Additional considerations

GENERAL OBSERVATIONS

While Rule 612(a) requires that prior to the hearing, the parties shall state all experts to be deposed, post-hearing, the same rule should also apply to lay witnesses to the extent possible. If the parties are aware that a lay witness is going to be unavailable at a hearing because of travel or scheduling conflicts, they should discuss prior to the hearing the possibility of deposing such witnesses.

Rule 613(a) requires the parties to submit within 15 days following the hearing a list of all expert witnesses to be deposed and the deposition dates. The same rule should apply to lay witnesses as well. As with experts, all witness depositions should be completed within 60 days.

The "costs" of the deposition transcripts are addressed by Rule 612(f). This requires that a copy of the deposition transcript be provided to the Commission at the cost of the party responsible for expert witness fees pursuant to other provisions under Rule 612 or the party requesting the lay testimony. It *does not* require that a party pay the cost of obtaining a copy of the transcript for the other party. See Rule 612(f).

Handling objections at depositions can be somewhat tricky and the parties should remember that there is no one present at the depositions to rule on the objections made. Therefore, the parties need to make certain that the objections are raised and that the party attempting to elicit testimony makes efforts to get the testimony into the record over objections, so that the commission can rule on both the objection and consider the testimony, if necessary, when preparing the opinion and award.

In rare instances, especially with lay witnesses, there could be issues which necessitate the parties stopping the deposition to obtain a ruling from the Deputy Commissioner concerning the objection (such as claims of privileged information in the case of a lay witness). In such an instance, the parties should attempt to resolve the issue without needing to stop the deposition; but if necessary, can attempt to contact the Deputy Commissioner by telephone to try and rule on the objection at that time. Keep in mind that if a deposition is stopped so that an objection can be ruled on, and additional expert costs and fees are incurred with having to reconvene the deposition, the objecting party may be responsible for such additional costs, especially if the objection is overruled.

LAY WITNESSES

Rule 612(j) allows non-expert witness deposition testimony to be offered after hearing by order of the Deputy Commissioner. The cost of obtaining the non-expert testimony by deposition shall be borne by the party making the request, unless otherwise ordered by the commission in

the interests of justice, or to promote judicial economy. Please see the manuscript flowchart for instances where Deputy Commissioners have granted the parties requests to obtain lay testimony by deposition. Again, to the extent possible, such request should be made prior to the hearing, or at the very least, the parties should have discussed lay witness depositions prior to the hearing.

Note that one of the instances where a Deputy Commissioner may grant lay testimony is if the hearing is running late in the day. This example has been troublesome in some instances where a plaintiff is able to present all of their testimony through live witnesses (especially if it includes witnesses other than plaintiff), and the defendant has not had an opportunity to put on any witnesses of their own. Especially in light of now having regional offices, it may be a better practice to request that the additional testimony be obtained at a subsequent hearing before the same Deputy Commissioner instead of by deposition if such concerns exist in a particular case.

EXPERT WITNESSES

Rule 612(a) requires the parties to stipulate to the admission of all relevant medical records, in an effort to minimize the use of post-hearing depositions. Rule 612(i) states that if a party refuses to stipulate to relevant medical evidence, and a deposition is required because of that refusal, the Deputy Commissioner may assess the costs of such deposition, *including reasonable attorney's fees*, against a party who refused to stipulate the medical evidence.

In light of Rule 612(c) which requires employers to pay the cost of two post-hearing depositions (and possibly a third), these provisions regarding the stipulation of medical evidence become even more important. Therefore, the practitioner is advised to keep these provisions in mind when determining what depositions are actually necessary at a hearing. For example, if a party refuses to stipulate medical evidence requiring a second doctor's deposition, how will the Commission determine which provisions of Rule 612 should control the cost of that deposition?

The Rule 612(c) requirement of the employer paying the costs for two expert post-hearing depositions only applies to healthcare providers who evaluated or treated the employee. It does not apply to non-medical experts, such as industrial experts or vocational experts. This rule also provides for an additional deposition at the employer's costs for the deposition of a second opinion doctor selected jointly by the parties or ordered by the Commission pursuant to N.C.G.S. § 97–25. However, again, keep in mind the provision of Rule 612(i), and whether such deposition is actually necessary, as opposed to stipulating relevant medical evidence into the record. Note that relevant medical evidence is not limited to medical records, but could also include the doctors' written responses to medical questionnaires posed by one or both parties.

The Rule does allow the parties to take additional depositions at their own expense, beyond the two or three set out in Rule 612(c). However, please note that if the employee obtains a favorable ruling from the Commission on the claim, and the ruling is either not appealed or the employer's appeal is dismissed or withdrawn, the employer shall reimburse the employee the cost of such additional expert depositions.

Rule 612(e) does allow for additional depositions to be taken at the employer's expense in exceptional, unique, or complex cases. In making a determination whether such additional depositions are required, the Rule lists eight factors to be considered by the Commission.

Rule 612(h) provides that if the claimant is unrepresented at the time of the full evidentiary hearing, the Deputy Commissioner shall confer with the parties and determine the best method for presenting medical evidence if necessary and the party responsible for doing so. Sometimes, the Commission will require the parties to submit written questions to the medical provider and in other instances may actually order the deposition of a treating physician. While the rule does not address situations where the employer is unrepresented, with the increase in claims involving noninsured employers, there may be more instances where a noninsured employer is not represented at a hearing. Presumably, this same rule would apply in that circumstance.

Additional considerations in planning for expert depositions include the order and timing of such depositions. For example, is the deposition one which involves the case-in-chief, or is simply something to rebut the testimony of an already deposed expert? Both parties may have different opinions regarding the proper timing of these depositions and the timing of such depositions will also be greatly determined by the physician's availability within the 60-day timeframe allowed to complete such depositions. Normally, the Commission will, for good cause shown, grant extensions beyond the 60 days allowed by the Rule. However, parties that routinely request extensions simply because they haven't made efforts to depose doctors in a timely manner, may find themselves having more difficulty obtaining extensions when actually necessary. Furthermore, Rule 613(a) requires the parties to not only identify all expert witnesses to be deposed within 15 days following the hearing, but requires the deposition dates to also be listed.

A physician's reliance on the opinions of other doctors and the weight of the opinions of that physician are discussed in other portions of this manuscript. Normally the use of authoritative medical literature/learned treatises are admissible, if the expert testifies that such authorities are reliable and generally accepted in the field.

The cost for witness fees associated with deposing an expert are set by the Commission. Rule 613 discusses the mechanics of obtaining the order of the commission and timing requirements for submitting the request for an expert witness fee and payment of such fee. Basically, the party that noticed the deposition is required to submit the fee invoice to the Commission within 10 days after receiving the expert's fee invoice. Note that the invoice should be received after the expert's deposition and there is no requirement that it be submitted to the Commission until the deposition has actually taken place. Many times, physicians will attempt to be paid "up front." Our statute and rules require that the expert's fee be approved by the Commission and that such fee is determined after the deposition itself.

Rule 613(b) lists the eight items that are required in the cover letter to the Commission with the invoice requesting approval of an expert witness fee. In addition, the parties are required to submit a proposed order for approval of the fee. Thereafter, the Commission shall issue an order setting the deposition costs of the expert, which shall include the expert's time for preparing for the deposition, if applicable.

Please note that once the fee order is entered, the party responsible for such fee (normally the employer for the first two or three depositions) must make payment within 30 days of entry of that order. Failure to do so **SHALL** result in in a 10% penalty being added to the fee granted in the order.

There are no specific guidelines regarding the amount of expert fees to be awarded by the Commission, such as a fee schedule. Rather, each Deputy Commissioner has discretion to award a fee they deem appropriate. This may result in very different fee amounts being awarded depending on the Deputy Commissioner or the invoice amount submitted.

There are some known general guidelines that Deputy Commissioners may follow, but there is nothing specifically set by statute or fee schedule. Generally, Deputy Commissioners want to make certain that doctors remain in the Industrial Commission system, and therefore, will generally approve a reasonable fee as submitted without any reductions. As stated above, the Rule does require that the fee include a physician's preparation time for the deposition. Therefore, even if the invoice does not include preparation time, some Deputy Commissioners may actually increase the expert fee awarded to a physician to account for such preparation.

Pre-Hearing

Rule 612(a): "Prior to a hearing … [t]he parties shall stipulate … to the admission of all relevant medical records, reports, and forms, as well as opinion letters from the employee's health care providers with the goal of minimizing the use of post-hearing depositions. The parties shall state all experts to be deposed post-hearing."

Hearing/within 15 days post-hearing

Rule 613(a): "The parties shall file … within 15 days following the hearing, a list identifying all expert witnesses to be deposed and the deposition dates…."

Rule 612(b): The Deputy Commissioner "may order expert depositions to be taken [within] 60 days from the date of the hearing…."

Post-hearing expert depositions

Rule 612(c): "The employer shall pay for the costs of up to two post-hearing depositions requested by the employee of health care providers who evaluated or treated the employee. The employer shall also bear the costs of a deposition of a second opinion doctor … pursuant to G.S. 97-25."

Rule 612(d): Additional depositions (beyond the two or three above): "costs thereof shall be borne by the party noticing the depositions…."

Exceptions

Rule 612(e): "In … cases involving exceptional, unique, or complex injuries or diseases, the Commission may allow additional depositions … to be taken at the employer's expense … when necessary to address the issues in dispute…."

Factors the Commission "shall consider when determining whether or not the employer shall bear the costs of such depositions" are listed 1-8 in Rule 612(e).

Post-hearing lay depositions

Rule 612(j): "Non-expert evidence may be offered after the hearing … by order of a Deputy Commissioner or Commissioner. The costs of obtaining non-expert testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission in the interests of justice or to promote judicial economy."

Common scenarios in which Deputies may allow post-hearing lay depositions:

- Prohibitive travel
- Schedule conflicts
- Small employer
- Hearing running late in the day
- New information learned at the hearing

04 NCAC 10A .0612 DEPOSITIONS

(a) Prior to a hearing before a Deputy Commissioner, the parties shall confer to determine the methods by which medical evidence will be submitted. The parties shall stipulate in a Pre-Trial Agreement to the admission of all relevant medical records, reports, and forms, as well as opinion letters from the employee's health care providers with the goal of minimizing the use of post-hearing depositions. The parties shall state all experts to be deposed post-hearing. The parties shall certify that the parties have conferred to determine the methods by which medical evidence will be submitted. If there is a disagreement about the stipulation of medical evidence, the parties shall state the nature and basis of the disagreement.

(b) When medical or other expert testimony is requested by the parties for the disposition of a case, a Deputy Commissioner or Commissioner may order expert depositions to be taken on or before a day certain not to exceed 60 days from the date of the hearing; provided, however, the time allowed may be enlarged or shortened in the interests of justice or to promote judicial economy, or where required by the Act.

(c) The employer shall pay for the costs of up to two post-hearing depositions requested by the employee of health care providers who evaluated or treated the employee. The employer shall also bear the costs of a deposition of a second opinion doctor selected jointly by the parties or ordered by the Commission pursuant to G.S. 97-25.

(d) The parties may notice depositions of additional experts, and the costs thereof shall be borne by the party noticing the depositions; provided, however, if a ruling favorable to the employee is rendered and is not timely appealed by the employer, or the employer's appeal is dismissed or withdrawn, then the employer shall reimburse the employee the costs of such additional expert depositions.

(e) In claims pursuant to G.S. 97-29(d) or cases involving exceptional, unique, or complex injuries or diseases, the Commission may allow additional depositions of experts to be taken at the employer's expense, when requested by the employee and when necessary to address the issues in dispute, in which case the employee shall state, and the Commission shall consider when determining whether or not the employer shall bear the costs of such depositions such factors as:

(1) the name and profession of the proposed deponent;
(2) if the proposed deponent is a health care provider, whether the health care provider evaluated, diagnosed or treated the employee;
(3) the issue to which the testimony is material, relevant and necessary;
(4) the availability of alternate methods for submitting the evidence and the efforts made to utilize alternate methods;
(5) the severity or complexity of the employee's condition;
(6) the number and complexity of the issues in dispute;
(7) whether the testimony is likely to be duplicative of other evidence; and
(8) the opposing party's position on the request.

(f) The term "costs" as used in this Rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, if applicable. The term shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee. The term shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1.

(g) Notwithstanding Paragraphs (c) and (d) of this Rule, the parties may come to a separate agreement regarding reimbursement of deposition costs, which shall be submitted to the Commission for approval.

(h) If the claimant is unrepresented at the time of a full evidentiary hearing before a Deputy Commissioner, the Commission shall confer with the parties and determine the best method for presenting medical evidence, if necessary, and the party responsible for bearing associated costs.

(i) If a party refuses to stipulate to relevant medical evidence, and as a result, the case is reset or depositions are ordered for testimony of medical or expert witnesses, a Deputy Commissioner or Commissioner may assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation, pursuant to G.S. 97-88.1.

(j) All evidence and witnesses other than those tendered as an expert witness shall be offered at the hearing before the Deputy Commissioner. Non-expert evidence may be offered after the hearing before the Deputy Commissioner by order of a Deputy Commissioner or Commissioner. The costs of obtaining non-expert testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission in the interests of justice or to promote judicial economy.

History Note: Authority G.S. 97-26.1; 97-80(a); 97-88; 97-88.1;

Eff. June 1, 1990;
Amended Eff. November 1, 2014; June 1, 2000.

04 NCAC 10A .0613 EXPERT WITNESSES AND FEES

(a) The parties shall file with the Deputy Commissioner or Commissioner in accordance with Rule .0108 of this Subchapter within 15 days following the hearing, a list identifying all expert witnesses to be deposed and the deposition dates unless otherwise extended by the Commission in the interests of justice and judicial economy.

(b) After the deposition of each expert, the party that noticed the deposition shall, within 10 days after receiving the expert's fee invoice, file with the Deputy Commissioner or Commissioner in accordance with Rule .0108 of this Subchapter a request to approve the costs related to the expert deposition. In these requests, the party shall provide, in a cover letter along with the invoice (if available), the following:

(1) the name of the expert and the expert's practice;
(2) the expert's fax number;
(3) the expert's area of specialty and board certifications, if any;
(4) the length of the deposition;
(5) the length of time the expert spent preparing for the deposition, excluding any time meeting with parties' counsel;
(6) whether the Commission determined that the claim was filed pursuant to G.S. 97-29(d) or involved an exceptional, unique, or complex injury or disease;
(7) whether the deponent was selected by the employee in the Pre-Trial Agreement as an expert to be deposed at employer's expense; and
(8) the party initially responsible for payment of the deposition fee pursuant to Rule .0612 of this Section.

At the time the request is made, the requesting party shall submit a proposed Order that shows the expert's name, practice name and fax number under the "Appearances" section. The proposed Order shall also reflect the party initially responsible for payment of the deposition fee pursuant to Rule .0612 of this Section.

(c) The Commission shall issue an order setting the deposition costs of the expert. The term "costs" as used in this Rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, if applicable.

(d) Failure to make payment to an expert witness within 30 days following the entry of a fee order shall result in an amount equal to 10 percent being added to the fee granted in the Order.

(e) A proposed fee for cancellation of a deposition within five days of a scheduled deposition may be filed with the Deputy Commissioner in accordance with Rule .0108 of this Subchapter for consideration and approval if in the interest of justice and judicial economy.

(f) This Rule applies to all expert fees for depositions; provided, however, either party may elect to reimburse a retained expert that did not treat or examine the employee the difference between the fee awarded by the Commission and the contractual fee of the expert.

History Note: *Authority G.S. 97-26.1; 97-80(a); 97-80(d);*
Eff. January 1, 1990;
Amended Eff. February 1, 2016; November 1, 2014; January 1, 2011; June 1, 2000.

Chapter 6 entitled "Proving Causation in Workers' Compensation Cases" and authored by Narendra Ghosh and Martha Geer is included in the third edition of *North Carolina Workers' Compensation Law: A Practical Guide to Success at Every Stage of a Claim* published by LexisNexis and the NC Advocates for Justice (2016) and edited by Gina Cammarano and Valerie Johnson.

A portion of this chapter (V. "Issues Regarding Proof of Causation") is include below. For details and to buy a copy of this book, visit lexisnexis.com/ncaj.

CHAPTER 6

PROVING CAUSATION IN WORKERS' COMPENSATION CASES[1]

CONTENTS

[1] The author wishes to express sincere appreciation to Paul Smith and Narendra K. Ghosh, both of Patterson Harkavy LLP, who updated the research for this chapter.

V. ISSUES REGARDING PROOF OF CAUSATION

Sixty years ago, the North Carolina Supreme Court held that evidence regarding causation "must be such as to take the case out of the realm of conjecture and remote possibility. . . ." *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942). What evidence is competent and sufficient to prove causation has become a frequently litigated question on appeal. Indeed, it may be the most commonly raised causation issue. This development undoubtedly arises from the appellate standard of review pursuant to which the Commission's findings of fact are binding so long as they are supported by competent evidence. In order to obtain a reversal in the face of adverse testimony, the appellant is left to argue that the evidence was not "competent."

A. The Requirement of Expert Testimony

In *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980), the Court noted that "[t]he quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." The Court acknowledged that, in "many instances," the evidence will be such that a layman can assess causation. *Id.* When, however, "the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, *only an expert* can give competent opinion evidence as to the cause of the injury." *Id.* (emphasis added). *See also Poe v. Raleigh/Durham Airport Auth.*, 121 N.C. App. 117, 125, 464 S.E.2d 689, 694 (1995) ("*Click* stands for the proposition that expert medical testimony will be required to establish causation in the more complicated cases involving disc injuries.").

In *Cannizzaro v. Food Lion*, 198 N.C. App. 660, 666, 680 S.E.2d 265, 269 (2009) (quoting *Maloney v. Wake Hospital Systems, Inc.*, 45 N.C. App. 172, 178, 262 S.E.2d 680, 683, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980)), the Court of Appeals emphasized that even when expert testimony is necessary regarding a medical question, "'[t]he common law does not require that the expert witness on a medical subject shall be a person duly licensed to practice medicine.'" The Court proceeded—not surprisingly—to find that a licensed psychologist with a doctorate in neurological and cognitive psychology who had served as the director of a brain injury rehabilitation center was qualified to give expert medical testimony as to whether a work-related traumatic brain injury caused the plaintiff's condition.

In *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 380, 293 S.E.2d 594, 596 (1982), the Court of Appeals applied *Click* in finding "a total lack of proof of causation." Although a doctor diagnosed the plaintiff as suffering a lumbosacral strain, the court found that "[t]here was no medical evidence indicating how the strain might have been sustained. . . . [and] without the guidance of expert opinion as to whether the accident could or might have resulted in her injury, there is no proper foundation for a finding by the Commission regarding the origin of plaintiff's back injury." *Id.*

See also Richardson v. Maxim Healthcare/Allegis Group, 362 N.C. 657, 664-65, 669 S.E.2d 582, 587 (2008) (holding that Commission erred in concluding that because breast implant replacements should be symmetrical, replacement of left breast implant was compensable when only right implant was damaged: "Plaintiff cites no testimony to support the Commission's finding, referring only to Dr. Bowers' testimony that plaintiff told him that she thought there had been bilateral loss in the size of the implants. Although it seems logical that symmetry is desirable, our review is limited to the evidence in the record, and on this point, we find none."); *cf. Blalock*, 209 N.C. App. at 233, 703 S.E.2d at 900 (finding attorney's fees warranted under N.C. Gen. Stat. §97–88.1 when defendant's only response to plaintiff's expert testimony was based on "common sense").

By way of contrast, the court in *Slizewski v. International Seafood, Inc.*, 46 N.C. App. 228, 234, 264 S.E.2d 810, 814 (1980), found that the circumstances of that case fell into the category of cases not requiring an expert witness to establish causation: an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence, and prior good health. The *Slizewski* plaintiff was healthy prior to his fall with no history of seizures, paralysis, or visual disability; he fell landing on his head and immediately began having convulsions; he was unconscious following the accident; and when he woke up, he was paralyzed on his left side and unable to speak or see well. The court concluded that "[u]nder these circumstances, the fact that the accident caused the injuries can reasonably be inferred." *Id.* at 235, 264 S.E.2d at 814. *See also Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 319, 636 S.E.2d 824, 828 (2006) (whether plaintiff would have broken her ankle had her wrist not been injured did "not involve a complicated medical question" and, therefore, plaintiff's testimony alone was sufficient); *McCrary v. King Bio, Inc.*, 225 N.C. App. 378, 387-88, 737 S.E.2d 761, 767 (2013) (holding similarly for wrist pain that occurred immediately after accident where wrist "popped").

This principle regarding the need for expert testimony also means that a Commission's finding of fact based on expert testimony is not insufficient as a matter of law based solely on the testimony of the plaintiff regarding his beliefs about his injury when he "is not a medical doctor, was not competent to diagnose himself, and his statements cannot render [the expert's] testimony incompetent. . . ." *Erickson v. Siegler*, 195 N.C. App. 513, 524, 672 S.E.2d 772, 779 (2009) (holding that plaintiff's testimony that he felt a pop in his back rather than a pop in his neck was not sufficient to negate expert testimony that neck injury was causally related to compensable back injury).

In the context of occupational diseases, our courts have held that the proof of a causal connection between the disease and the employee's occupation is "not restricted to consideration of expert medical testimony," *Matthews*, 160 N.C. App. at 610, 586 S.E.2d at 839, but may also be accomplished using circumstantial evidence, including evidence as to the following factors: "(1) the extent of exposure to the disease or disease-causing agents during employment, (2) the

extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history." *Booker v. Duke Medical Center*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979).

B. Competency of Expert Testimony

Perhaps the most actively litigated issue in the causation area is whether an expert's testimony is competent—not based on speculation—and whether it is sufficient to prove causation. The Supreme Court first evaluated what type of expert testimony is sufficient to establish causation in *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000), in which the Court stressed that when "expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." In *Young*, a case involving fibromyalgia following a lumbosacral sprain, the Court found the expert testimony inadequate based on the fact (1) that fibromyalgia is a controversial condition, (2) that it cannot be objectively studied, (3) that it occurs "[f]ar and away" for unknown reasons, and (4) that, although the doctor testified that there were several potential causes of the plaintiff's fibromyalgia requiring additional studies, he had not conducted the necessary testing to exclude those potential causes. *Id.* at 231, 538 S.E.2d at 915-16. The doctor ultimately testified that he could not assign a cause for fibromyalgia other than by *post hoc ergo propter hoc*, an insufficient basis "where the threshold question is the cause of a *controversial* medical condition." *Id.* at 232, 538 S.E.2d at 916 (emphasis added). *Young* addressed, but did not resolve, the question of the phrasing of the expert's opinion. The Court expressly acknowledged the admissibility of "could" or "might" expert testimony, but cautioned that it may not be sufficient if the evidence establishes that this testimony was actually a "guess." *Id.* at 233, 538 S.E.2d at 916.

The Supreme Court answered the question of the sufficiency of "could" or "might" testimony in *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003). The Court first acknowledged that parties, prior to the amendment of the Rules of Evidence, were required—in order to avoid invading the province of the jury—to ask the expert whether a particular event "could" or "might" have produced a particular result; they could not ask whether it did in fact produce the result. *Id.* at 232, 581 S.E.2d at 753. The Court observed that "[w]hile the 'could' or 'might' question format circumvented the admissibility problem, it led to confusion that such testimony was sufficient to prove causation." *Id.* at 233, 581 S.E.2d at 753. The Court held: "Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* (internal citations and quotation marks omitted). The Court explained that "[d]octors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation." *Id.* at 234, 581 S.E.2d at 754. The Court added that "[a]lthough medical certainty is not required," the failure of an

expert to express an opinion "to any degree of medical certainty" is insufficient to prove causation. *Id.*

Since *Holley*, the Court of Appeals has issued numerous decisions discussing the competency of expert witness testimony. Although the arguments of counsel and the opinions do not necessarily reflect the distinction between *Young* and *Holley*, those opinions actually address two different concepts. In *Young*, the question was whether the doctor's testimony amounted to speculation, while in *Holley*, the Court was focusing more on testimony as it relates to the standard of proof.

In *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 591-92, 654 S.E.2d 254, 261-62 (2007), the defendants argued, relying upon *Young*, that the record did not contain competent evidence regarding the cause of the plaintiff's subdural hematomas when that cause could not be definitively established. The Court of Appeals concluded that *Young* was not analogous because "[u]nlike fibromyalgia, there are physical tests which can be performed to indicate whether a person has subdural hematomas, and one of those tests was performed in the present case." *Id.* at 591, 654 S.E.2d at 262. The Court noted that the record contained an MRI following the accident that showed the hematomas, and the plaintiff had presented testimony that a common cause of subdural hematoma is head trauma of the type suffered by the plaintiff. Although the defendants argued that the subdural hematomas could have developed from pre-existing undiagnosed small strokes, from spontaneous hemorrhaging due to a medication, or from an intervening fall between the accident and the MRI, the Court held that "based on plaintiff's medical records and the testimony of treating physicians, we hold there is sufficient evidence to support the Commission's findings that plaintiff's initial head injury and later subdural hematoma were the result of the 2 June 2003 motor vehicle accident." *Id.* at 592, 654 S.E.2d at 262.

Young has given rise in particular to arguments that expert testimony was incompetent because it relied too heavily on a temporal relationship between the accident and the symptoms. In *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 156-57, 619 S.E.2d 888, 894 (2005), as in *Young*, the employee was suffering from fibromyalgia. The Court of Appeals upheld the Commission's finding of causation after distinguishing the testimony of the plaintiff's expert from that of the expert in *Young*: "Dr. Irwin's causation testimony was not mere speculation and was not entirely premised on the temporal relationship between [the plaintiff's] injury at work and her development of fibromyalgia. Rather, although this temporal relationship played a role in the diagnosis, Dr. Irwin also considered, tested for, and excluded other causes of her condition." *Id.*

The Court of Appeals also rejected the argument that expert testimony was incompetent based on only a temporal relationship in *Jones v. Steve Jones Auto Group*, 200 N.C. App. 458, 684 S.E.2d 497 (2009), *disc. review denied*, 363 N.C. 855, 694 S.E.2d 205 (2010), in which the plaintiff alleged that his asthma and other related symptoms were caused by exposure to mold at work. The Court

found the expert testimony "competent evidence to support the Commission's findings of fact that Plaintiff's exposure to mold at his place of work caused his illness" when one expert testified that the combination of the plaintiff's symptoms, the time course of their onset, and the plaintiff's response to therapy strongly suggested that the illness was caused by mold, and the second expert testified that he did not know of another irritant or exposure, other than mold, that could have been the primary cause of the plaintiff's symptoms. *See also Kelly v. Duke University*, 190 N.C. App. 733, 740, 661 S.E.2d 745, 749 (2008) (holding that although expert testified that it was possible non-work related condition caused employee's death, evidence was sufficient when expert testified that it was "'more likely than not"' that decedent's compensable diabetes caused death and opinion was not based just on temporal sequence of events, but also on statistical information and expert's "knowledge of the history of decedent's condition"); *Pickett v. Advance Auto Parts*, __ N.C. App. __, 782 S.E.2d 66, 72 (2016) (rejecting challenge based on *Young*, in part because temporal proximity can be relevant, stating it is "obvious to this Court that temporal sequence or proximity is not only relevant, but a necessary consideration in diagnosing psychological conditions such as *post*-traumatic stress disorder").

The Court of Appeals has additionally rejected attempts to evade the standard of review by recharacterizing challenges to an expert's credibility as challenges to the expert's competence. *See Huffman v. Moore County*, 208 N.C. App. 471, 489, 704 S.E.2d 17, 30 (2010) (concluding that defense claim that plaintiff's expert was incompetent due to his testimony being both outside his area of expertise and based on incorrect versions of the fact was actually a challenge to expert's credibility and not properly reconsidered on appeal).

With respect to the *Holley* analysis regarding the degree of certainty of the expert's opinion, the Supreme Court has weighed in further through a series of *per curiam* opinions. In *Edmonds v. Fresenius Medical Care*, 359 N.C. 313, 608 S.E.2d 755 (2005), the Supreme Court reversed *per curiam* for the reasons in the dissenting opinion, 165 N.C. App. 811, 817, 600 S.E.2d 501, 505 (2004) (Steelman, J., dissenting). In *Edmonds*, the critical issue was the linking of the administration of non-steroidal anti-inflammatory drugs to the plaintiff's reduced renal function. The dissent adopted by the Supreme Court pointed out that the Commission had specifically found that the expert had testified only that the drugs possibly or could or might have caused the plaintiff's renal problems and could not give an opinion to a reasonable degree of medical certainty on causation. *Id.* at 818, 600 S.E.2d at 506. The Commission relied not only on this testimony, but also on testimony of other witnesses that a short exposure to non-steroidal anti-inflammatories can result in renal failure. According to the dissent, "[t]he Commission thus attempted to link together the testimony of several expert witnesses and render its own medical opinion that the medications 'more likely than not worsened or exacerbated her pre-existing kidney problems.'. . . It is not the role of the Commission to render expert opinions. In cases involving complex medical questions, only an expert can give opinion evidence as to the cause of an injury." *Id.* at 818-19, 600 S.E.2d at 506. The dissent, therefore, concluded that

the Commission should be reversed on the issue of causation. *Id.* at 819, 600 S.E.2d at 506-07.

In *Adams v. Metals USA*, 360 N.C. 54, 619 S.E.2d 495 (2005), the Supreme Court affirmed the Court of Appeals opinion *per curiam*, 168 N.C. App. 469, 608 S.E.2d 357 (2005). In *Adams*, although the doctor had testified that he could not express an opinion to a reasonable degree of medical certainty whether a fall from a ladder had caused the plaintiff's back injury, the Court observed that "testimony attesting 'medical certainty is not required.'" *Id.* at 482, 608 S.E.2d at 365 (quoting *Holley*, 357 N.C. at 234, 581 S.E.2d at 754). The Court added: "The fact that the treating physician in this case could not state with reasonable medical certainty that plaintiff's accident caused his disability is not dispositive—the degree of the doctor's certainty goes to the weight of his testimony.'" *Id.* at 483, 608 S.E.2d at 365. The Court concluded that there was competent evidence of causation when the doctor testified (1) that if the plaintiff was asymptomatic before he fell off the ladder and developed symptoms after he fell, "then I would certainly believe that the falling off the ladder was the cause of his difficulty"; (2) that the development of the plaintiff's symptoms was consistent with the injury occurring from the fall; and (3) that, although a disc herniation can result from everyday activities, the doctor had no indication that everyday activities caused the herniation. *Id.* at 482, 608 S.E.2d at 365. The Court concluded: "This testimony, combined with the additional evidence in the case, including the history and medical testimony, provided competent record evidence which supports the Commission's finding with respect to causation." *Id. See also Erickson*, 195 N.C. App. at 525, 672 S.E.2d at 780 (holding that expert's inability to testify to reasonable degree of medical certainty did not render testimony incompetent and insufficient when he testified that he "'would have to say it is more likely'" that the accident caused plaintiff's neck injury); *Booker-Douglas v. J&S Truck Serv., Inc.*, 178 N.C. App. 174, 178-79, 630 S.E.2d 726, 730 ("However, medical certainty from the expert is not required, and even if an expert is unable to state with certainty that there is a nexus between an event and an injury, his testimony relating the two is at least some evidence of causation if there is additional evidence which establishes that the expert's testimony is more than conjecture."), *disc. review denied*, 360 N.C. 644, 636 S.E.2d 803 (2006); *Fontenot v. Ammons Springmoor Assocs.*, 176 N.C. App. 93, 102, 625 S.E.2d 862, 868 (2006) ("Even if an expert is unable to state with certainty that there is a nexus between an event and an injury, his testimony relating the two is at least some evidence of causation if there is additional evidence which establishes that the expert's testimony is more than conjecture."); *Wyatt v. Haldex Hydraulics*, __ N.C. App. __, 768 S.E.2d 150, 158 (2014) (concluding that objections regarding physician's "inability to pinpoint the exact source of Plaintiff's [condition] go more to the weight of his opinion than its competence").

It should also be noted that another area of litigation relating to *Young* competency may involve *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d

674 (2004), and *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), much as lawyers used to argue *Daubert*. In *Legette v. Scotland Mem. Hosp.*, 181 N.C. App. 437, 454, 640 S.E.2d 744, 755 (2007), defendants argued that the Commission erred in relying upon the testimony of a particular expert because his testimony was "not sufficiently reliable" under the standard in *Goode* and *Howerton*. The Court noted that "[i]t appears that our courts have not decided whether the standard for admissibility of expert testimony set forth in *Goode* and *Howerton* applies in workers' compensation cases," but held, even assuming that the standard did apply, the expert's testimony was sufficiently reliable. *Id.* at 454-55, 640 S.E.2d at 755-56. Note also that Rule of Evidence 702(a) was amended in 2011 to use the *Daubert* standard instead, which may eventually impact workers' compensation cases. *See State v. McGrady*, __ N.C. __, 787 S.E.2d 1, 7-11 (2016).

In terms of the language used by an expert, *Adams* seems to indicate that testimony need not specifically state that the opinion is to "a reasonable degree of medical certainty." On the other hand, as the Court of Appeals stated in *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47, *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005), "it appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases. Expert testimony that a work-related injury 'could' or 'might' have caused further injury is insufficient to prove causation when other evidence shows the testimony to be a 'guess or mere speculation.' However, when expert testimony establishes that a work-related injury 'likely' caused further injury, competent evidence exists to support a finding of causation." *See also Davis v. City of New Bern*, 189 N.C. App. 723, 728, 659 S.E.2d 53, 57 (2008) ("Plaintiff concedes that his evidence consists of 'could or might' expert testimony regarding the cause of plaintiff's injury. Plaintiff, however, argues that there is no evidence indicating that the testimony was guess work or mere speculation under *Edmonds*. Simply put, a plaintiff may not rely on 'could' or 'might' expert testimony to establish causation where there is some evidence that the testimony was speculative."); *Chaffins v. Tar Heel Capital Corp.*, 230 N.C. App. 156, 161, 750 S.E.2d 536, 540 (2013) (finding insufficient expert testimony that causation was "at least as likely as not," "possible," or "50/50").

The Court of Appeals' standard of review appears to be playing a role in application of the *Holley* rule. Thus, the Court of Appeals has held that the Commission could properly find testimony insufficient when an expert based his opinion on a "medical assumption" that a work-related incident "should be implicated as the culprit" in the employee's condition. *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 437, 637 S.E.2d 299, 303 (2006). The Court, however, based its ruling on the fact that "[t]he degree of a doctor's certainty goes to the weight of the testimony and the weight given expert evidence is a duty for the Commission and not this Court." *Id.* In *Avery v. Phelps Chevrolet*, 176 N.C. App. 347, 354-55, 626 S.E.2d 690, 695 (2006), the Court held although some of the medical experts testified that the plaintiff's injury "could" or "might" have been the result of the workplace accident, the Commission's finding of causation was

conclusive on appeal because one expert testified that it was "likely" plaintiff's cervical disc herniation was related to the workplace accident. The Court reasoned: "Because our standard of review is to determine whether there is 'any competent evidence in the record' to support the Commission's findings, and because our Supreme Court has found expert testimony that an accident 'likely' caused a subsequent injury to be competent evidence to support a finding of causation, we must overrule defendants' first argument that the medical evidence was insufficient to establish a causal connection between plaintiff's workplace accident and his cervical spine injury." *Id.* at 355, 626 S.E.2d at 695. *See also Castaneda v. International Leg Wear Group*, 194 N.C. App. 27, 32, 668 S.E.2d 909, 913 (2008) (holding that expert's admission that "'you can't tell for sure'" what the cause of annular tear was did not amount to speculation when expert testified that it was "'quite possible'" and "'more likely than not'" that tear was caused by plaintiff's work-related injury); *Carr v. Dep't of Health & Human Services (Caswell Ctr.)*, 218 N.C. App. 151, 155, 720 S.E.2d 869, 873 (2012) (testimony that fall "theoretically could" have caused the spine injury not speculative when expert also testified causation was "more likely than not" and MRI scan supported the opinion).

The question has arisen when a doctor's testimony on direct examination is arguably inconsistent with his testimony on cross-examination. The Supreme Court adopted the dissent on this point in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005), *rev'd for the reasons in the dissent*, 166 N.C. App. 563, 603 S.E.2d 552 (2004). Although some of the doctor's testimony supported the Commission's finding of causation, in other places, the expert used language such as "my suspicion is" and "I suspect." The dissent, as adopted by the Supreme Court, concluded that reliance by the majority on this latter language violated the standard of review: "Here, where the stipulated records and the testimony of Dr. Harris do support the Commission's findings, when viewed in light of the standard of review, the finding [of causation] should be upheld. I do not believe it is the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence. As demonstrated above, much of the evidence reveals that the doctor expressed her opinions repeatedly and without equivocation. Thus, I conclude that the Commission's finding is supported, and that we should affirm the opinion and award." 166 N.C. App. at 573-74, 603 S.E.2d at 558. *See also Kashino v. Carolina Veterinary Specialists Med. Servs.*, 186 N.C. App. 418, 423, 650 S.E.2d 839, 842 (2007) (when Commission found that plaintiff had failed to prove causation, that finding was supported by competent evidence during the doctor's cross-examination, even though his testimony on direct examination would support a finding of causation).

On the other hand, in *Chambers*, 360 N.C. at 615, 636 S.E.2d at 557, the Supreme Court examined a doctor's testimony on cross-examination on the

grounds that the "testimony on direct was clarified." During direct examination, the plaintiff's counsel had asked whether the plaintiff's work as a bus driver placed him at an increased risk of either aggravating or developing a left ulnar neuropathy. *Id.* The doctor testified that "[t]he statement of aggravation of the ulnar neuropathy I believe is very accurate," but expressed the view that whether repetitive motion "actually causes" entrapment neuropathy "isn't as clear cut as we would like it to be." *Id.* When the attorney repeated the question—including both aggravation and development—the expert responded, "I would believe so, yes." The Court pointed out that "[f]rom this testimony alone, it is not clear whether Dr. Adamson believed that plaintiff's employment placed him at a greater risk of *contracting* his condition than the general population." *Id.* The Court then turned to the cross-examination as clarifying the direct testimony. On cross, the doctor was asked: "I want to make sure I'm clear on what you have indicated, am I correct in understanding that in your opinion, you're not able to say that the bus driving activities caused the ulnar neuropathy, but that it could have aggravated the ulnar neuropathy?" *Id.* The doctor answered: "I think that's correct." *Id.* The Court, therefore, held that "[c]onsidering Dr. Adamson's testimony on cross-examination, plaintiff produced no evidence that his employment exposed him to a greater risk of contracting an occupational disease relative to the general public." *Id.* at 616, 636 S.E.2d at 557.

In related areas, the Court of Appeals has stated that if a doctor testifies that he would defer to the opinion of a second doctor as to causation, then the Commission's finding giving greater weight to the first doctor on the issue of causation would not be supported by competent evidence. *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 109-10, 549 S.E.2d 558, 562-63 (2001). The Commission is not, however, required to give greater weight to a treating physician's opinion as to causation over that of an expert who has only reviewed material supplied by counsel. *Carroll v. Town of Ayden*, 160 N.C. App. 637, 643, 586 S.E.2d 822, 827 (2003). And, a physician is not required to review or consider the medical records of another physician in reaching an expert opinion. *Hutchens v. Lee*, 221 N.C. App. 622, 627-28, 729 S.E.2d 111, 114 (2012) (holding this to be an issue of weight of the evidence, not competence).

Physician opinions are often challenged as being based on subjective information provided by the patient. Rejecting such challenges, the Court of Appeals has held: "The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination." *Adams*, 168 N.C. App. at 476, 608 S.E.2d at 362; *see also Jenkins v. Pub. Serv. Co. of N.C.*, 134 N.C. App. 405, 410, 518 S.E.2d 6, 9 (1999) ("A physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law."), *rev'd in part on other grounds*, 351 N.C. 341, 524 S.E.2d 805 (2000). Even a doctor's acknowledgment that a plaintiff is not wholly believable or credible does not render his opinion, based on plaintiff's statements, speculative and incompetent. *Calloway*, 137 N.C. App. at 485, 528 S.E.2d at 401.

With respect to the question of "significant contribution" for occupational disease cases, the Court of Appeals has held that actual use of the phrase "significantly contributing" need not be used, but the doctor's testimony must include some indication of the degree of contribution. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 355, 524 S.E.2d 368, 372, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). Testimony that work was a contributing factor without any specification as to the degree of contribution is insufficient to prove causation. *Id.*

The moral of these decisions is that counsel must be much more precise in eliciting opinions from experts. Advance preparation of the expert, including discussion of the degree of certainty with which the doctor is comfortable, may be critical to the testimony's competency and sufficiency to prove causation. At a minimum, an expert should be prepared to testify regarding probabilities or likelihood. Counsel's hypothetical question must not use "could," "might," or "possible," and it should not be phrased in the disjunctive. The question and answer should be as free from ambiguity as possible.