court held that fairness to the employer required that the average weekly wage calculation take into account consideration of both peak and slack periods of employment, and as a result, the proper method of calculating the average weekly wage was Method 3. Interestingly, the Court of Appeals cited to their decision in *Wilkins* in support of their decision for Plaintiff in the *Nay*, which is also included above in this manuscript and came down in August 2020.

III. N.C.G.S. § 97-2 Disability

A. *Griffin v. Absolute Fire Control, Inc.*, ___ N.C. App. ___, 837 S.E.2d 420 (January 2020) (Brook, J.) (Disability; suitability of employment; make work)

FACTS:

Plaintiff worked as a pipe fitter for Defendant-Employer, Absolute Fire Control (Absolute), from 2007 through 2014, installing and hanging sprinkler pipes and operating power machines and grease fittings, working 10 hours per day, five days per week, and earning $18 to $20 per hour. He testified he was expected to lift pipes weighing 25 to 300 pounds.

In 2014, Plaintiff was injured and returned to work a month later and was restricted from lifting greater than 20 pounds, standing or walking longer than 30 minutes, and driving while taking Hydrocodone. His pre-injury job was outside his restrictions, so Absolute offered him work in the fabrication shop, which Plaintiff accepted. In the fabrication shop, Plaintiff cut rods, drove a truck, made deliveries, and boxed up materials. Absolute's vice president testified that Plaintiff was assisting another employee in that position who was lifting more than 20 pounds. His wages and hours were the same as his pre-injury position.

After two years, Plaintiff was assigned permanent work restrictions of no bending, no lifting more than 20 pounds, a requirement to alternate sitting and standing, and a requirement to wear a brace while working. In 2016, Plaintiff underwent non-work related heart surgery and asked to return to work in the field, believing the additional walking in the field would improve his back condition. Defendants returned Plaintiff to work in the field as a helper, where his job duties included wrapping Teflon tape on sprinkler heads, putting pipe hangers together, and driving a forklift.

Plaintiff later requested a hearing seeking determination of whether either job was suitable employment. The Deputy Commissioner concluded he was not disabled and failed to reach the issue of suitability. The Full Commission determined the fabrication shop job was suitable because it was a real, actual position and that the field position was never offered as suitable employment, but was an accommodation offered to Plaintiff at his request. Therefore, Plaintiff failed to prove he was disabled. Plaintiff appealed.

ISSUES:

1. Whether the Commission erroneously concluded Plaintiff had not engaged a reasonable but unsuccessful effort to find post-injury employment.

2. Whether the Commission erroneously concluded Plaintiff failed to present evidence he was capable of some work, but that seeking work would be futile.

3. Whether the Commission erroneously concluded Defendants provided, and for a time Plaintiff performed, a suitable job.

HOLDINGS:

1. No. The reasonable effort analysis reflected a well-reasoned application of the law to the facts. As there is no general rule for determining the reasonableness of a job search, the Commission is free to decide whether a job search was reasonable. Here, the Commission's findings that Plaintiff testified he had not looked for work outside of Defendant-Employer's business or filed any other applications, supported its finding that he did not engage in a reasonable job search. Accordingly, the Court affirmed the Commission's conclusion of law that Plaintiff failed to establish disability under prong 2 of *Russell v. Lowe's Prod. Dist*.

2. Yes. The Commission's futility analysis was built on a misapplication of governing case law. Plaintiff argued the Commission erred in concluding he did not prove disability through a showing of futility because he brought forward "no evidence" on this point. Under *Russell,* an employee can meet his burden of proving disability by showing he is capable of some work, but that it would be futile to look for other work because of pre-existing conditions like age, inexperience, and lack of education. In this case, the Commission found as a fact that Plaintiff failed to show it would be futile because of pre-existing factors to search for work, and concluded as a matter of law that he had not proven futility. However, it also found that he was 49 years old, had a 9th grade education, and worked primarily as a pipe-fitter in the construction industry. Further, it found he had a permanent 20-pound lifting restriction (among other limitations), would sometimes need to leave work because of pain, and reached maximum medical improvement in 2017. The Court of Appeals noted Plaintiff's circumstances were quite similar to the employee in *Thompson v. Carolina Cabinet Co.,* 223 N.C. App. 352, 357, 734 S.E.2d 125, 128 (2012) (holding it was futile to look for work because claimant was 45 years old, had a high school education, had only heavy labor work experience, and had 15-pound lifting restriction). Therefore, Plaintiff was "clearly" disabled as the Commission's factual findings clearly constituted evidence consistent with futility under *Russell* as interpreted by *Thompson*.

   Regarding the dissent's argument that the Commission's futility conclusion could not be reviewed because it "found" that Plaintiff had not shown that it would be futile to search for work (which is therefore binding on the Court as it was not challenged by Plaintiff), the majority characterized the Commission's "finding" as a label, which is not dispositive on the Court's review under *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). The majority further concluded the Commission's "finding" on this point was actually a conclusion of law, requiring legal reasoning. Finally, the majority found Plaintiff "unmistakably" challenged this legal reasoning, subjecting it to de novo review under *Gregory v. W.A. Brown & Sons,* 212 N.C. App. 287, 295, 713 S.E.2d 68, 74 (2011).

3. Yes. The Commission's suitable employment analysis was also built on a misapplication of governing case law. "Make work" (e.g., non-suitable positions) are those that have been altered such that they are not ordinarily available on the job market and are not therefore indicative of an employee's earning capacity. The Court reasoned that whether a position existed with employers beyond a given defendant-employer was an essential part of the make work inquiry because the Workers' Compensation Act does not allow employers to avoid paying benefits by offering a job that does not exist outside of that defendant-employer's business and the employee could not otherwise obtain. Because the Commission's findings failed to address whether the job was available with employers other than Defendant-Employer, and because there was no evidence that any other employer other than Defendant-Employer would hire Plaintiff for that or a similar job, the Commission's assessment was flawed.

   Additionally, the Commission's holding that "Defendant's unique hiring practice of hiring based upon word of mouth and personal recommendations" meant the position was "available to individuals in the marketplace" exemplified this shortcoming in the Court's view and defined the competitive marketplace based on Defendant's idiosyncratic employment practices (i.e., if it exists with this employer, then it must be available on the open market).

DISSENT (Tyson, J.):

Judge Tyson concurred with the majority's opinion regarding Plaintiff's failure to make a reasonable effort to obtain other employment, but strongly disagreed with the majority's "[o]verruling the Commission's unchallenged findings and conclusion by asserting a double-negative burden on Defendant to disprove disability through a showing of non-futility." He would have remanded without addressing futility or suitable employment assuming the correct standard of review had been used.

Regarding futility, the Commission found as a fact that Plaintiff failed to show he was disabled because he was able to earn pre-injury wages in a suitable position within his restrictions. Judge Tyson noted there was competent evidence in the record to support the finding and the majority should not have re-weighed evidence or treated this finding as a conclusion of law. In doing so, the majority improperly analyzed the case under *Russell* and its progeny cited by the majority (*Wilkes, Thompson, Johnson*, and *Weatherford*), (all of which upheld the Commission's findings and properly applied the standard of review) by ignoring an unchallenged and binding finding of act. Judge Tyson found the majority's opinion incorrectly purported to shift the burden to Defendants to prove competitive jobs existed in the market for which Plaintiff was qualified and could physically accomplish. However, under *Hilliard*, unless Plaintiff met his prima facie case of proving disability, Defendants had no burden for production of proof.

Related Unpublished Cases

NOTE: *An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

B. *Brim v. Harris Teeter,* No. COA 19-1044, 2020 WL 2529823 (May 19, 2020) (J. Young) (N.C.G.S. § 97-22; notice)

Plaintiff slipped and fell on wet floor in the restroom of his employer, injuring his shoulder. Plaintiff mentioned the fall to coworkers and manager several times. Plaintiff continued to work and treated the injury with over-the counter medication and completed an accident report with Defendant-Employer almost three months later. Plaintiff was then treated by urgent care and ultimately underwent surgery. The Deputy Commissioner found Plaintiff had not filed his claim in accordance with N.C.G.S. § 97-22 and the Full Commission overturned this decision. Defendants appealed. The Court reviewed the record and the findings of fact and conclusions of law, and determined the record contained sufficient evidence to support the Full Commission's decision. Plaintiff's testimony was reviewed and showed he notified his manager of the fall which was a reasonable excuse for the delay in providing written notice of the injury.

C. *Shipman v. Murphy Brown, LLC*, No. COA 18-1243, 2019 WL 4178741 (September 3, 2019) (Collins, J.) (Suitable employment; make work)

Competent evidence supported the Commission's finding that Plaintiff was disabled and that the position offered to him as a "sorter" was post-MMI make work, and therefore, not suitable employment. Plaintiff suffered an admittedly compensable shoulder injury and was released by surgeon Dr. Lippe with permanent restrictions lifting 20 to 50 pounds occasionally, 10 to 25 pounds frequently, and 10 pounds constantly in September 2015. By March 2016, he had returned to his pre-injury position as a truck driver and complained that the repetitive motions of shifting gears was aggravating his injuries. Dr. Lippe modified his permanent restrictions to prohibit repetitive motions, which precluded the truck driving job. In June 2016, Defendant-Employer determined Plaintiff could work as a "loading crew loader," which required repetitive lifting, constant pulling of hog gates, and other maneuvers that were outside his permanent restrictions and caused pain when attempted by Plaintiff. Plaintiff's primary care physician, Dr. Martin, took him out of work due to the pain caused by repetitively opening and closing the hog gates.

Around that time, in August 2016, the employer notified Plaintiff he was eligible for FMLA, short-term disability, and TTD benefits. Defendants did not reinstate TTD, and Plaintiff filed a Motion to Reinstate TTD and requested a return appointment with Dr. Lippe, which Dr. Lippe refused. Defendants sent Plaintiff to Dr. Moore for a second opinion, who agreed with Dr. Lippe's previous assessment and that the Loading Crew Loader job was outside of his restrictions. Defendants then modified the loading crew loader job into a "sorter" position that required no lifting greater than 20 pounds and no repetitive movements. However, in October 2016, Dr. Martin wrote Plaintiff out of work entirely due to elbow pain.

The Deputy Commissioner concluded Plaintiff had not constructively or unjustifiably refused suitable employment, that Defendants had not provided suitable employment from August 2016 and ongoing, and that Defendants failed to show that other employers would hire Plaintiff to do a similar job at a comparable wage. The Full Commission agreed.

On appeal, Defendants argued the Full Commission's findings of fact did not support its conclusion of law that Plaintiff met his burden to show disability. The Court of Appeals disagreed. The Court held the findings of fact were sufficient to show that Plaintiff proved disability. His permanent restrictions precluded his pre-injury position or any other employment because he attempted to work in two positions offered by Defendant-Employer that did not comply with his permanent restrictions. The Commission also properly determined that the sorter position was make work because it was not a position that would be offered to applicants in the competitive marketplace.

D. *Garrett v. Goodyear Tire & Rubber Co.*, No. COA 19-228, 2019 WL 5221699 (October 15, 2019) (Garrett II) (Arrowood, J.) (Estoppel; disability)

Garrett I was a published opinion from the first time this case was before the Court of Appeals, which held that: (1) Plaintiff had properly raised an estoppel issue at the Deputy and Full Commission levels and that it was error for the Full Commission to fail to address the estoppel argument (Plaintiff's issue); and (2) the Full Commission erred by failing to enter sufficient findings to support its conclusion that Plaintiff was disabled between the dates Defendants had stopped accommodating her restrictions and the date Plaintiff refused a job offer from Defendants (Defendants' issue).

The underlying facts of *Garrett I* and *II* involve a Plaintiff who worked as a production service carcass trucker, which required her to operate a forklift in a warehouse. In December 2013, her vehicle was struck by another vehicle while working. She reported neck and back pain and returned after two weeks to her pre-injury position, but subject to light duty restrictions imposed by her treating provider. On May 12, 2014, Goodyear informed Plaintiff it could no longer accommodate her work restrictions, and Plaintiff went out on medical leave. Important to her argument for disability in *Garrett II*, her union contract would trigger termination if she accepted outside employment during medical leave. Four months after Plaintiff filed her Form 18, Defendants filed a Form 63 initiating medical benefits only. Plaintiff requested a hearing because "Defendants failed to file any forms" and "treated the claims as compensable." Three months later, Defendants offered Plaintiff a position as a carcass trucker, but Plaintiff refused the offer, stating she did not want the position because the truck bounced. Defendants then filed a Form 61.

The Deputy Commissioner found that Plaintiff's neck and low back conditions were causally related to her work accident, but that her bilateral shoulder condition was not related. The Deputy Commissioner also noted the Commission could not prohibit Defendants from contesting compensability as a punishment for their failure to timely admit or deny the claim. Plaintiff was asserting her claims should be deemed admitted because of Defendants' actions. The Full Commission found that Plaintiff's low back condition was not compensable, but that her neck was. Plaintiff was awarded TTD benefits between the dates Defendants stopped accommodating her work restrictions (May 2014) and the date Plaintiff refused Defendants' job offer (July 2015). Both parties appealed to the Court of Appeals.

Estoppel Issue: In *Garrett I,* the Court held that the Commission erred in failing to address

Plaintiff's argument that Defendants were estopped from denying the compensability of her claims because of their actions. The Full Commission had invoked the law of the case doctrine in determining that Plaintiff had failed to appeal the issue and that she could not challenge the issue in a subsequent proceeding in the same case. The Court determined Plaintiff had properly raised the issue and instructed the Commission to consider it. On remand, the Full Commission supplemented its Opinion and Award with findings of fact and conclusions of law on the issue determining that Defendants were not prohibited from contesting the compensability of the claim.

In *Garrett II*, Plaintiff argued that the Full Commission: (1) failed to follow the Court's directive to consider whether the facts supported a conclusion that Defendants should be estopped from denying coverage; and (2) failed to enter sufficient findings of fact and conclusions of law on the estoppel issue. The Court determined that the Commission had not ignored the mandate by entering a lengthy finding of fact in which it considered several aspects of Defendants' conduct and whether or not any such conduct supported Plaintiff's estoppel argument. Furthermore, the Court held that the Commission's conclusions of law were supported by competent evidence.

Disability Issue: In *Garrett I*, the Court held that the Full Commission erred by failing to enter sufficient findings to support its conclusion that Plaintiff was disabled between May 2014, and July 2015, the period between Defendants' decision to stop accommodating her work restrictions and the date Plaintiff refused Defendants' job offer. On remand, the Full Commission determined: (1) that Plaintiff was required to engage in a job search to establish her disability during the relevant period; and (2) that she was not disabled during that time.

In *Garrett II*, Plaintiff challenged both findings. Plaintiff argued that under *Patillo*, she was not required to make a reasonable job search where her union contract would trigger termination if she accepted outside employment during medical leave. The Court disagreed because *Patillo* never reached that issue and merely reiterated "that we will defer to the Commission in its determination of whether or not a claimant engaged in a reasonable job search, so long as: (1) the Commission's conclusion is based upon findings that are not conclusory and sufficiently explain its determination; and (2) such findings are supported by competent evidence in the record." In this case, the Commission had met that standard by making non-conclusory findings that provided a detailed basis for the Commission's determination that Plaintiff failed to engage in a reasonable job search. These included findings that Plaintiff was capable of non-sedentary work, but only looked for sedentary work. She did not produce evidence corroborating her job search, "which was uninspired even as described in her own testimony." The Commission placed little weight on Plaintiff's testimony that she loved working for Defendant-Employer because she had declined to return to the Production Service Carcass Trucker position when it was offered.

E. *Bentley v. Revlon,* No. COA 18-1009, 2019 WL 5742083 (November 5, 2019) (Hampson, J.) (Disability; causation)

Plaintiff was injured on December 28, 1995 when she was struck in the face and right side

multiple times resulting in injuries to her face, nasal passage, head, neck, right shoulder, and right arm. The Industrial Commission entered three Opinion and Awards relevant to the case: in 2003, 2013, and 2018. The 2003 Opinion and Award found Plaintiff's injuries compensable under the Act and required Defendants' to pay for all associated medical care, but expressly left open whether Plaintiff should be paid any permanent partial disability compensation. The 2013 Opinion and Award denied Plaintiff's contention she was disabled as a result of the 1995 injury, required Defendants to pay ongoing medical benefits, and ordered Defendants to pay for the 3% rating to Plaintiff neck and the 4% rating for her headaches and sinusitis.

On May 3, 2016, Plaintiff filed a Form 33 request for hearing alleging a change in condition due to a right shoulder injury. The Deputy Commissioner issued an Opinion and Award finding the right shoulder condition not be a compensable consequence of the 1995 work injury, and held there was no disability or right to additional indemnity benefits. Plaintiff appealed to the Full Commission, which affirmed in 2018, but increased the amount of benefits owed for permanent partial disability.

Plaintiff appealed to the Court of Appeals, which reversed the Commission, finding Defendants had not rebutted the presumption that the right shoulder condition was causally related to the 1995 injury under the Parsons presumption. The Court afforded more weight to Plaintiff's treating doctor than the independent medical evaluation doctor due to limited review of the medical records. The Court also found the Commission had erred in applying the change of condition analysis under N.C.G.S. § 97-47, instead finding there was no final award for permanent partial disability. The court further found the Commission had not made findings of fact regarding whether Plaintiff was disabled under the third element under *Hilliard v. Apex Cabinet Co.,* 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

IV. N.C.G.S. § 97-10.2 – Subrogation Rights

A. *Walker v. K&W Cafeterias,* ___ *N.C.* ___, ____ *S.E.2d* ___ (August 2020) (Hudson, J.) (N.C.G.S. § 97-10.2; Uninsured/underinsured motorist (UIM) proceeds)

FACTS:

Plaintiff's husband worked for Defendant-Employer and was involved in a motor vehicle accident in Dillon, South Carolina. Decedent died as a result of his injuries. Decedent-Employer is a North Carolina corporation headquartered in Winston-Salem, North Carolina, and the vehicle Decedent was driving was owned by Defendant-Employer. The applicable insurance policy had an endorsement for vehicles licenses or principally garaged in South Carolina, which provided that coverage would be paid in accordance with the South Carolina Underinsured Motorists Law.

Plaintiff filed a workers' compensation claim in North Carolina for medical expenses and death benefits under N.C.G.S. § 97-38. On January 7, 2013, the Commission entered a Consent Opinion and Award ordering Defendants to pay $333,763 in workers' compensation benefits to Plaintiff. In 2014, Plaintiff filed a new and separate civil action against the third-party driver in South Carolina seeking

damages for wrongful death. In 2016, the parties reached a settlement agreement wherein Plaintiff recovered a total of $962,500 on behalf of Decedent's estate. This included $50,000 in liability benefits from the third-party's insurer, $12,500 in personal UIM proceeds from Plaintiff's and Decedent's personal UIM carrier, and $900,000 in UIM proceeds from Defendant-Employer's commercial UIM carrier.

On March 21, 2016, Defendant-Employer's workers' compensation carrier filed a request for hearing before the North Carolina Industrial Commission seeking repayment of workers' compensation death benefits paid to Plaintiff in 2013, claiming a lien under N.C.G.S. § 97-10.2 on UIM proceeds she received as a part of the South Carolina wrongful death settlement. On March 30, 2016, Plaintiff filed a declaratory judgement action against Defendants in South Carolina claiming South Carolina law precluded subrogation and assignment of UIM settlement proceeds to Defendants. In May 2016, Defendants removed the action to the U.S. District Court for the District of South Carolina on the basis of diversity jurisdiction, but the U.S. District Court abstained from hearing the declaratory judgment action.

On June 13, 2016, Plaintiff filed a motion with the North Carolina Industrial Commission staying all proceedings in Defendant's subrogation claim pending the result of federal litigation. The motion was denied and Plaintiff filed a motion to reconsider, which was also denied. Plaintiff appealed and filed another motion to stay, which was heard by the Deputy Commissioner, who issued an Opinion and Award on July 10, 2017 denying Plaintiff's motion to stay and ordering distribution of Plaintiff's entire recovery from the South Carolina wrongful death settlement. The Deputy Commission found Defendants were entitled to subrogation under N.C.G.S. § 97-10.2(f)(1)(c) and (h) and ordered Defendants to be reimbursed out of the third-party recovery for the $333,763 in workers' compensation benefits paid pursuant to the January 7, 2013 Consent Opinion and Award.

Plaintiff appealed to the Full Commission, which affirmed the Deputy Commissioner's decision. Plaintiff then appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed and held Defendants had a subrogation lien on the UIM policy proceeds obtained in the South Carolina wrongful death action.

ISSUE:

Whether the Full Commission correctly concluded Defendants could assert a subrogation lien for workers' compensation benefits paid to Plaintiff on the UIM policy proceeds obtained by Plaintiff in the South Carolina wrongful death action.

HOLDING:

No. The North Carolina Supreme Court reversed the Court of Appeals and held Defendants had no subrogation interest in the UIM policy proceeds obtained as a part of the South Carolina wrongful death action. The Court highlighted that this was not a workers' compensation action, as that case was fully resolved in 2013 when death benefits were paid to Plaintiff. Instead, the Court indicated it was reviewing what should happen to the more than $900,000 that was paid to Plaintiff in the South Carolina wrongful death settlement.

The Court reasoned the South Carolina UIM policy controlled the outcome in this case, which required application of South Carolina law. Under that South Carolina law, S.C. Code § 38-77-160, an insurer is barred from seeking to be reimbursed with UIM proceeds for benefits it previously paid. When deciding whether to apply North Carolina or South Carolina law to the subrogation of Plaintiff's wrongful death settlement UIM proceeds, the Court concluded the case should be analyzed under contract law interpreting a choice-of-law clause rather than the choice-of-law analysis applied by the Court of Appeals. Here, there was an explicit term of contract – the endorsement that mandating UIM proceeds be paid and governed by South Carolina law. The Court characterized the case as a contract case, not as a workers' compensation case.

The Court declined to agree with Defendants' argument that the commercial UIM policy was made in North Carolina under N.C.G.S. § 58-3-1, instead finding that the endorsement to the policy changed the contract to be in conformity with South Carolina law. The Court concluded the UIM payments were governed under South Carolina law and the intent of the North Carolina General Assembly and resulting laws did not control. South Carolina law prohibited subrogation of UIM payments, and as such, the Court held Defendants did not have any subrogation interest under N.C.G.S. § 97-10.2. The Court rejected the dissent's assertion that this holding allowed for double recovery.

DISSENT: (Newby, J.)

Justice Newby dissented and framed the issue as whether Plaintiff's 2012 stipulation to North Carolina Industrial Commission jurisdiction subjected her to North Carolina's subrogation laws. Justice Newby emphasized Plaintiff's ability to choose where to proceed for workers' compensation benefits, and the fact that she chose North Carolina because it provided more generous benefits. He concluded this then bound her to the provisions of the North Carolina Workers' Compensation Act, including the subrogation statute allowing defendants to seek subrogation recovery from third-parties and thus prevent double recoveries. Justice Newby found the majority's holding allowed Plaintiff to choose the best parts of the Act and obtain full benefits without being subject to the subrogation portion of the Act, thus allowing a double recovery. He raised the concern that carriers need just include a rider to the insurance policy applying a state's law that prohibits subrogation in order to allow for this double recovery. He highlighted the voluntary nature of Plaintiff's stipulation to North Carolina Industrial Commission jurisdiction when receiving full benefits under the Act, but then later disputing jurisdiction for the first time when Defendants filed for subrogation in order to recover a portion of the wrongful death settlement proceeds. Justice Newby concluded the North Carolina General Assembly intended a plaintiff, who receives benefits under the Act, to also be bound by its remedial provisions, focusing on the remedial nature of N.C.G.S. § 97-10.2(f).

V. Exclusive Remedy/Jurisdiction

A. *Hidalgo v. Erosion Control Services*, ___ N.C. App. ___, ___ S.E.2d ___ (July 2020) (Hampson, J.) (Wrongful death; exclusive remedy; negligence)

FACTS:

Decedent was an employee for Erosion Control Services ("ECS"). He was driving a tractor at a construction site and was fatally injured when the tractor rolled on a slope. Decedent's mother filed a

wrongful death complaint as Administratrix of Decedent's estate. Plaintiff alleged that Defendant was negligent in allowing the tractor to be operated without a seatbelt and allowing Decedent to drive the tractor on a steep slope. ECS's shop manager claimed that it was never made known to him that the seat did not have a seatbelt. Defendants alleged that the slope on which Decedent's tractor rolled was not near the designated project area where ECS was working, and that there was no reason Decedent's job would require him to drive on the slope.

Defendant ECS moved for summary judgement, arguing that Plaintiff's exclusive remedy was within the North Carolina Workers' Compensation Act. Plaintiff argued that Defendants' negligence was sufficiently egregious to fall within the *Woodson* exception to the Act's exclusivity provision, which allows Plaintiffs to file civil complaints against employers that would otherwise be barred by the Act's exclusivity provision in cases where the Defendant's actions are "tantamount to an intentional tort."

ISSUE:

Whether Plaintiff forecasted sufficient evidence that Defendants' actions were "tantamount to an individual tort" to survive Defendants' Motion for Summary Judgement.

HOLDING:

No. Plaintiff did not forecast evidence sufficient to survive Defendants' Motion for Summary Judgement. There was no evidence that ECS directed Plaintiff to drive on the slope where his tractor rolled, indicating a lack of intentionality regarding the unsafe conditions. Additionally, unlike the defendant in *Woodson*, ECS did not have a pattern of OSHA violations regarding the unsafe conditions at issue. The *Woodson* exception only applies in cases where the employer's intentional misconduct is substantially certain to cause serious injury or death. Here, the lack of a seatbelt, while unsafe, did not make serious injury or death substantially certain. Therefore, the *Woodson* exception did not apply and Plaintiff's exclusive remedy was within the North Carolina Workers' Compensation Act.

VI. N.C.G.S. § 97-36 Out of State Injury

Related Unpublished Case

NOTE: *An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

A. *Lequire v. Southeastern Construction and Equipment, Inc.*, No. COA 19-603, 2019 WL 6528882 (December 3, 2019) (Lequire II) (Young, J.) (Jurisdiction)

The Court of Appeals affirmed the Commission's conclusion that it did not have jurisdiction to adjudicate Plaintiff's claim. Plaintiff alleged he sustained a compensable injury while working for Southeastern in South Hill, Virginia in February 2015. He filed a claim in Virginia, for which Defendants accepted compensability and paid benefits. A dispute arose over additional medical treatment and the case was scheduled for hearing in Virginia. However, prior to the hearing, Plaintiff filed and was granted, a voluntary dismissal of his Virginia claim. He resided in North Carolina, where he filed a new Form 18.

Defendants denied the claim on the basis that the North Carolina Industrial Commission lacked jurisdiction and the case went to a hearing.

Southeastern is a land clearing company whose principal place of business was in Tennessee. They hired workers for specific projects, and as a result, the workforce was often laid off in between projects. Plaintiff had worked for them for three separate periods of time since 1999. His most recent term of employment began in 2013, at which time he accepted the contract of employment via telephone from Kansas and did not have to re-complete pre-employment paperwork. He was required to show valid DOT certification when he arrived at the job site in Virginia and was hired to work at projects in Oklahoma, Texas, and Virginia. Plaintiff never performed any work for Southeastern in North Carolina. After his injury, the carrier referred Plaintiff for shoulder surgery in North Carolina. After he was released from care, he was denied any further treatment by the carrier and received subsequent medical treatment at the VA.

The Deputy Commissioner and Full Commission found that that the North Carolina Industrial Commission lacked jurisdiction on the grounds that Plaintiff's principal place of employment was not in North Carolina and his employment contract was not formed in North Carolina. The Court of Appeals agreed. N.C.G.S. § 97-36 is the controlling jurisdictional statute in workers' compensation cases even if a party had substantial contacts with North Carolina and met the minimum due process requirements for jurisdiction. That statute provides that, where an accident happens while the employee is located outside of North Carolina, the employee is entitled to benefits under the North Carolina's Workers' Compensation Act if: (1) the contract of employment was made in NC; (2) the employer's principal place of business is NC; or (3) the employee's principal place of employment is in NC.

Southeastern's principal place of business was Tennessee. Therefore, the only issues were whether North Carolina was Plaintiff's principal place of employment and whether the contract was made in North Carolina. Even though Plaintiff resided in North Carolina, kept his work truck in North Carolina, and deposited his wages into a North Carolina bank, this evidence was insufficient to show his principal place of employment because he worked and earned all of his income outside of North Carolina. Regarding the place of contract formation, North Carolina uses the "last act" test, which means that, for a contract to be made in North Carolina, the final act necessary to make it a binding obligation must occur in North Carolina. In this case, he accepted the contract via telephone from Kansas and had to provide proof of DOT certification in Virginia, both one of which could be considered the "last act," and neither of which occurred in North Carolina. The Full Commission's holding was affirmed.

B. *Lequire v. Southeastern Construction and Equipment, Inc.*, No. COA 19-603-2 (May 5, 2020) (Lequire II) (Young, J.)

In a second decision from the Court of Appeals, the Court analyzed the case based upon a slightly different standard of review. The decision from December 2019 was based upon whether there was sufficient evidence to support the Full Commission's findings of fact and

resulting conclusion of law. However, in the May, 2020 decision, the Court of Appeals conducted a *de novo* review. The Court noted that the question of subject matter jurisdiction may be raised at any time, even before the Supreme Court, and whether a trial court has subject matter jurisdiction is a question of law, which is subject to *de novo* review on appeal. The Court of Appeals' May 2020 decision tracked essentially the same analysis above, but the conclusion was slightly different in that Court held that, after careful *de novo* review, they held that the Industrial Commission did not have jurisdiction based upon the formation of Plaintiff's employment contract. Whether Plaintiff's acceptance of the a job offer from Kansas or his providing proof of DOT certification in Virginia was the last act to form the employment contract, no act in the formation of the employment contract was done in North Carolina. Therefore, the North Carolina Industrial Commission did not have jurisdiction over his claim.

VII. N.C.G.S. § 97-53 – Occupational Disease

A. *Hinson v. Cont'l Tire The Ams.,* ___ N.C. App. ___, 832 S.E.2d 519 (November 2019) (McGee, C.J.) (Asbestosis; medical testimony; consolidated cases)

FACTS:

This matter was a companion to four other appeals that were consolidated for hearing, together referred to as the "bellwether cases." These cases are a small percentage of a larger group of 144 cases, referred to by the Court as the "consolidated cases," all with related claims. Decedent Walter Hinson worked for Defendant Continental Tire the Americas, at Continental's tire factory between 1967 and 1999. Plaintiff, along with the other "Bellwether Plaintiffs," alleged occupational exposure to asbestos, which led to the development of asbestosis, colon cancer, tonsil cancer, and other diseases. Defendants denied that the diagnoses of asbestosis claimed by Plaintiffs were legitimate. Defendants further denied that any of its employees could have developed asbestosis as a result of their employment because there was insufficient exposure. Plaintiffs' counsel selected six "Bellwether Plaintiffs" as representatives of the larger group of 144 Plaintiffs to be tried first and together. One filed a voluntary dismissal, leaving five Plaintiffs now involved in this appeal.

The Deputy Commissioner denied all five claims, finding that the manufacturing process did not produce sufficient airborne asbestos to cause Plaintiffs' claimed diseases. Furthermore, several air samples taken over the years at the factory had shown potential exposure below the OSHA PEL. Plaintiffs appealed, and the Full Commission affirmed the denial of Plaintiffs' claims. The Opinion and Awards included findings of fact and conclusions of law common to all claims. Plaintiffs appealed.

ISSUES:

1. Whether the Commission applied the appropriate burden of proof in reaching its determinations concerning Plaintiffs' exposure to asbestos as employees in the factory.

2. Whether the Commission relied on incompetent evidence in reaching its conclusions.

3. Whether the Commission's ultimate conclusions of law were supported by the findings.

HOLDINGS:

1. Yes. Plaintiffs argued that the Commission improperly placed the burden on Plaintiffs to prove the level of asbestos to which they were allegedly exposed under N.C.G.S. § 97-53. The Court disagreed, holding that the Commission applied the proper burden of proof by requiring Plaintiffs to prove, as alleged, that their exposure significantly contributed to their development of asbestosis. Because factors such as quantity and frequency of exposure are directly relevant to that determination, it was appropriate for the Commission to consider them.

2. No. Plaintiffs argued that certain evidence relied upon by the Commission was incompetent. However, the Court noted that findings of facts that are supported by competent evidence are conclusive on appeal, even if some of the evidence admitted was incompetent. Because the competent evidence received by the Commission was sufficient to support its findings of fact, those findings were conclusive.

3. Yes. Plaintiffs challenged a conclusion of law which stated that Plaintiffs were not exposed to a sufficient amount of airborne asbestos to cause asbestosis. Plaintiffs argue that this conclusion was based on findings of fact that were reached through the consideration of incompetent evidence. Because the Court held that the Commission's findings of fact were supported by competent evidence, even if some incompetent evidence was improperly admitted, the Court held that the Commission's conclusion of law based on those findings was also correct.

Related Unpublished Case

NOTE: *An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

B. *Day v. Travelers Insurance Co.*, No. COA 19-705, 2020 WL 4462171 (August 4, 2020) (Zachary, J.) (Occupational disease; increased risk)

Plaintiff started working as a senior claims representative for Defendant-Employer in 1996 in Reading, Pennsylvania. She was assigned to handle approximately 175 to 180 cases. Plaintiff filed an occupational disease claim for anxiety disorder, panic disorder, and depressive disorder as a result of the stressful work conditions. She contended her workload was higher than that of other employees and that, although she worked overtime frequently, she struggled to complete her assignments. Due to her husband being stationed at Charleston Air Force Base, Plaintiff accepted a position in Defendant-Employer's Charlotte, North Carolina office. Plaintiff contended various aspects of this new job exacerbated her anxiety and stress. She also reported bouts of physical ailments associated with the stress of the job. Plaintiff went out of work in March 2013.

Defendants denied Plaintiff's occupational disease claim. The Deputy Commissioner denied Plaintiff's claim for workers' compensation benefits, and the Full Commission affirmed.

Plaintiff then appealed to the Court of Appeals. The Court held Plaintiff had failed to establish increased risk of contracting anxiety and depression as a result of her employment. The Court rejected Plaintiff's argument that the Commission had misapplied the *Rutledge* test when analyzing increased risk, and concluded Plaintiff's employment did not place her at an increased risk of contracting anxiety and depression when compared to the general public. The Court further found Plaintiff had not met her burden to establish increased risk through medical testimony because her treating psychiatrist had not expressed an opinion regarding increased risk when deposed. The Court highlighted the Commission's role of finder of fact and sole judge of credibility, and its inability to review the weight and credibility of evidence already considered by the Commission.

VIII. Dismissal/Failure to Prosecute

A. *Lauziere v. Stanley Martin Communities, LLC*, ___ N.C. App. ___, 844 S.E.2d 9 (May 2020) (Murphy, J.) (Dismiss with prejudice; *Lee v. Roses* factors; abuse of discretion)

FACTS:

Plaintiff's injury was denied by Defendant-Employer and Plaintiff requested a hearing. Defendants served discovery and Plaintiff stated some medical records would be supplemented at a later time. Plaintiff's counsel recused herself, and Defendants served a second set of discovery. When this second set of discovery went unanswered, Defendants filed a Motion to Compel, but Plaintiff underwent low back surgery three days later and the case was continued. Plaintiff responded to the discovery request two months later but did so insufficiently. A year passed without any movement in the case and Defendants moved to dismiss with prejudice. A hearing was held and Pro Se Plaintiff's case was dismissed with prejudice for failure to prosecute. Plaintiff appealed to the Full Commission, who also dismissed Plaintiff's claim with prejudice.

ISSUE:

Whether the Full Commission erred in dismissing Plaintiff's claim with prejudice.

HOLDING:

Yes. In making its determination, the Commission must make findings of fact and conclusions of law to support its order. Additionally, the Commission must analyze the three factors cited in *Lee v. Roses* to dismiss a claim with prejudice for failure to prosecute. 162 N.C. App. 129, 131, 590 S.E.2d 404, 406 (2004). The Court reviewed the findings of fact and conclusions of law from the Commission and determined some were unsupported by evidence. There was no evidence Defendants were materially prejudiced, nor was there evidence showing the delay impaired their ability to investigate the claim. Additionally, Defendants failed to show exactly how they incurred "substantial" expenses. Lastly, there was no evidence to support the Commission's finding that Plaintiff was unable to pay sanctions in the amount of Defendants' damages incurred, which lead the Commission to believe the only remedy was dismissal with prejudice. The Court reversed and remanded.

Concur in part, dissent in part (Dillon, J.):

Judge Dillon opined the case should be vacated and remanded for further proceedings instead of reversed and remanded. He believed it would not be an abuse of discretion for the Full Commission to have ordered dismissal based on the findings, which he argued some were supported by the evidence. Judge Dillon cited evidence in the record showing Plaintiff had injuries prior to her comp claim and discussed an employer's right to investigate a claim before accepting it, and applied these facts to the *Lee* factors.

IX. N.C.G.S. § 58-48-35(a)(1) – Guaranty Act

A. *Booth v. Hackney Acquisition Co.*, ___ N. C. App. ___, 842 S.E.2d 171 (April 2020) (Hampson, J.) (NC Insurance Guaranty Association; bar date; statute of repose)

FACTS:

Decedent was employed as a welder by the employer, Hackney, from 1967 through 1989. Hackney held workers' compensation insurance through the Home Insurance Company, covering Decedent as an employee from 1988 through 1990. On June 13, 2003, a New Hampshire court declared Home Insurance Company insolvent and entered an Order for Liquidation. The New Hampshire court further ordered all claims against the company be filed by June 13, 2004. In June 2008, Decedent was diagnosed with lung cancer, from which he died on April 27, 2009. On December 1, 2009, Plaintiff, Decedent's widow, filed a Form 18. The Form 18 was supported by a written opinion from an expert that Decedent's lung cancer was caused by his exposure to welding fumes in combination with his habit of cigarette smoking.

On June 17, 2013, the North Carolina Insurance Guaranty Association, NCIGA, filed a Form 61 on behalf of the now insolvent Home Insurance Company. On October 20, 2015, the NCIGA filed a motion to dismiss Plaintiff's claims, arguing that the claims related to Home Insurance Company were barred under the Guaranty Act's bar date provision, N.C.G.S. § 58-48-35(a)(1), and the five-year statute of repose, N.C.G.S. §58-48-100(a).

The Deputy Commissioner denied the NCIGA's motion to dismiss and they appealed to the Full Commission. At the Full Commission, Plaintiff argued that interpreting the Guaranty Act's bar date and statute of repose to deny otherwise valid claims before they existed was a violation of constitutional due process under the North Carolina and United States Constitutions. On December 7, 2016, the Full Commission certified to the Court of Appeals the question of the constitutionality of the bar date provision and statute of repose under the North Carolina and United States Constitutions. On November 7, 2017, the Court of Appeals held that both of these provisions of the Guaranty Act were constitutional under the state and federal Constitutions and remanded the matter back to the Full Commission for further proceedings. The North Carolina Supreme Court denied discretionary review.

On remand from the Court of Appeals, the Full Commission issued an opinion granting the NCIGA's Motion to Dismiss, concluding that Plaintiff's claim was barred by both the Guaranty Act's bar date and statute of repose.

ISSUE:

Whether the Court of Appeals may interpret the Guaranty Act to include Plaintiff's claim even though the plain language of the bar date provision and statute of repose exclude coverage.

HOLDING:

No. Plaintiff argued that a strict application of the Guaranty Act's bar date provision and statute of repose defy the nature and purpose of the Guaranty Act and the North Carolina Workers' Compensation Act because it bars claims, such as Decedent's, that arise due to an occupational disease that is discovered after the bar date and statute of repose deadlines, thereby rendering recovery under the Guaranty Act impossible.

The Court of Appeals noted that the NCIGA is a nonprofit, unincorporated legal entity created by the general assembly in 1971 to provide a mechanism for the payment of covered claims under certain insurance policies to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. The Guaranty Act's coverage was expanded in 1993 to include workers compensation claims made against insolvent insurers. The Court of Appeals noted that, in order for the NCIGA to incur any liability, the claim must be a "covered claim" and that a covered claim does not include any claim filed with the NCIGA after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. In addition, the statute of repose provides that an otherwise covered claim not instituted against the insured of an insolvent insurer or the NCIGA, within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be insolvent, shall be barred forever as a claim against the NCIGA.

The parties conceded that the bar date in this case was June 13, 2004 and Plaintiff did not file a claim until December 1, 2019. In addition, even if Plaintiff's claim constituted a covered claim notwithstanding the bar date, Plaintiff's claim was further barred by the five-year statute of repose. Specifically, in order to meet the statute repose, Plaintiff would have had to file a claim within five years of the date the New Hampshire court declared Home Insurance Company to be insolvent. In this case, that would have required Plaintiff to have filed a claim on or before June 13, 2008.

The Court of Appeals acknowledged that, while the Guaranty Act was not part of the statutory worker's compensation regime found in Chapter 97, they still applied the standard that the Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents. In this case, Plaintiff argued that the decedent was not diagnosed with lung cancer until June 23, 2008 and did not pass away until 2009, rendering it impossible for Plaintiff to comply with the June 13, 2004 bar date. However, even applying the liberal rules of construction when interpreting workers' compensation statutes, the Court of Appeals held that the bar date and statute of repose were clearly provided for in the statute and that the plain language of the statute prevented the interpretation requested by Plaintiff. The Court of Appeals held that, under principles of statutory construction, the General Assembly was aware of the prior statutes establishing the statute of repose and bar date, in 1985 in 1989 respectively, when they amended the Guaranty Act in 1993 to include coverage for workers' compensation claims. Even with this knowledge, the General Assembly elected not to make any alterations to the statute of repose or bar

date in 1993. Consequently, the Court of Appeals affirmed the motion to dismiss Plaintiff's claim, and noted that while Plaintiff's argument that the statutory regime of the Guaranty Act as it currently exists fails to provide accommodation for latent occupational disease claims that may not manifest themselves until after expiration of the bar date and/or statute repose, the remedy for this issue lies with the legislature and not with the Court.

B. *NC Ins. Guar. Ass'n v. Weathersfield Mgmt., LLC,* ___ N.C. ___, 846 S.E.2d 285 (November 2019) (Young, J.) (Insurer insolvency; self-insured retention; deductible; guaranty)

FACTS:

Defendant-Employer, a regional worker staffing company, filed for bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code. North Carolina statutorily requires employers to maintain workers' compensation insurance coverage. Defendant entered into an insurance coverage policy with Freestone, formerly known as Dallas National, which required a deductible of $800,000 per occurrence and a $600,000 collateral deposit.

In June 2012, an employee of Defendant asserted a workplace injury and filed a workers' compensation claim. The Industrial Commission determined that the employee was entitled to weekly disability benefits. In 2014, Plaintiff's involvement with Defendant's policy was activated due to Freestone's insolvency. Plaintiff retained counsel to defend Defendant-Employer during the pendency of the employee's claim. As of August 10, 2018, Plaintiff paid $134,002.93 in indemnity and expense payments on the employee's claim. On September 28, 2017, Plaintiff commenced this action for reimbursement under N.C.G.S. § 58-48-1 for payment of the employee's claims asserted under coverage of Defendant's policy with Freestone.

Following discovery, Plaintiff moved for summary judgment, which the trial court granted.

ISSUE:

1. Whether the trial court properly granted summary judgment for Plaintiff under N.C.G.S. § 58-48-35, which governs Plaintiff's powers and duties, and specifically, whether:

    a. Defendant did not have a self-insured retention;

    b. Defendant was not a high-net-worth employer or affiliate;

    c. Estoppel barred the claim; and

    d. Genuine issues of material fact remained undecided.

HOLDING:

1. Yes, Plaintiff was entitled to summary judgment as a matter of law.

    a. The Court found that Plaintiff had a claim under N.C.G.S. § 58-48-35 under a statutory analysis. First, the statute includes provisions that refer to a "self-insured retention," and

states that Plaintiff "has the right to recover the amount of the self-insured retention from the employer." In reading the statute, the Court found that a self-insured retention serves as a "first insurance" by the insured up to the coverage dollar limit of the retained risk. The policy in this case was a deductible with a duty to defend, which required involvement from the initiation of the claim. Further, the statute provided Plaintiff with the rights, duties, and obligations of the insolvent insurer, Freestone f/k/a Dallas National. The policy under Freestone permitted reimbursement of the deductible amount from Defendant and allowed Plaintiff to be provided the safeguard of the collateral deposit in the event Defendant faced further financial difficulties.

b. The Court held that Defendant's argument on this ground was misplaced because Plaintiff was not pursuing reimbursement for the entire claim in the matter, but only the deductible as defined in the insurance contract. Because the claim was allowed by statute, Defendant's policy, and the Court's binding precedent; Defendant's argument was overruled.

c. The Court stated that, because there was no evidence of a provision or clause in the insurance policy or grounds in the statutes that supported Defendant's contention that Plaintiff failed in its obligation to Defendant in the handling of the claim, Defendant's estoppel argument was dismissed.

d. The Court found that Defendant abandoned its argument that there remained undecided material facts because Defendant did not raise or argue any specific issue of fact that remained undecided.

INDEX