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North Carolina Workers' Compensation Case Law Update

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N.C.G.S. § 97-2 – Employee-Employer Relationship/Arising Out of/ in the Course of Employment

A. *Harris v. S. Comm. Glass*, ___ N.C. App. ___, 789 S.E.2d 735 (August 2016) (Zachary, J.) (New Injury by Accident/Specific Traumatic Incident; Material Aggravation; Apportionment of Liability)

FACTS:

On July 13, 2010, Plaintiff suffered a back injury while working for Southern Commercial Glass, Inc. ("Glass") at a jobsite in Georgia. After the injury, Plaintiff moved home to North Carolina, and the parties agreed to a change of jurisdiction from Georgia to North Carolina. After being terminated from employment with Glass, Plaintiff began working for Southeastern Installation, Inc. ("Southeastern") in 2012. Nevertheless, Glass continued to provide workers' compensation benefits. Thereafter, Glass went out of business and Plaintiff continued to work for Southeastern. On April 1, 2014, while working for Southeastern, Plaintiff bent over slightly and was unable to straighten his back. He was then written out of work by his authorized treating provider and remained out of work. Plaintiff's doctor recommended a fusion surgery, and Glass thereafter denied that Plaintiff was entitled to further benefits given that he had suffered a new injury while employed by Southeastern. Both Glass and Southeastern filed Form 61s denying Plaintiff's claim for benefits. Southeastern argued that Plaintiff's need for surgery was related to his prior July 2010 injury while working for Glass.

The Deputy Commissioner held that Plaintiff did not suffer a compensable injury by accident on April 1, 2014, and that his need for surgery was caused by the July 13, 2010, injury. The Full Commission reversed the Deputy Commissioner's Opinion and Award and found that Plaintiff had suffered a compensable specific traumatic incident on April 1, 2014, holding Southeastern solely responsible for benefits. Southeastern appealed to the Court of Appeals.

ISSUES:

1. Whether the Commission erred in finding that Plaintiff suffered a new compensable injury by accident resulting from a specific traumatic incident on April 1, 2014.

2. Whether the Commission erred in failing to apportion liability for Plaintiff's benefits between Glass and Southeastern.

3. Whether the Commission erred in its analysis of causation and material aggravation.

4. Whether the Commission erred in concluding that the April 1, 2014, incident constituted a new specific traumatic incident.

5. Whether the Commission erred in indicating that the *Parsons* presumption did not apply in this case while also applying the presumption in the alternative.

HOLDINGS:

1. No. The Court noted that the Commission is the sole judge of credibility and weight to be given conflicting testimony, and found that the Commission had placed more weight on Dr. Cohen's

testimony rather than Plaintiff's testimony regarding his recollection of the extent to which the April 1, 2014, incident differed from earlier episodes. The Court noted that the doctor had testified that, to a reasonable degree of medical certainty, the April 1, 2014, incident had caused Plaintiff's injury and materially aggravated his pre-existing back condition to the point of requiring the fusion surgery.

2. No. The Court held that apportionment was not required in this case, distinguishing between this case and *Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 677 S.E.2d 167 (2009). The Court emphasized that the Commission did not make a finding adopting the doctor's testimony that, in response to a hypothetical question, 70% of Plaintiff's need for surgery was related to his 2010 injury and 30% was related to the 2014 injury. The Court also noted that the hypothetical question posed to the doctor was premised on a hypothetical assumption that did not come to pass after the Commission rendered its decision.

3. No. The Court rejected the argument that the Commission had erred in its finding of causation and material aggravation by citing *Moore v. Fed. Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004).

4. No. The Court held that the Commission's finding that Plaintiff suffered a new compensable injury by accident on April 1, 2014, was based on expert medical testimony and not merely on the temporal connection between the incident and onset of pain. The Court further held that the expert medical testimony was not based on speculation and found that Plaintiff's doctor had testified to a reasonable degree of medical certainty that the April 1, 2014, incident materially aggravated Plaintiff's pre-existing condition.

5. No. The Court held that it was not obligated to provide "clarity for future matters" given that the Commission applied the *Parsons* presumption, despite its conclusion that the presumption did not apply to this case, and given that a reversal on this issue would not have changed the outcome for Defendants. The Court emphasized that its proper function was not to give advisory opinions or answer moot questions.

B. *Weaver v. Dedmon*, ___ N.C. App. ___, 801 S.E.2d 131 (May 2017) (Inman, J.) (Arising Out of and in the Course of Employment; Negligence Theory)

FACTS:

Plaintiff was employed as a fence builder. This position required Plaintiff to regularly operate a forklift and move fencing supplies around the outdoor storage yard in which the supplies were kept. Plaintiff testified that on the date of injury, he had just finished unloading supplies with the forklift and was about to return the forklift to the warehouse when he turned the forklift too quickly and it overturned. A witness was approximately 350 feet from Plaintiff just before the accident occurred. The witness testified he saw Plaintiff doing "donuts" with the forklift just prior to the accident. The witness had just turned his back to Plaintiff when he heard a loud noise and screaming. He ran over to Plaintiff and found Plaintiff underneath the forklift. Plaintiff sustained a crush injury, closed head injury, multiple fractures, liver and renal lacerations, splenic injury, and cardiac arrest.

Defendants denied the claim and asserted that Plaintiff had not sustained an injury by accident or specific traumatic event arising out of and during the course and scope of his employment. Following a hearing, the Deputy Commissioner entered an Opinion and Award denying Plaintiff's claim in its entirety. Plaintiff appealed to the Full Commission.

The Full Commission affirmed the Deputy Commissioner's Opinion and Award. The Commission found that the witness's testimony was credible because the witness was an unbiased, disinterested eyewitness of the events immediately preceding the accident. The Commission also found credible testimony by an accident reconstruction expert that photos of the tire impressions at the scene of the accident were consistent with the forklift having been driven in tight circles. The Commission concluded Plaintiff was "operating the forklift at such a speed to cause it to rollover," he was "joyriding" or "thrill seeking" when the accident occurred, and this activity bore no relationship to accomplishment of the duty for which Plaintiff was hired. The Commission further concluded that "to the extent Plaintiff may have initially performed some work-related tasks with the forklift, his decision to do donuts . . . was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment." The Commission concluded Plaintiff's injury did not arise out of and in the course of his employment and therefore, was not compensable. Plaintiff appealed.

ISSUES:

1. Whether the Commission's conclusions of law were actually findings of fact.

2. If so, whether these findings of fact were sufficient to support the Commission's legal conclusion that Plaintiff's operation of the forklift removed him from the scope of employment.

3. Whether the Commission erroneously applied a negligence analysis to deny compensation to Plaintiff.

HOLDINGS:

1. Yes. The Commission's conclusions regarding the lack of relationship between Plaintiff's activity on the forklift to the accomplishment of his employment duties and the proposition that Plaintiff may have initially been performing some work-related tasks with the forklift were findings of fact, not conclusions of law, as these determinations were reached through logical reasoning from the evidentiary facts.

2. No. The Commission's inconsistent factual findings were not sufficient to support a conclusion that Plaintiff was not in the scope of his employment at the time of the accident. The Commission's findings of fact that Plaintiff's actions both (a) bore no relation to his job duties and (b) that Plaintiff may have initially performed some work-related tasks with the forklift, were inconsistent. Therefore, the Court of Appeals was unable to determine whether the Commission's findings of fact supported the legal conclusion that Plaintiff's operation of the forklift removed him from the scope of employment.

3. Yes. The Commission's conclusion was based in findings regarding the speed and manner in which Plaintiff operated the forklift. These findings fail to address whether Plaintiff was operating the forklift in furtherance of his job duties and his employer's interest. These findings appear to impute negligence on the employee, indicating that the Commission reached its decision under a misapprehension of law. The Court of Appeals remanded this case to the Commission to weigh the evidence and re-determine the factual and legal issues necessary to resolve the claim.

DISSENT (Tyson, J.):

Since the Commission found that Plaintiff "may" have been initially engaged in a work-related task at the time of the accident, the majority's opinion concluded that the Commission's findings failed to support the conclusion that Plaintiff's injuries did not arise out of and in the course of his employment. Judge Tyson found that the majority opinion parsed the Commission's findings and conclusions and failed to apply the plain and ordinary meanings of the Commission's words. Whether Plaintiff initially performed work-related activities was inconsequential because the employee carries the burden of proving a causal connection between the employment and the injury. The Commission found that Plaintiff's joyriding or thrill seeking ultimately broke the causal connection between Plaintiff's employment and his injuries. Thus, Judge Tyson noted, the Commission's Opinion and Award denying Plaintiff compensation was consistent with precedent, was supported by competent evidence, and should have been affirmed.

Judge Tyson concluded the Commission did not erroneously apply a negligence standard to hold Plaintiff's injuries not compensable. Where the Commission's decision was based on Plaintiff's unreasonable actions, not the grossly negligent manner in which he performed them, Plaintiff had failed to carry his burden and compensation was properly denied. Here, nothing in the record showed the Commission relied on any negligence theory to deny compensation. Further, the Commission found Plaintiff's joyriding or thrill seeking was an unreasonable activity, and as such, Judge Tyson concluded the Commission did not erroneously apply a negligence standard.

Parsons Presumption

A. *Wilkes v. City of Greenville*, ___ N.C. App. ___, 777 S.E.2d 282 (October 2015) (Davis, J.) (Parsons Presumption; Futility of Seeking Employment)

FACTS:

Plaintiff was working as a landscaper and driving one of Defendant-Employer's trucks when a third-party ran a red light and collided with the truck. Plaintiff's truck then collided with a tree, breaking the windshield and deploying the airbags. He was transported to Pitt County Memorial Hospital, where he was treated for an abrasion on his head, broken ribs, and various injuries to his neck, back, pelvis, and left hip. He also underwent a brain MRI, which showed negative results for acute injury but did reveal some evidence of sinus disease resulting from a concussion.

Defendant-Employer filed a Form 19 reporting to the Commission that Plaintiff had, in the course of performing his duties as a landscaper, sustained injuries in a multi-vehicle accident. Defendants also

filed a Form 60 admitting Plaintiff's entitlement to compensation for injuries to his "ribs, neck, legs and entire left side." Thereafter, both parties filed Form 33s requesting that the claim be assigned for hearing. Defendants' Form 33 stated that the "[p]arties disagree[d] about the totality of plaintiff's complaints related to his compensable injury and need for additional medical evaluations." Plaintiff's Form 33 alleged that Plaintiff "[was] in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon."

A Deputy Commissioner entered an Order requiring Defendants to send Plaintiff for a one-time evaluation with a neurosurgeon of their choosing. If that neurosurgeon recommended additional treatment, Defendants were to provide that treatment. Another Deputy Commissioner later entered an Opinion and Award determining that Plaintiff's low back, knee, anxiety, depression, sleep disorder, tinnitus, headaches, and joint pain were all causally related to his compensable injury and ordering Defendant-Employer to pay all of Plaintiff's medical expenses. The Deputy Commissioner also concluded that Plaintiff demonstrated that it was futile for him to search for work because of pre-existing conditions such as age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and Plaintiff's physical conditions resulting from his compensable injury. The Deputy Commissioner concluded that Plaintiff was entitled to TTD compensation.

The Full Commission reversed the Deputy Commissioner's decision, holding that: (1) Plaintiff failed to meet his burden of demonstrating that his anxiety and depression were caused by his work-related accident; and (2) Plaintiff was no longer entitled to TTD benefits because he "presented insufficient evidence that a job search would be futile." Plaintiff timely appealed.

ISSUES:

1. Whether the Full Commission erred in concluding that Plaintiff was not entitled to medical compensation for his anxiety and depression because these conditions were not causally related to his work-related accident.

2. Whether the Full Commission erred in concluding that Plaintiff was not entitled to TTD benefits because he presented insufficient evidence that a job search would be futile.

HOLDINGS:

1. Yes. To find that Plaintiff's anxiety and depression were not caused by his work-related accident, the Full Commission relied upon conflicting testimony of physicians and psychologists who evaluated Plaintiff. Based on this, the Court held that it was evident that the Commission did not apply the rebuttable presumption under *Parsons v. Pantry, Inc.,* 126 N.C. App. 540, 485 S.E.2d 867 (1997), to Plaintiff's psychological symptoms and instead kept the burden on Plaintiff to demonstrate causation despite Defendants' prior admission of general compensability in the Form 60. The Court remanded this matter to the Commission so that it could apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms were casually related to his injury.

2. Yes. Plaintiff offered evidence of pre-existing conditions such as his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his compensable injury. Therefore, by introducing evidence of these pre-existing conditions, Plaintiff offered sufficient evidence that engaging in a job search would be futile so as to shift the burden to his employer to show that suitable jobs were available and that he was capable of obtaining suitable employment taking into account his limitations. Thus, because Plaintiff demonstrated the futility of engaging in a job search, and Defendants made no attempt to show that suitable jobs were available to Plaintiff, the Commission erred in ruling that Plaintiff was not temporarily totally disabled.

3. The Court distinguished the case at hand with its recent decision in *Fields v. H & E Equip. Servs., LLC*, ___ N.C. App. ___, 771 S.E.2d 791 (2015), where it held that the Plaintiff did not demonstrate that engaging in a job search would be futile because he "failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury . . . ." *Id.* at ___, 771 S.E.2d at 794-95. The Court noted that the present case was distinguishable from *Fields* factually, and took the opportunity to clarify that "a plaintiff is not required to present medical evidence or the testimony of a vocational expert on the issue of futility." *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 360, 734 S.E.2d 125, 129 (2012).

B. *Wilkes v. City of Greenville*, ___ N.C. ___, 799 S.E.2d 838 (June 2017) (Hudson, J.) (Parsons Presumption Extended; Proof of Disability; Expert Testimony to Show Inability to Earn Wages)

FACTS:

As outlined above. Defendants' petition for discretionary review to the N.C. Supreme Court was granted, and the Supreme Court considered the case.

ISSUES:

1. Whether Plaintiff met his burden of establishing that his anxiety and depression were the result of a work-related accident, and whether the *Parsons* presumption of compensability applied to give Plaintiff the benefit of a presumption that these conditions were related to his accident.

2. Whether the Commission erred in awarding Plaintiff disability payments for tinnitus made after January 18, 2011, without making findings on how tinnitus might have affected Plaintiff's ability to engage in wage-earning activities in light of his pre-existing and/or co-existing conditions.

HOLDINGS:

1. Yes, Plaintiff was entitled to a presumption of compensability regarding his anxiety and depression as "related to" his compensable condition when Defendants filed a Form 60 accepting Plaintiff's physical injuries and began paying temporary total disability compensation and medical compensation for the accepted injuries.

   The Court considered the scenarios where a presumption could arise in cases with an established compensable injury. The Court first addressed this issue in *Parsons*, where the plaintiff was assaulted and shot with a stun gun. The plaintiff met her initial burden of

establishing a compensable injury, specifically headaches, and the Commission ordered the defendants to pay the plaintiff's related medical treatment. The plaintiff later requested a hearing on the defendants' failure to pay such expenses, and the Commission denied that the defendants owed further medical treatment because the plaintiff had not introduced additional evidence of causation between her compensable injury and headaches at the time of the second hearing. The Court of Appeals reversed, holding that once a plaintiff establishes causation, she is entitled to a presumption that additional medical treatment for the accepted condition is related to the compensable injury (the *"Parsons* Presumption"). The Court found it unfair "to require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident . . . ."

Since that decision, the *Parsons* Presumption has been extended to Form 21 agreements accepting the injury and paying compensation, as well as in Form 60 cases involving direct payment. *See* N.C.G.S. §§ 97-18 and 97-82. Therefore, when compensability and liability are admitted (i.e., via a Form 21, a Form 60, or a Form 63 not contesting compensability), this "shall constitute an award of the Commission on the question of compensability and of the insurer's liability for the injury for which payment is made." The Court concluded that "an [award or] admission of compensability . . . entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury."

The Court rejected numerous arguments of Defendants. Defendants argued that an "award" under N.C.G.S. § 97-82(b) is only an admission that an employee suffered an accident arising out of and in the course of employment and that the specifics of any injury must still be determined by the Commission. The Court rejected this argument as narrow and contrary to the language, purpose, and spirit of the Act, as it would require the employee to "repeatedly 'build claims for medical compensation'" for an admittedly compensable injury. Further, the Court found that such a construction would allow the employer to admit compensability and have the right to direct medical treatment without accepting responsibility to provide medical compensation for any treatment until the employee proved relatedness to the compensable injury, contrary to N.C.G.S. § 97-25 as interpreted by *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980).

Defendants next argued that applying the *Parsons* Presumption to Form 60 filings discourages direct payment, upsets the framework of the Act, and converts the Act into a general health insurance policy. The Court found that applying the *Parsons* Presumption simply removed Plaintiff's burden of repeatedly proving treatment for injuries and symptoms causally related to the compensable condition. The Court explained that the presumption may be rebutted with evidence that the condition or treatment was not "directly related" to the compensable injury. The Court noted the complexity of medical issues and the difficulty in determining the extent of an injury at the time of an accident. Additionally, the Court noted that employers can utilize the Form 63 procedure and pay benefits without prejudice, investigate injuries without admitting liability, and still provide prompt payment to injured employees. Further, the Court

explained that the Act provided for an expedited "medical motions" procedure, which was utilized in this case and could be used to quickly rebut the presumption.

In this case, Defendants filed a Form 60 accepting Plaintiff's accident as compensable and began paying temporary total disability compensation and medical compensation for the initial injuries. Thus, Plaintiff was entitled to a rebuttable presumption that his additional conditions of tinnitus, anxiety, and depression were directly related to his compensable injuries. Because the Commission did not apply the presumption, instead placing the initial burden on Plaintiff to prove causation, it misapprehended the law. The Court of Appeals vacated the Commission's Opinion and Award and remanded for application of the presumption.

2. Yes, because the Commission failed to address the effects of Plaintiff's tinnitus in determining whether he lost wage-earning capacity, that portion of the Court of Appeals' decision was modified and remanded for further proceedings.

   The Commission terminated Plaintiff's TTD benefits, but the Court of Appeals reversed, relying on *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), and holding that Plaintiff was entitled to TTD benefits because evidence demonstrating his cognitive limitations was sufficient to demonstrate that any attempt to find other work would be futile.

   The Supreme Court explained that application of *Russell* was inappropriate in this case, where the Commission found numerous preexisting limitations, including Plaintiff's age (over sixty), limited IQ of 65, and limited education and work experience. While the Commission must take age, education, and prior work experience into account when determining disability, and while Plaintiff has the initial burden to show disability, once that is done, Defendants bear the burden "to show not only that suitable jobs are available, but also that plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508, 510 (2004).

   Defendants argued that, in reversing the Commission's termination of benefits, the Court of Appeals overruled *Fields v. H&E Equipment Services, LLC*, 240 N.C. App. 483, 771 S.E.2d 791 (2015) (holding that the plaintiff did not establish futility when he failed to present expert testimony on his inability to find work because of his work-related injury). The Court was unclear whether relying on *Fields*, Defendants were arguing that Plaintiff was required to put on expert testimony to demonstrate his inability to earn wages based on futility under *Russell*.

   Because *Russell* did not apply in this case, the Court declined to hold that an employee is required to use expert testimony to demonstrate his inability to earn wages. Furthermore, the Court reiterated that "[a] plaintiff's own testimony, as well as that of his lay witness, can be quite competent to explain how a plaintiff's injury and any related symptoms have affected his activities."

   The Commission found Plaintiff's evidence of tinnitus (consisting of complaints in the medical

records dating back to May 2010) to be credible, and that Plaintiff had therefore not reached maximum medical improvement with regard to tinnitus. The Commission awarded compensation for tinnitus, but made no findings on how this condition may have affected his ability to engage in wage-earning activities. For this reason, the Court remanded the case for further proceedings and findings addressing Plaintiff's wage-earning capacity in light of his compensable tinnitus in the context of his other pre-existing and/or co-existing conditions affecting his capacity to earn wages. *Medlin v. Weaver Cooke Construction, LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014) (requiring compensation for actual incapacity caused by an injury in light of the Plaintiff's actual preexisting conditions, rather than the degree of incapacity that would be suffered by a younger person with more education or work experience).

(*NOTE: The General Assembly amended N.C.G.S. § 97-82 in June 2017 and it was ratified on July 20, 2017. Session Law 2017-124.)

C. *Patillo v. Goodyear Tire and Rubber Co*., ___ N.C. App. ___, 794 S.E.2d 906 (December 2016) (Hunter, Jr., J.) (Reasonableness of Job Search; Parsons Presumption)

FACTS:

Plaintiff suffered a low back injury on February 16, 2011 while working as a press operator for Defendant-Employer. He was unloading tires from a flatbed press machine when a nearby flatbed became unattached and hit Plaintiff in his lower back, knocking him to the floor and causing pain to the back, hips, and legs. Plaintiff was evaluated at the on-site medical clinic and was restricted to "off-standard" work, which meant Plaintiff could not fully perform all his job functions and required assistance with performing his job. The day after the accident, Plaintiff was continued with off-standard restrictions to have help with large tires. He remained on off-standard work until April 4, 2011. Plaintiff applied for and was hired as a wind-up operator with Defendant-Employer, but ended up failing the certification test. As such, he then returned to on-standard work as a press operator on April 5, 2011. On May 13, 2011, Plaintiff was restricted to two weeks of sit-down work only. There was no sit-down work available and, as a result, Plaintiff went out of work on May 13, 2011.

Plaintiff filed a Form 33 request for hearing. A Form 60, 61, or 63 was never filed. The parties entered into a consent order wherein Defendants admitted Plaintiff suffered "some level of contusion to the lower back as a result of [the] accident." The Deputy Commissioner issued an Opinion and Award finding Plaintiff's injury compensable and awarding temporary total disability benefits between March 6, 2012 and the time of the hearing, but denied Plaintiff's request for prior temporary total disability benefits from May 13, 2011 and March 6, 2012. Defendants appealed to the Full Commission. The Commission thereafter issued an Opinion and Award finding that the consent order created a rebuttable presumption that Plaintiff's low back injury was related to the compensable February 16, 2011 injury. The Commission further found that Defendants failed to rebut the presumption that Plaintiff's need for medical treatment was causally related to the at-work injury and that, even without the presumption, Plaintiff had proved that his at-work injury caused his continuing back pain. The Commission therefore found Plaintiff was entitled to all related medical treatment. In regard to disability, the Commission found that Plaintiff failed to prove that he was disabled since March 6, 2012 because he failed to show that he had made a reasonable effort to return to work or that a job search would have been futile. Both Plaintiff and Defendants appealed to the Court of Appeals.

ISSUES:

1. Whether the Commission erred in finding that Plaintiff had not made a reasonable effort to find suitable employment.

2. Whether the Commission properly applied the *Parsons* presumption and considered whether Defendants had rebutted the presumption.

HOLDINGS:

1. Yes. The Court ultimately reversed and remanded in part, and affirmed in part. The Court reversed and remanded the Commission's finding that Plaintiff failed to make a reasonable effort to find suitable employment. The Court indicated that there is no general rule for determining the reasonableness of an employee's job search, but that the Commission has the discretion to decide whether an employee made a reasonable effort to return to work under the second prong of *Russell*. The Court also noted that the Commission must make findings of fact and conclusions of law regarding the reasonableness of a job search. The Court rejected Plaintiff's argument that he was not required to search for employment outside of Defendant-Employer in order for his search to be considered reasonable. The Court found that the Commission's opinion contained no explanation of its determination of reasonableness, and as such, remanded the case for an explanation.

2. Yes. The Court affirmed the Commission's application of the *Parsons* presumption and found that Defendants had not rebutted the presumption that Plaintiff's medical treatment was related to the at-work injury. The Court cited *Parsons* and *Perez* to note that the presumption of compensability for medical treatment applies to future symptoms allegedly related to the original injury, not just the original injury itself. The Court rejected Defendants' argument that they had only consented to the compensability of the contusion to Plaintiff's back and instead held that Plaintiff's continuing back pain was a future symptom related to the original compensable injury. The Court further found that Defendants had not rebutted the presumption of compensability because they were unable to show, through the medical testimony, that Plaintiff's low back pain was separate and distinct from his work injury.

D. *Bell v. Goodyear Tire & Rubber Co*., ___ N.C. App. ___, 798 S.E.2d 143 (March 2017) (Bryant, J.) (Compensable Injury; Causal Relationship; Trial Return to Work; Sanctions)

FACTS:

On May 12, 2007, Plaintiff was working as a tire builder for Defendant-Employer when she sustained an injury to her right shoulder, which Defendants accepted as compensable. Plaintiff underwent surgery and returned to work. Plaintiff re-injured her shoulder in January of 2010 while at work. Following the incident in 2010, Plaintiff began treating with Dr. Robert Carroll. Dr. Carroll assessed Plaintiff at maximum medical improvement on March 14, 2012, and Plaintiff ultimately returned to her pre-injury employment. On September 6, 2013, Plaintiff was lifting at work when she again injured her right shoulder. She returned to work briefly from October 3, 2013 to October 23, 2013, but again reported pain. Plaintiff was written out of work and diagnosed with proximal biceps tendinitis. Defendants argued this new diagnosis of biceps tendinitis was not causally related to the May 12, 2007

injury. Defendants contended that Plaintiff's injury was to a different part of the body — the biceps tendon rather than the superior labrum and rotator cuff which Plaintiff injured in 2007 — and therefore Defendants did not owe indemnity benefits.

Plaintiff's three physicians, Dr. Kevin Speer, Dr. Christopher Barnes, and Dr. Carroll, testified that they could not say to a reasonable degree of medical certainty whether the September 6, 2013 injury to the biceps tendon was related to the original compensable injury. However, Dr. Barnes and Dr. Carroll both testified that the superior labral repair surgery that Plaintiff underwent in 2007 weakened the complex where her biceps attached to the shoulder socket, which placed Plaintiff at a higher risk for injury to the biceps tendon.

The Deputy Commissioner issued an Opinion and Award finding that the medical opinion testimony was insufficient to establish that the biceps tendon was causally related to the original injury, and the Commission denied Plaintiff's claim for further indemnity benefits. Plaintiff appealed to the Full Commission, which reversed the Deputy Commissioner's Opinion and Award. Citing the *Parsons* presumption, the Full Commission concluded that Defendants had the burden to prove that the September 2013 injury was not directly related to the 2007 injury. The Full Commission found that Defendants failed to meet their burden and ordered Defendants to pay Plaintiff benefits. Defendants appealed.

ISSUES:

1. Whether the Full Commission erred by concluding Plaintiff's shoulder injury was causally related to her compensable work injury.

2. Whether the Full Commission erred by failing to conclude that Defendants were required to immediately reinstate benefits upon learning of Plaintiff's failed trial return to work.

3. Whether the Full Commission erred by not assessing a late penalty on Defendants for failing to reinstate Plaintiff's disability compensation benefits following notice of her unsuccessful trial return to work.

4. Whether the Full Commission erred by failing to impose sanctions, including attorney fees and costs, on Defendants.

HOLDINGS:

1. No. The Court held that the medical testimony by Drs. Barnes and Carroll lent support to the presumption that additional medical treatment to Plaintiff's right shoulder complex was directly related to her 2007 compensable right shoulder injury. Therefore, the Court concluded there was sufficient evidence to support the Commission's findings of fact and conclusions of law that the medical treatment on Plaintiff's right shoulder proximal biceps tendinitis was causally related to her 2007 compensable right shoulder injury. The Court further held that the Full Commission properly placed the burden of proof on Defendants to rebut the presumption that a causal relationship existed between Plaintiff's successive shoulder injuries and Defendants failed to present evidence to disprove the causal connection.

2. Yes. Citing *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 692 S.E.2d 631 (2010), and N.C.G.S. § 97-32.1, the Court held that Defendants were obligated to reinstate Plaintiff's benefits immediately. In *Davis*, the Court held "[t]hough an employee 'should' give notice to an employer of an unsuccessful trial return to work via a Form 28U prior to total disability compensation resuming, a Form 28U is not required for reinstatement of compensation." 202 N.C. App. 660, 692 S.E.2d 631 (2010). The Court further held that, in the circumstance of a contradiction between N.C.G.S. § 97-32.1 (stating where "the trial return to work is unsuccessful, the employee's right to continuing compensation . . . shall be unimpaired") and Workers' Compensation Rule 404A(3) (stating where an employee fails to file a Form 28U with the Industrial Commission "the employer or carrier/administrator shall not be required to resume payment of compensation"), N.C.G.S. § 97-32.1 controls.

3. Yes. In accordance with N.C.G.S. § 97-32.1 and *Davis*, the Court held the Commission should have concluded that Defendants were obligated to reinstate Plaintiff's compensation as soon as her trial return to work failed. The Court noted that the record did not reflect any action by Defendants giving notice to Plaintiff or the Commission to contest Plaintiff's right to compensation in accordance with N.C.G.S. § 97-18(c), and that Defendants simply refused to reinstate Plaintiff's disability compensation benefits following notice of Plaintiff's unsuccessful trial return to work. Thus, the Court held that Defendants were subject to a penalty of 10% on TTD benefits not paid to Plaintiff following the end of her trial return to work.

4. No. The Court held that it was within the Full Commission's discretion to deny imposing sanctions of attorney fees and costs on Defendants. The Court acknowledged the Commission's rationale that Defendants' defense was not grounded in unfounded litigiousness, and therefore, Plaintiff was not entitled to attorney's fees.

E. *Anders v. Universal Leaf N. Am*., ___ N.C. App. ___, 800 S.E.2d 99 (May 2017) (Zachary, J.) (Hernia; Parsons Presumption; Limitation Period on Claims for Additional Medical Compensation; Seagraves test; Proving Disability)

FACTS:

On November 20, 2010, Plaintiff was pulling a wire from a bale of tobacco when he felt pain. He was diagnosed with an inguinal hernia, and was treated and restricted to light-duty work for several days. Thereafter, Plaintiff sought additional treatment and missed work. When he returned to work, he was terminated from employment for noncompliance pursuant Defendant-Employer's attendance policy. Plaintiff found a new position at a Waffle House. He underwent a bilateral inguinal repair surgery. Approximately two months later, Plaintiff sought treatment for ongoing right groin pain. His treating physician found no evidence of recurring hernia.

Defendants accepted Plaintiff's workers' compensation claim upon filing of a Form 60. Defendants also filed a Form 28 indicating that Plaintiff had returned to work, and a Form 28B indicating that Plaintiff had received his last payment of indemnity benefits on April 8, 2011 and his last payment of medical benefits on January 19, 2012. Plaintiff sought treatment for bilateral groin pain in May 2013. He

underwent surgery to repair a recurrent right inguinal hernia. He sought medical treatment sporadically between July 2013 and August 2014.

On January 27, 2014, Plaintiff filed a Form 33 seeking medical and indemnity benefits for his recurring hernias. After the hearing, the Deputy Commissioner concluded that Plaintiff's subsequent, recurring hernias were not related to his compensable work injury, and therefore, denied the request for certain indemnity benefits and all medical benefits.

Plaintiff appealed, and the Full Commission found that: (1) Plaintiff's work-related hernia had "fully healed" after it was repaired with surgery; (2) Defendants' last payments of indemnity benefits occurred on April 8, 2011 and medical benefits on January 19, 2012; (3) Plaintiff did not request additional medical compensation until January 27, 2014; (4) Plaintiff had not suffered permanent injury as a result of the work-related injury; and (5) Plaintiff failed to produce evidence of his earnings from the work he performed after his termination from Defendant-Employer.

Based on these findings, the Commission concluded that Plaintiff had failed to prove his November 2010 work-related injury was causally related to his subsequent hernias and that his request for medical compensation was time-barred by N.C.G.S.. § 97-25.1. Further, since Plaintiff failed to prove he was disabled as defined by the Workers' Compensation Act, he was not entitled to additional indemnity benefits for his subsequent hernias. Plaintiff appealed.

ISSUES:

1. Whether Plaintiff's claims for additional medical benefits were time-barred.

2. Whether Plaintiff was entitled to additional indemnity benefits.

HOLDINGS:

1. Yes. Plaintiff argued he was entitled to indemnity benefits for the period he was allegedly disabled, and that such an award would restart the clock on the statute of limitations period outlined in N.C.G.S. § 97-25.1. The Court rejected this argument and clarified that the two-year statute of limitations period begins on the date of the last actual payment of benefits. Plaintiff's request for additional medical compensation was filed more than two years after Defendants' last payments of indemnity and medical compensation. Thus, Plaintiff's claims for additional medical treatment are barred pursuant to N.C.G.S. § 97-25.1.

2. No. Following Plaintiff's termination, Defendant-Employer was required, under the *Seagraves* test, to show that: (1) Plaintiff was terminated for misconduct or other fault; (2) a nondisabled employee would have been terminated for the same misconduct; and (3)the termination was unrelated to Plaintiff's compensable injury. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234 (1996). Such evidence will bar Plaintiff's claim for lost earnings unless Plaintiff can show that he is unable to find or hold other employment at a wage comparable to that earned prior to the injury because of a work-related disability. Plaintiff was unable to prove the same beyond the period during which indemnity benefits had already been paid.

3. The Court also found that the Commission had failed to give Plaintiff the benefit of the *Parsons* presumption. However, since Plaintiff's claim for medical benefits was time-barred and the Court affirmed the Commission's conclusion that Plaintiff was not entitled to additional indemnity compensation, a remand on the issue of whether the subsequent hernias were caused by the original hernia was determined to be futile.

Permanent Partial Disability

A. *Harrison v. Gemma Power Sys., LLC*, ___ N.C. ___, 799 S.E.2d 855 (June 2017) (Hudson, J.) (Permanent Partial Disability; Sufficiency of Factual Findings)

FACTS:
Plaintiff worked as a pipefitter and suffered compensable injuries when a heavy valve fell on his head. Plaintiff's injuries primarily consisted of neck pain and headaches, and on June 27, 2001, four months after the accident, orthopaedic surgeon Dr. Dixon Gerber found that Plaintiff "was at maximum medical improvement and had no permanent partial disability." Plaintiff was thus released from treatment without restrictions on July 2, 2001. Although Plaintiff had by that time been laid off by Defendant-Employer, he found work within the construction industry for the next two years as a pipefitter.

In 2003, Plaintiff testified he stopped working due to ongoing neck pain. During the years after his work-related accident, Plaintiff reported continued pain and Defendants continued to authorize treatment. In October 2002, Dr. Robert Lacin stated after an independent examination that he "certainly had no doubt that plaintiff's [neck] symptoms are related to this incident of March 2, 2001." After an MRI showed evidence of Plaintiff's continuing injury, Plaintiff received another independent evaluation from Dr. Alfred Rhyne, who recommended another MRI. At that point, in April of 2009, Defendants refused to authorize additional medical treatment. The last payment of medical compensation was made in May of 2009. On January 25, 2012, Plaintiff filed a Form 33 asserting that Defendants had failed to authorize further medical treatment and refused to pay indemnity benefits. The Full Commission affirmed the Deputy Commissioner's Opinion and Award, which ordered Defendants to pay for all medical treatment for Plaintiff's neck condition through May 18, 2009, but denied Plaintiff's claim for additional benefits. The Commission agreed with Defendants' assertion that further benefits were barred by the two-year statute of limitations applicable to medical only claims.

Plaintiff appealed, and in *Harrison I* (unpublished), the Court of Appeals vacated portions of the Commission's Opinion and Award and remanded the case for further findings of fact and conclusions of law as to Plaintiff's entitlement to benefits under N.C.G.S. § 97-31. The *Harrison I* decision held that the Commission failed to make findings of fact concerning the evidence of disability under prongs two and three of *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425. S.E.2d 454 (1993) [unsuccessful job search or futility]. Additionally, the Court held that the Commission failed to enter conclusions of law regarding Plaintiff's right, if any, to permanent partial impairment benefits under N.C.G.S. § 97-31. Therefore, it was improper for the Commission to conclude that Plaintiff was not entitled to indemnity benefits. Upon remand, the Commission concluded that Plaintiff failed to establish disability under

Russell and that Plaintiff was not entitled to any compensation for permanent partial disability under N.C.G.S. § 97-31.

Plaintiff again appealed the Commission's determination, this time arguing that he was entitled to compensation for permanent partial disability under N.C.G.S. § 97-31 since the revised Opinion and Award inconsistently found that, even though Plaintiff was assigned work restrictions, he still had no permanent impairment. The Court of Appeals (*Harrison II* (unpublished)), in a divided opinion, affirmed the denial, holding that evidence of work restrictions does not necessarily indicate that such restrictions were related to the compensable injury. Plaintiff appealed to the North Carolina Supreme Court on the basis of a dissenting opinion by Judge Geer.

ISSUE:
Whether the Full Commission erred in concluding that Plaintiff was not entitled to any compensation for permanent partial disability.

HOLDING:
Yes. The Court held the Commission erred in concluding that Plaintiff was not entitled to compensation based on the findings of fact in the record. Although the Supreme Court was clear that their opinion was not concluding that Plaintiff retained permanent impairment, the case was remanded back to the Commission with instructions to "explain its finding of no permanent impairment, given the nearly eight years of treatment between Dr. Gerber's medical opinion in June 2001 and May 2009, when the condition was found compensable." The Court concluded that the Commission failed to carry out the Court of Appeals' mandate from *Harrison I* that it make additional findings of fact and conclusions of law on the issue of Plaintiff's entitlement to benefits under N.C.G.S. § 97-31. For this reason, the Court reversed the decision of the Court of Appeals and remanded this matter to the Commission to comply with the 2014 mandate of the Court of Appeals in *Harrison I*, and to enter a new opinion and award not inconsistent with this opinion. The Court also reminded the Commission that numerous medical records were in evidence showing that Plaintiff continued to report and treat for neck symptoms after the 2001 medical opinion stating that Plaintiff had reached maximum medical improvement and had no permanent impairment.

N.C.G.S. § 97-25.1 – Statute of Limitations for Medical Compensation

A. *Lewis v. Transit Management of Charlotte*, ___ N.C. App. ___, 792 S.E.2d 890 (December 2016) (McCullough, J.) (N.C.G.S. § 97-25.1; N.C.G.S. § 97-47)

FACTS:
Plaintiff, who worked as a bus operator for Defendant, suffered an admittedly compensable injury in June of 2009. Later that year, a physician completed a Form 25R dated November 17, 2009 indicating that Plaintiff was at maximum medical improvement and suffered a 0% impairment to his back. A Form 28 reported that Plaintiff had returned to work as of December 2, 2009. A Form 28B completed on the same date indicated that Plaintiff had received a total of $22,631.71 in temporary total disability compensation and medical compensation as a result of his injury. The Form indicated that Plaintiff's last payment of temporary total disability compensation was paid on December 2, 2009. The parties

later stipulated that although the Form 28B showed that the last medical compensation was paid on November 24, 2009, it was actually paid on April 22, 2010, based on the claims history.

Years later, Plaintiff filed a Form 18. Following denial of Plaintiff's claim based on the expiration of the statute of limitations in a Form 61, Plaintiff filed a Form 33, claiming additional temporary total disability compensation owed due to Defendant's underpayment because of a miscalculation of Plaintiff's average weekly wage. Defendant filed a Form 33R asserting that Plaintiff's claim was barred by the statute of limitations pursuant to N.C.G.S. § 97-47 and N.C.G.S. § 97-25.1 based on the fact that the Form 28B was filed on December 2, 2009, showing the last check being forwarded on December 2, 2009.

Pursuant to a pre-trial agreement, Deputy Commissioner Wanda Blanche Taylor considered only whether Plaintiff was time-barred from seeking additional benefits under N.C.G.S. § 97-25.1 or N.C.G.S. § 97-47, or both. Deputy Commissioner Taylor filed her opinion and award in favor of Plaintiff. The matter was thereafter heard by the Full Commission, who ordered that Defendant was to pay Plaintiff $714.90 to correct the underpayment of the amount owed for temporary total disability benefits, and Plaintiff's claim for additional medical treatment was time-barred under N.C.G.S. § 97-25.1. Pursuant to the Commission's award, Defendant paid Plaintiff $714.90 on December 7, 2015.

Plaintiff appealed the Commission's determination that the two-year limitations period in N.C.G.S. § 97-25.1 had expired and that Plaintiff was barred from seeking additional medical compensation. Defendant also appealed the Commission's order requiring the corrective payment of temporary total disability compensation owed to Plaintiff due to the miscalculation of Plaintiff's average weekly wage. The Court of Appeals affirmed the Full Commission decision.

ISSUES:

1. Whether the December 7, 2015 payment to Plaintiff constituted the "last payment" under N.C.G.S. § 97-25.1.

2. Whether a payment to correct an earlier error in medical or indemnity payments to make an employee whole restarts the limitations period in N.C.G.S. § 97-25.1.

3. Whether the Commission erred in holding that there was a remedy at law under N.C.G.S. § 97-47, and not applying the equitable doctrine of laches to bar Plaintiff's claim.

HOLDINGS:

1. No. The Court rejected Plaintiff's argument that the two-year statute of limitations period found in N.C.G.S. § 97-25.1 had not yet begun and would not begin until the Plaintiff received payment from the Defendant for indemnity benefits, citing the plain language of the statute. The Court relied on its analysis in *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 214 WL 2993853 (July 2014) (unpub.), citing that the word "last" does not "refer to a hypothetical future payment" that Plaintiff may be entitled to. Second, the Court stated that Plaintiff's argument assumed the certainty of a future payment before the right to such a payment had been decided by the Industrial Commission. Third, the Court held that accepting

Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. The Court applied a straightforward reading of N.C.G.S. § 97-25.1 and held that the two-year statute of limitations period for additional medical compensation expired two years after the date on which the last payment of medical compensation was made, April 22, 2010, and years before Plaintiff filed his request for additional compensation in his Form 33. The Court also noted that the December 7, 2015 corrective payment had not been made at the time of the Commission's decision and, therefore, could not have been the "last payment" under a straightforward application of N.C.G.S. § 97-25.1.

2. It is unclear. The Court recognized the Commission's argument that Plaintiff's interpretation of "last payment" could result in increased litigation and could thwart the legislative intent in enacting N.C.G.S. § 97-25.1. However, the Court left the matter for the legislature to address since it did not have to decide the issue in the present case, noting that N.C.G.S. § 97-25.1 is not entirely clear as to how such corrective payments are to be treated.

3. No. The Court rejected Defendant's argument that there can be no remedy at law without a final award. The Court noted that both N.C.G.S. § 97-25.1 and N.C.G.S. § 97-47 supply remedies at law to bar claims where there has been a delay in the case. The Court held that "simply because the limitations period had not run in the present case to bar Plaintiff's recovery of the underpaid amount of disability compensation owed to him does not mean the doctrine of laches is available as an alternative." The Court also disagreed with Defendant's argument that waiting 4 years to challenge the average weekly wage is too long and not within a "reasonable time." The Court distinguished the present case from *Miller v. Carolinas Medical Center-Northeast*, 233 N.C. App. 342, 756 S.E.2d 54 (2014). In *Miller*, there was a Form 21 agreement at issue in which the average weekly wage was recorded, and the Court held that "a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a 'reasonable time' has passed." Here, the Court, stated, there was no agreement and no requirement that Plaintiff seek verification of the average weekly wage within a reasonable time.

Death Benefits

A. *Brown v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___ S.E.2d ___ (July 2017) (McGee, J.) (Death Benefits; Statute of Limitations; N.C.G.S. § 97-38)

FACTS:

Decedent worked as a correctional officer for Defendant-Employer when he fell and injured his low back, left hip, and left leg during a training exercise on August 25, 2005. He filed a Form 18 noting injury to the low back only. Defendants initially denied the claim upon filing of a Form 61, but thereafter filed a Form 60 accepting the low back injury. Decedent continued to work full time for Defendant-Employer in 2005 and 2006. He underwent back surgery in December 2007. Decedent filed

a second Form 18 for the same date of injury, but again never mentioned injury to his left hip or leg. Indemnity benefits were initiated in June 2008. On February 10, 2009, Decedent was placed at maximum medical improvement and assigned a 15% permanent partial impairment rating to the back. Decedent filed a third Form 18 where, for the first time, he noted an injury to his left hip and leg in addition to his low back. Decedent also filed a Form 33 on October 7, 2010 alleging an injury to the left hip which was being denied by Defendants. There was no evidence in the record that Decedent ever claimed a left hip injury prior to filing of the third Form 18, which was filed concurrently with the Form 33. Two days before the hearing, Decedent filed a request that the matter be postponed indefinitely, indicating that there were no issues in dispute and the parties were going to mediate the case. Pursuant to this request, the Deputy Commissioner removed the matter from the hearing docket and the claim was referred to mediation. The mediation resulted in an impasse, and no additional Form 33 was filed during Decedent's lifetime.

Decedent received significant medical treatment for his left hip from 2007 to his death outside of the workers' compensation system, including a total hip replacement in 2008 and multiple additional surgeries. Defendants did not authorize, direct, or pay for any left hip medical treatment. Indemnity benefits for Decedent's accepted back injury continued until his death on January 1, 2014. Decedent's death certificate listed alcoholic cirrhosis of the liver as the immediate cause of death.

Plaintiff, Decedent's daughter and next of kin, filed a Form 33 on August 21, 2014 seeking death benefits. The Form 33 noted injuries to the back and hip. Defendants denied that Decedent's death was related to the August 25, 2005 injury. The parties ultimately agreed to proceed without a hearing, and the Deputy Commissioner closed the record after receiving depositions, briefs, and other materials. The Deputy Commissioner issued an Opinion and Award concluding that Plaintiff was entitled to death benefits pursuant to N.C.G.S. § 97-38 and ordered Defendants to pay benefits. Defendants appealed to the Full Commission, which dismissed Plaintiff's claim with prejudice for both death benefits and medical compensation for the alleged hip injury. The Full Commission concluded that Decedent's death was unrelated to his compensable back injury and that Plaintiff's claim for death benefits based on the denied hip injury was time-barred under N.C.G.S. § 97-38. Plaintiff appealed to the Court of Appeals.

ISSUE:

Whether the Commission erred by dismissing her claim for death benefits based on the conclusion that the claim was time-barred pursuant to N.C.G.S. § 97-38.

HOLDING:

No. The Court found that the Commission did not err in dismissing Plaintiff's claim for death benefits on the grounds that this claim was time-barred under N.C.G.S. § 97-38. The Court noted that the statute first requires that the death be a result of the compensable injury. Second, the statute imposes a time limitation in that death must occur within six years of the injury or within two years of the final determination of disability, whichever is later.

Here, the accident occurred on August 25, 2005 and Decedent died on January 1, 2014. Plaintiff filed her Form 33 seeking death benefits on August 21, 2014. As an initial matter, Plaintiff acknowledged

that Decedent did not die within six years of the injury. However, Plaintiff argued that, because no final determination was made, the second prong imposing the two-year statute of limitations rendered her claim timely. The Court cited *Shaw v. U.S. Airways, Inc.*, 217 N.C. App. 539, 543, 720 S.E.2d 688, 691 (2011), which found that, despite the decedent's death occurring greater than six years after the injury, there was no final determination of disability and the claim was not time-barred. However, the Court distinguished this case from *Shaw* in that Decedent's death was not the result of the accepted low back injury. Defendants never accepted the left hip injury and a determination was never made regarding the compensability of that injury. The Court rejected the contention that the left hip injury would entitle Plaintiff to death benefits merely because there was no final determination of disability for Decedent's compensable back injury. There was still no determination of compensability for the left hip, and as such, could not be the basis for a timely death benefits claim under N.C.G.S. § 97-38.

The Court emphasized that compensability and disability are distinct concepts requiring different elements of proof. Therefore, an injured employee must prove a compensable injury before there can be any determination of disability. A defendant's admission of compensability does not give rise to a presumption of disability. The Court ultimately held that "the phrase 'final determination of disability,' as used in N.C.G.S. § 97-38, is limited to the final determination of disability for the compensable injury that is specifically alleged to have proximately caused the employee's death." Implicit in this holding is that the final determination of disability cannot be made unless the compensability of the injury upon which the death claim is based has been established. The Court noted that a holding based on Plaintiff's argument would allow claimants to delay pursuing a death claim on an indefinite basis and would override the purpose of having a statute of limitations. The Court thus affirmed the Commission's holding dismissing Plaintiff's claim with prejudice.

Deputy Commissioner Hearings

A. *Bentley v. Jonathan Piner Construction*, ___ N.C. App. ___, 790 S.E.2d 379 (September 2016) (McGee, C.J.) (Deputy Commissioner Hearings)

FACTS:

Plaintiff was injured while working construction. Just under two months before she was set to leave the Commission, the Deputy Commissioner bifurcated the issue of determining whether Plaintiff was an employee from the rest of his claim. A different Deputy Commissioner issued the Opinion and Award concluding as a matter of law that the Commission lacked jurisdiction over the claim because Plaintiff was not an employee at the time the injury was sustained. Plaintiff appealed to the Full Commission, which affirmed the Deputy Commissioner's decision. Plaintiff appealed contending that N.C.G.S. § 97-84 requires the same Deputy Commissioner who conducted the hearing to issue the opinion and award.

ISSUE:

Whether the same Deputy Commissioner who presided over a hearing must issue the opinion and award for the claim.

HOLDING:

Yes. The Court noted that N.C.G.S. § 97-84 states the parties "may be heard by a deputy . . . and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion . . . and the deputy shall cause to be issued an award pursuant to such determination." The Court stated the words "a deputy[,]" "said deputy[,]" and "the deputy" indicate the legislature's intent that the same Deputy Commissioner singularly hear a case from beginning to end. Therefore, the Deputy Commissioner's Opinion and Award was vacated and the case was remanded for a new hearing.

B. *Bentley v. Jonathan Piner Construction*, ___ N.C. App. ___, ___ S.E.2d ___ (July 2017) (McGee, C.J.) (Deputy Commissioner Hearings)

FACTS:

See facts provided above. In addition, Plaintiff and his friend stopped by the Breakwater jobsite while working side jobs in the area. Piner Construction was the subcontractor for framing houses. Plaintiff held himself out as owner and operator of Bentley Construction and Maintenance. Plaintiff and his friend left their contact information with Piner offering framing services. Piner later contacted them to assist with framing work, and Plaintiff contacted an additional friend, Noling, to assist with this work. Noling acted as the lead worker, and all three were paid per hour. Plaintiff was the lowest paid person due to his relative inexperience. Piner wrote separate checks to each of the three men. They all set their own hours, made their own decisions regarding when to take breaks, used Plaintiff's tools, and were entitled to hire any person they wanted to assist with the work. Plaintiff suffered a right eye injury on March 3, 2014 when a nail struck him in the eye.

Plaintiff filed a Form 33, and the Deputy Commissioner concluded the Commission lacked jurisdiction as a matter of law because Plaintiff was not an employee of Piner at the time of his injury. Plaintiff appealed. After the first Court of Appeals decision was issued vacating the Commission's ruling and remanding the case, Defendants filed a petition for rehearing, which was granted, and the case was reheard by the Court on February 6, 2017.

ISSUES:

1. Whether the Commission erred in basing its Opinion and Award on an order issued by a Deputy Commissioner who was not present at the hearing and did not hear the evidence.

2. Whether the Commission erred in failing to find Plaintiff was an employee of Defendant-Employer at the time of his injury.

3. Whether the Commission erred in failing to find and hold Defendant-Employer liable as a statutory employer pursuant to N.C.G.S. § 97-19.

HOLDINGS:

1. The Court found that Plaintiff raised the argument regarding proper interpretation of N.C.G.S. § 97-84 for the first time before the Court of Appeals. Plaintiff never raised the issue of whether a Deputy Commissioner could issue an Opinion and Award when he or she was not present at the hearing at the Deputy Commissioner level, in his Form 44, or in his brief to the Full Commission. As such, the Court found that this issue was waived.

2. No. The Court found that Plaintiff was an independent contractor, not employee, of Defendant-Employer at the time of the accident. The Court considered the eight factors for determining whether a claimant is an employee or independent contractor as outlined in *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). Under this analysis, the Court found that the Commission correctly concluded that Plaintiff was an independent contractor and not an employee of Defendant-Employer. The Court provided a detailed analysis of each of the eight factors under the facts of the case.

3. No. The Court found that the Commission properly concluded Plaintiff was not a statutory employer given that N.C.G.S. § 97-19 was inapplicable to the case. Plaintiff argued that Noling was a subcontractor of Piner Construction and he was an employee of Noling. However, the Court noted there was no evidence of a contract between the owner and the principal contractor, or between the principal contractor and any of the subcontractors. Although there was evidence that Defendant-Employer subcontracted the framing job to Piner Construction, Plaintiff provided no evidence that Noling was a subcontractor of Piner Construction or that Plaintiff was an employee of Noling. The Court instead noted Plaintiff would at most be an independent contractor of Noling. The Court found that the evidence tended to suggest that Plaintiff, Noling, and Plaintiff's friend were each independent contractors of Piner Construction. N.C.G.S. § 97-19 regarding statutory employers only applies to subcontractors and their employees, and as such, this statute would not apply for Plaintiff given that he was at most an independent contractor.

   (*NOTE: The legislature amended N.C.G.S. § 97-84 in June 2017 and it was ratified on July 20, 2017. Session Law 2017-150.)

Insurance Policy Coverage

A. *Beal v. Coastal Carriers, Inc*., ___ N.C. App. ___, 794 S.E.2d 882 (December 2016) (Davis, J.) (Coverage; Joint Employment; Lent Employee)

FACTS:

Plaintiff worked in North Carolina for Coastal Carriers, Inc. ("Coastal"), a furniture and moving installation company. The owner of Coastal was a longtime friend of the owner of The Warehousing Company, LLC ("TWC"), which was also a furniture and moving installation company. In 2010, TWC obtained a job in Florida to provide furniture, fixtures, and electronics installation at a condominium development. TWC did not have enough manpower to complete the job, so TWC's owner contacted the owner of Coastal to determine if he would be able to hire four of Coastal's employees on a temporary basis to work on the project. At one of Coastal's safety meetings, Coastal's owner shared information regarding TWC's Florida project. He advised that if anyone was interested in the opportunity, they should contact TWC's owner directly. Coastal's owner did not select or designate anyone to work on the project and his employees were free to accept or reject the offer from TWC's owner. Plaintiff and three other employees contacted TWC's owner and were offered jobs, which they accepted while they were all in North Carolina. All the employees were paid by TWC, they worked

under the on-site supervision of one of the Coastal employees hired for the project and also a TWC employee, they received instructions on what to do from TWC, their work hours and progress was monitored by TWC, and the TWC owner kept in contact with the on-site supervisors on a daily basis from his home in South Carolina. The subcontract agreement for the project was negotiated and entered into by TWC's owner only. Coastal's owner was not in any way involved and never directed the work performed on the project. Coastal's owner did loan the four men a Coastal sales van and gave them a gas card to travel down to Florida, but he expected to be reimbursed by TWC's owner. The men's motel room was paid for by TWC's owner and all the men, except for Plaintiff, collected their pay at TWC's office in Myrtle Beach, South Carolina. TWC's owner arranged for workers' compensation insurance for the project and also provided proof of insurance.

On September 26, 2010, while working on the project in Florida, Plaintiff sustained multiple injuries after he fell while lifting furniture. The Commission found that Plaintiff was an employee of TWC who had been lent by Coastal. TWC was thereby a special employer and Coastal was Plaintiff's general employer, and both employers were jointly liable for Plaintiff's injuries. The Commission further found that Key Risk, the carrier for TWC, was obligated to pay temporary total disability benefits to Plaintiff for the injury and to pay all other indemnity benefits owed on the claim despite Key Risk's argument that the workers' compensation insurance policy did not provide coverage due to application of an exclusion. Key Risk appealed to the Court of Appeals from the Commission's Opinion and Award.

ISSUES:

1. Whether the North Carolina Industrial Commission had jurisdiction over the matter.

2. Whether Plaintiff was principally employed in South Carolina such that South Carolina's Workers' Compensation Act required that coverage be provided under Key Risk's policy provided to TWC.

HOLDINGS:

1. Yes. The North Carolina Industrial Commission had jurisdiction using the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). The Court found that the final act necessary to make the employment obligation binding occurred in North Carolina. Plaintiff was physically present in North Carolina during the telephone conversation wherein he accepted the employment offer from the owner of TWC. The Court further found that an employer-employee relationship existed between both TWC as a special employer (Plaintiff was a borrowed employee) and Coastal as a general employer. The Commission, therefore, had jurisdiction to hear the case.

2. No. The Court found that the Commission erred when finding that Key Risk's policy provided coverage for Plaintiff's accident. The Court agreed with the Commission that the last act to make a binding insurance contract occurred in South Carolina so that South Carolina's substantive law applied to govern the interpretation of Key Risk's policy. *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). However, the Court applied South Carolina's "base of operation" rule to determine that Plaintiff's base of operation was located in Florida. The Court found that, due to the utter lack of contacts Plaintiff had with South

Carolina, the case required nothing more than a commonsense application of the "base of operation" test to conclude that Plaintiff's employment was located in Florida. Plaintiff had never reported to South Carolina for duty or ever even visited South Carolina except to drive through the state as a matter of necessity to get from North Carolina to Florida for the project. The Court also noted that TWC's owner did not have direct control over Plaintiff's work so as to provide sufficient direct connection between Plaintiff and South Carolina. The Court compared the facts of this case to the facts in other South Carolina cases discussing the "base of operation" rule and ultimately found that Key Risk's policy did not provide coverage for Plaintiff's injury.

Interest and Attorney's Fees

A. *Saunders v. ADP TotalSource Fi Xi, Inc*., ___ N.C. ___, 791 S.E.2d 466 (September 2016) (Tyson, J.) (Attendant Care; Attorney's Fees; Right to Direct Care)

FACTS:

Plaintiff sustained two compensable injuries to the low back and retained attorney Henry E. Teich to represent him. Plaintiff and Mr. Teich entered into a contingency fee agreement, in which Mr. Teich would receive "25% of any recovery as Ordered by the North Carolina Industrial Commission." The agreement was later amended to provide a contingency fee of 25% of any award for ongoing temporary total disability benefits. Ultimately, Plaintiff's condition deteriorated to the point that he required attendant care, which was provided by Plaintiff's partner.

After extensive litigation on the attendant care issues, the Full Commission ultimately awarded retroactive and ongoing attendant care. The Commission ordered no additional attorney's fee for Plaintiff's counsel to be paid from attendant care or medical compensation. Plaintiff tried to consent to payment of attorney's fees out of the amount awarded, but counsel correctly noted it is a criminal offense for an attorney to receive a fee without approval by the Industrial Commission. N.C.G.S. 97-90(b). Plaintiff appealed the Industrial Commission decision to Buncombe County Superior Court and requested judicial review under N.C.G.S. 97-90(c), which states that if the Commission finds a fee agreement unreasonable, the attorney may appeal to the senior resident judge of the superior court in the county in which the cause of action arose. Defendants moved to intervene in the court proceeding, which was granted.

The superior court reversed the decision of the Industrial Commission and awarded attorney's fees be paid from the medical compensation award for retroactive attendant care. Both parties appealed.

ISSUES:

1. Whether Defendants had standing to challenge the superior court order.

2. Whether the superior court erred in allowing Defendants to intervene in the superior court action.

3. Whether the superior court had subject matter jurisdiction to review the denial of attorney's fees under N.C.G.S. 97-90.

HOLDINGS:

1. Yes. Defendants had standing both as parties before the Industrial Commission and as interveners in the superior court action. Defendants argued the deduction of Plaintiff's attorney's fee from the award of medical compensation infringed on their right to direct medical treatment. The Court held that, in light of Defendants' duty and right to direct medical care, as well as their continuing interest in the pool of resources available for medical care, Defendants' rights had been denied or directly and injuriously affected by the superior court's award of attorney's fees.

2. No. Defendants met the criteria for both permissive intervention and intervention as of right. In order to intervene as a matter of right, the intervener must show: (1) it has an interest relating to the property or transaction, (2) denying intervention would result in impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. In light of Defendants' right to direct medical care, the Court held that Defendants met the criteria to intervene as of right. The Court also pointed to the *Hurley v. Wal-Mart Stores, Inc.,* 219 N.C. App. 607, 613, 723 S.E.2d 794, 798 (2012) case, in which the Court validated an employer's interest in proceeding in superior court when the plaintiff appeals under N.C.G.S. 97-90.

3. No. N.C.G.S. 97-90 provides the superior court with appellate authority to review the Industrial Commission's determination of the "reasonableness" of the award of attorney's fees. However, the Court analyzed the legislative history of the statute and noted that the General Assembly specifically amended N.C.G.S. 97-90 to give the superior court limited authority to review the reasonableness of attorney's fees in a fee contract between an employee and his attorneys, as presented to and reviewed by the Industrial Commission. In this case, the Industrial Commission's decision was based on the fact that medical compensation is separate and apart from indemnity compensation and there was no evidence of a fee agreement between Plaintiff and any medical provider, including Plaintiff's partner who provided attendant care. The Court noted that the superior court went on to consider evidence not considered before the Industrial Commission, and Plaintiff's counsel made new arguments. Thus, the Court held Plaintiff's counsel did not petition for appellate review of the "reasonableness" of the Industrial Commission decision, but presented a purported "fee contract" never reviewed by the Industrial Commission. The Court vacated and remanded to the Industrial Commission for further proceedings.

B. *Thompson v. Int'l Paper Co*., ___ N.C. ___, 795 S.E. 2d 615 (January 2017) (Stroud, J.) (Workers' Compensation; Attendant Care Services; Prescribed by Authorized Health Care Provider)

FACTS:

On February 23, 2012, Plaintiff sustained severe burns while working at Defendant-Employer's paper plant. The burns covered approximately 23% of Plaintiff's body, primarily on his left shoulder and arm. Defendants accepted the injury as compensable. Plaintiff received extensive treatment at the UNC

Burn Center in Chapel Hill. In light of his injuries, Plaintiff's wife took a leave of absence from her job to stay with him during recovery. Plaintiff's wife was not compensated for the care and services she provided during this recovery. On April 2, 2012, Plaintiff was discharged, and Plaintiff's wife requested that her FMLA leave be extended an additional two months, until June 1, 2012, to provide attendant care and wound care to Plaintiff.

Plaintiff's wife returned to work on June 1, 2012, but arranged an alternate work schedule so she could continue to provide care. She would drive Plaintiff to and from physical therapy appointments each morning, return home to make him lunch, and return home in the evenings to re-apply his bandages. Plaintiff continued to undergo laser treatment sessions with Dr. Hultman at the Burn Center from November 2012 to July 2014. Dr. Hultman testified at his deposition that Plaintiff would require some level of attendant care for the rest of his life. He admitted that he had never provided a written prescription for attendant care.

On February 10, 2015, a Deputy Commissioner filed an Opinion and Award determining that the attendant care Plaintiff's wife provided since February 23, 2012 was necessary and "reasonably required to effect a cure, provide relief and/or lessen the period of Plaintiff's disability." Defendants appealed. The Full Commission mostly affirmed the Deputy Commissioner's findings, but determined that Plaintiff did not require attendant care services after December 31, 2012, as he had regained "sufficient independence" in his post-discharge recovery at that time.

ISSUE:

Whether the Full Commission erred in determining Plaintiff was not entitled to attendant care services after December 31, 2012.

HOLDING:

Yes. First, the Court of Appeals noted that N.C.G.S. § 97-2(19) was amended to require a prescription for attendant care services. However, because there is no definition for a "prescription" or "prescribe," the Court determined there was no requirement that the prescription be in writing. Plaintiff's physicians clearly stated he would require some attendant care for the rest of his life, and this was sufficient. With regard to the Full Commission's determination that attendant care services were not necessary after December 31, 2012, the Court of Appeals determined this date was selected arbitrarily. It was noted that the Commission did not make any findings that Plaintiff had returned to "normal life activities" by this date. Ultimately, the Court found there was no evidence or findings to support the December 31, 2012 cutoff date.

C. *Reed v. Carolina Holdings*, ___ N.C. ___, 796 S.E. 2d 102 (February 2017) (Inman, J.) (Attendant Care Services; Prescribed by Authorized Treating Provider)

FACTS:

On June 26, 1998, Plaintiff sustained a traumatic brain injury, along with injuries to his shoulder, back, and other body parts after a stack of building supplies collapsed on him. The claim was accepted as compensable, and Plaintiff received temporary total disability benefits and medical benefits. Plaintiff filed a Form 33 on the issue of attendant care services. On March 18, 2011, the Deputy Commissioner entered an Opinion and Award requiring Defendants to pay Plaintiff's mother $10.00 per hour, 24

hours per day, seven days per week from June 27, 1998 to the date of the Award and ongoing. It was noted that Plaintiff's counsel could deduct 25% as an attorney's fee.

On appeal to the Full Commission, additional evidence was received, including surveillance supporting Defendants' contention that Plaintiff did not require attendant care. The Full Commission determined that Plaintiff was entitled to attendant care from March 18, 2011 to present and ongoing. Attendant care was denied from March 18, 2007 to March 17, 2011. Plaintiff's counsel would receive 25% of the past due benefits as attorney's fees. The Commission denied Plaintiff's counsel's request that an attorney's fee be withdrawn from future attendant care payments.

Plaintiff appealed the denial of his request for attorney's fees to be deducted from future attendant care compensation. Defendants filed a Motion for Reconsideration, alleging, for the first time that the Commission erred in awarding any attorney's fees from medical compensation awarded to Plaintiff. Defendants also filed a notice of appeal from the Commission's Opinion and Award.

ISSUES:

1. Whether Defendants were permitted to raise the argument that Plaintiff's counsel should not be permitted to receive attorney's fee awards from medical compensation.

2. Whether the Full Commission erred in awarding attendant care compensation.

HOLDINGS:

1. No. Defendants failed to preserve their argument that Plaintiff's counsel should not be permitted to receive attorney's fee awards from medical compensation. Defendants appealed the award of attorney's fees on the Form 44 by stating: "For all the reasons stated above, Award #2 is contrary to law, is not supported by the findings of fact and is contrary to the competent and credible evidence of record." Rule 701 requires an appellant to state with particularity the grounds for appeal. Although Defendants appealed the award of attendant care, thereby implicitly appealing the award of attorney's fees, they failed to specifically preserve a challenge to the Commission's authority to award attorney's fees deducted from such compensation. Defendants provided only a generalized assignment of error regarding the attorney's fee award. The Court further noted that there was no indication in the record that Defendants raised this issue before the Commission, or that the Commission addressed it. Thus, Defendants' appeal was dismissed with respect to this issue.

2. No. The Court reiterated the rule that findings of fact supported by competent evidence are conclusive on appeal. Plaintiff's treating physician, Dr. Steven Prakken, testified that Plaintiff would require attendant care in the future, that he could not live independently, and that he was incredibly ill. Plaintiff's mother testified that she took him to his medical appointments, cooked for him, and monitored him 24 hours per day, seven days per week. The Court determined that this evidence was sufficient to support the Commission's findings of fact.

DISSENT (Tyson, J):

Judge Tyson opined that Defendants clearly challenged the Deputy Commissioner's Award #2 as "contrary to law," and that Award dealt solely with attorney's fees. He also noted that the attorney's fee award was inseparable from the award of attendant care compensation, which was clearly before the Full Commission.

Judge Tyson went on to state that Plaintiff would not have been entitled to attorney's fees out of the award of attendant care. He first cited *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003), which states that payments of medical compensation are not subject to any offsets to pay Plaintiff's attorney's fees. He further noted the Workers' Compensation Act contains no statutory authority to allow the Commission to award attorney's fees to be paid from an award of attendant care medical compensation.

N.C.G.S. § 97-10.2

A. *Dion v. Batten*, ___ N.C. App. ___, 790 S.E.2d 844 (August 2016) (McGee, J.) (N.C.G.S. § 97-10.2; Third-Party Lien)

FACTS:

Plaintiff sustained compensable injuries arising from a car accident occurring in the course and scope of his employment as a servicing agent for Defendant-Employer. The vehicle Plaintiff was driving was struck by Batten, who had failed to stop at a red light. Plaintiff settled his claim with Defendant-Employer and Defendant-Employer's carrier for $528,665.61. Defendant-Employer and Defendant-Carrier asserted a lien against any third-party recovery. Plaintiff then brought a negligence action against Batten. Batten's insurance carrier tendered $100,000.00 for Defendant's liability and UIM coverage limits. Plaintiff's personal insurance carriers proceeded to arbitration, and Plaintiff was awarded $285,000.00. The trial court determined that the arbitration award should be reduced by the $100,000.00 previously tendered to Plaintiff, and entered the arbitration award as a judgment in the amount of $185,000.00 with interest on the reduced amount. Plaintiff's UIM carrier filed a motion to determine the subrogation amount pursuant to N.C.G.S. § 97-10.2(j). The trial court determined Defendant-Employer and Defendant-Carrier's lien could not exceed $285,000.00. The trial court determined the amount of the lien to be $190,000.00, after subtracting attorney's fees, interest, and court costs. Plaintiff and Defendants both appealed.

ISSUES:

1. Whether Plaintiff's UIM carrier had standing to apply for a determination of the subrogation amount pursuant to N.C.G.S. § 97-10.2(j).

2. Whether the trial court had proper subject matter jurisdiction when it ruled on Plaintiff's UIM carrier's motion to determine the subrogation amount.

3. Whether the trial court erred in interpreting N.C.G.S. § 97-10.2(j) regarding the limit of the available lien.

4. Whether the trial court abused its discretion in determining the lien amount.

HOLDINGS:

1. Yes. Plaintiff's UIM carrier had standing to apply for a determination of the subrogation amount because N.C.G.S. § 97-10.2(j) states as follows: "[I]n the event a judgment is obtained by the employee . . . against a third party . . . *either party may apply* . . . to determine the subrogation amount." The Court found that Plaintiff's UIM carrier was a "third party" permitted to apply for a determination of the lien under N.C.G.S. § 97-10.2(a); which, somewhat indirectly, defines a third party as "some other person other than the employer" who is or may be liable for damages.

2. Yes. The Court rejected Defendants' argument that the lien amount is statutorily set, and the trial court did not have proper jurisdiction to "determine" the lien amount (as opposed to "reducing" or "eliminating" the lien). The Court emphasized that the word "determine" is included in the language of N.C.G.S. § 97-10.2(j), and refused to draw a distinction.

3. No. The trial court properly concluded that the amount of the lien could not exceed the proceeds actually recovered against a third-party tortfeasor. The Court highlighted the statutory language of N.C.G.S. § 97-10.2(f)(1) and (h), which provides that the lien is available on "any amount obtained by any person," and that a given party "shall have a lien to the extent of his interest . . . upon any payment made by the third party."

4. No. The trial court did not abuse its discretion. Specifically, the trial court was required to exclude attorney's fees, interest, and court costs from the lien amount pursuant to N.C.G.S. § 97-10.2(j) and cited *Bartell v. Sawyer*, 132 N.C. App. 484, 512 S.E.2d 93 (1999)(holding that a workers' compensation lien holder is not entitled to a share of pre-judgment interest from a plaintiff's third-party judgment).

B. *Key Risk Insurance Company v. Chad Peck v. Mark Andrew McGuire*, ___ N.C. App. ___, 797S.E.2d 354 (March 2017) (Tyson, J.) (Third-party Defendant; Right of Insurer to Bring Action Under § 97-10.2)

FACTS:

Judy Holliday and Mark McGuire were employed as EMTs for CarolinaEast Medical Center, for which Key Risk was the workers' compensation insurer. On February 3, 2013, Holliday was injured in a motor vehicle accident when Defendant's vehicle struck their ambulance. Defendant was also injured, but signed releases in exchange for payment. Key Risk and CarolinaEast paid for extensive medical treatment for Holliday, and on December 2, 2015, Key Risk filed a complaint alleging that Defendant negligently injured Holliday and that Key Risk was entitled to recover workers' compensation benefits paid to Holliday. Defendant filed an answer and a third-party complaint against McGuire, who was driving the ambulance that Defendant struck. The statute of limitations for the negligence action would have expired February 3, 2016.

On March 29, 2016, Defendant filed a motion to dismiss, and on April 13, 2016, Key Risk moved to substitute Holliday as the named plaintiff in an attempt to comply with N.C.G.S. § 97-10.2. The trial court denied Key Risk's motion to substitute and dismissed the claim. Key Risk appealed.

ISSUES:

1. Whether an insurer has standing to bring a negligence action under N.C.G.S. § 97-10.2.

2. Whether the trial court abused its discretion in denying Key Risk's motion to substitute Holliday as the named plaintiff.

HOLDINGS:

1. No. According to the plain meaning of the statute, the injured worker has the exclusive right to bring an action against a third-party tortfeasor within the first 12 months after the date of injury. After that period, either the injured worker *or* the employer may bring the action. 60 days prior to the expiration of the applicable statute, the right again belongs solely to the employee. Here, the insurer brought the action itself, which is not permitted anywhere in the statute. Key Risk argued that, based on a subrogation theory, it should be permitted all the rights and liabilities of the employer, and thus, it had standing to sue on the employer's behalf. The Court disagreed. The statute's language specifically states that the employer has standing during a certain time period and states "the action shall be brought in the name of the employer."

2. No. N.C.G.S. § 97-10.2 allows for a substitution of an employee as the plaintiff where the employee or his personal representative refuses to cooperate and the action is brought by the employer. The Court noted that in this case, however, there is no evidence the employee refused to cooperate. Key Risk argued that, if it was not a real party in interest under Rule 17(a) of the NC Rules of Civil Procedure, the trial court should have allowed its motion to substitute. The Court noted that the suit was thrown together at the last minute and it failed to request that the injured worker be a party until April 13, 2016.

C. *Robert Murray v. Joseph Clifton Moody*, ___ N.C. App. ___, ___ S.E.2d ___ (March 2017) (Zachary, J.) (Third-Party Defendant; Liens Third-Party Recovery)

FACTS:

Plaintiff was injured in a motor vehicle accident in the course and scope of his employment. Defendant was at fault. Plaintiff's employer and its carrier paid workers' compensation benefits to Plaintiff, and Plaintiff filed suit against Defendant for personal injury. At trial, evidence regarding the amount of workers' compensation benefits paid to Plaintiff was introduced. After a jury verdict in Plaintiff's favor, the trial judge entered a final judgment in favor of Plaintiff that reduced the amount of recovery by the amount of workers' compensation benefits he had been paid pursuant to N.C.G.S. § 97-10.2(e). Four days later, the judge amended the judgement. The new judgement did not reduce the amount awarded to the employer, rather, it specifically granted judgment in favor of the employer in the amount of benefits paid, with the remainder going to Plaintiff. As a result, while the lien amount was simply deducted from Plaintiff's recovery in the initial judgment, the amount was specifically awarded to the employer in the amended judgment.

About one year later, Defendant filed a motion with the Wilson County Superior Court under § 97-10.2(j) to determine the amount of the employer's lien on the judgment. The Superior Court dismissed the motion for lack of jurisdiction based on a theory of res judicata, arguing that since the trial court had already determined the lien amount in its amended judgment this matter had already been litigated and decided. Defendant appealed.

ISSUE:
Whether the Superior Court erred in denying Defendant's motion.

HOLDING:
Yes. Under N.C.G.S. § 97-10.2(j), the Superior Court has jurisdiction to determine the amount of an employer's or their insurance carrier's lien when the injured worker has either settled with or obtained a judgment against the third party. Defendant argued that the third-party defendant has the right under the statute to challenge the amount of the worker's compensation lien. The Court discussed prior appellate decisions, notably *Hieb v. Lowery*, in determining that it is permissible for a Superior Court judge to overrule or modify the judgement of another Superior Court judge pursuant to § 97-10.2(j). Thus, res judicata did not apply here, and the Superior Court erred in denying Defendant's motion.

Jurisdiction

A. *Holmes v. Associate Pipe Line Contractors, Inc.*, ___ N.C. ___, 795 S.E. 2d 671 (February 2017) (Davis, J.) (Jurisdiction; Last Act Test; Drug Test)

FACTS:
Defendant-Employer was headquartered in and had its principal place of business in Houston, Texas. In 2013, Defendant needed workers for a project in Huntsville, Texas. The superintendent contacted the on-site union steward and advised that union workers were needed for the project. The union steward then contacted a local trade union based in Tulsa, Oklahoma. Plaintiff was a member of that trade union and had been working as a welder for various contractors. On October 29, 2013, Plaintiff was living in Fayetteville, North Carolina. She was contacted via telephone and instructed she had "24 hours to be in route to the jobsite."

When she arrived in Huntsville, Texas, Plaintiff was required to submit to a drug test and complete various forms before she could begin working. Within two hours, she was working at the site. Plaintiff sustained injuries on January 8 and January 26, 2014. Defendants denied compensability on the basis that the North Carolina Industrial Commission lacked jurisdiction. The Deputy Commissioner dismissed the claim based on lack of subject matter jurisdiction. The Full Commission affirmed and dismissed Plaintiff's claims as well. One Commissioner dissented, finding that the Commission had jurisdiction in light of the fact that Plaintiff's contract of employment was made in North Carolina.

ISSUE:
Whether the Full Commission erred in determining the Industrial Commission did not have jurisdiction over Plaintiff's claim.

HOLDING:
No. First, it was undisputed that Defendant-Employer's principal place of business was in Texas. Therefore, the only question was whether Plaintiff's contract of employment was made in Texas or North Carolina, and the "last act" test was applied. Although Plaintiff accepted the job over the phone from her North Carolina home, her employment was conditioned on her submission to a drug test and written consent to a background check, both of which were conducted in Texas. Plaintiff would not have been permitted to begin work for Defendant-Employer had she refused to undergo the drug test. The Court noted that this requirement was more than an "administrative formality," as her employment was contingent on submitting to this test.

B. *Fagundes v. Ammons Dev. Group, Inc*., ___ N.C. ___, 796 S.E. 2d 529 (February 2017) (Dietz, J.) (Exclusivity; Court-Created Exceptions; Employment in an Ultrahazardous Activity)

FACTS:
On July 25, 2013, Plaintiff was performing rock crushing services for Defendant-Employer when he was struck by debris ejected from a blasting operation. Although Plaintiff was injured at work, he brought a strict liability claim against Defendants, and brought a willful, wanton, or reckless negligence claim against Defendant Albino, the blaster for that particular project. Plaintiff argued his job at a blasting company involved an "ultrahazardous" activity, and as such, he should be able to file a civil suit. Defendants moved for summary judgment, arguing that Plaintiff did not forecast sufficient evidence to overcome the exclusivity provision of the Workers' Compensation Act. The trial court partially granted the motion, but denied it with respect to Plaintiff's strict liability claim and claim against Defendant Albino.

ISSUES:
1. Whether a Plaintiff working in an "ultrahazardous" job can pursue a civil lawsuit against his employer despite provisions of the Workers' Compensation Act requiring the claim to be exclusively pursued at the Industrial Commission.

2. Whether the trial court erred in denying Defendant Albino's motion for summary judgment as to the willful, wanton, or reckless negligence claim.

HOLDINGS:
1. No. Plaintiff argued that his case was an extension of the North Carolina Supreme Court's decision in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). In that case, it was determined that an employee may file suit in civil court if their employer engaged in "misconduct knowing it is substantially certain to cause serious injury or death," regardless of whether the job was dangerous. The Court of Appeals stressed that this rule is a narrow exception to the exclusivity provision of the Workers' Compensation Act. Plaintiff essentially argued that the Court should create a new exception to the Workers' Compensation Act because of a high risk of serious injury in these types of jobs. The Court rejected this argument.

The Court held that, if the Act should provide an exception for workers engaged in ultrahazardous activity, this policy change should be sought at the General Assembly.

2. Yes. In order to survive a motion for summary judgment, the moving party must prove that an essential element of the opposing party's claim is nonexistent. The only evidence Plaintiff relied on to support his claims was five citations for OSHA safety violations stemming from the accident that resulted in Plaintiff's injury. Plaintiff admitted that, prior to his accident, Defendant Albino had no OSHA violations and no one had ever been injured as a result of the company's blasting activities. The Court held that these safety violations were insufficient to survive a motion for summary judgment, as Plaintiff could not forecast any evidence that Defendant Albino knowingly violated any of these safety violations. Plaintiff was unable to provide any other evidence which would show Defendant Albino was willfully, wantonly, or recklessly negligent.

Average Weekly Wage

A. *Ball v. Bayada Home Health Care*, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2017) (McGee, Chief J.) (Calculation of Average Weekly Wage; N.C.G.S. § 97-2(5))

FACTS:

Plaintiff worked as a part-time certified nurse's assistant between May 26, 2010 and November 30, 2010, after which she began working full time. During this time, she earned $8.00 per hour. Thereafter, in February 2011, Plaintiff began earning $10.00 following a transfer and position change. On the first day her higher rate was in effect, February 10, 2011, Plaintiff suffered an at-work injury. She was restricted to limited-duty work for three days, and was thereafter released to full-duty work. Then, on May 18, 2011, Plaintiff alleged that she suffered a second injury.

Plaintiff filed a Form 18 claiming injuries to her left hand, both knees, and her right hip as a result of the February 10, 2011 incident. On the same day, she also filed a Form 18 for the May 18, 2011 incident, claiming injuries to both knees. Defendants admitted compensability for the right leg, but denied compensability for the hips and hands. Defendants subsequently filed a Form 60 admitting that disability "resulting from the injur[ies]" began on May 19, 2011, but Defendants denied compensability for the May 18, 2011 incident.

Plaintiff filed a Form 33. The Deputy Commissioner found that Plaintiff suffered compensable injuries on February 10, 2011 and May 18, 2011. The Deputy Commissioner also determined that Method 5 under N.C.G.S. § 97-2(5) was the appropriate method to use to calculate average weekly wage. This resulted in an average weekly wage of $510.33 and a compensation rate of $340.24. Defendants appealed. The Full Commission concluded that: (1) Plaintiff suffered a compensable injury on February 10, 2011; (2) there was not competent evidence of a compensable injury on May 18, 2011; (3) Plaintiff's disability began on May 19, 2011; and (4) Plaintiff was entitled to ongoing medical treatment. The Commission also concluded that Methods 1, 2, and 4 under the statute were inapplicable, and that utilization of Method 3 should be applied in this case. The Commission concluded that Plaintiff's average weekly wage was $284.79 and compensation was $189.87. Plaintiff appealed.

ISSUE:
Whether the Commission erred in utilizing Method 3 under N.C.G.S. § 97-2(5) to calculate Plaintiff's average weekly wage.

HOLDING:
Yes. The Court of Appeals affirmed the Full Commission decision that Plaintiff did not suffer a compensable injury on May 18, 2011, but held that using Method 3 was not "fair and just" to the Plaintiff as required by N.C.G.S. § 97-2(5). The Court of Appeals instead reversed and remanded to the Commission to utilize Method 5 to calculate Plaintiff's average weekly wage. The Court was persuaded by Plaintiff's argument that using Method 3 was unfair given that it only took into account her part-time work at the lower hourly rate and ignored the fact that she worked at a higher hourly rate and with more frequency after the injury. Although Defendants argued that there was no certainty that Plaintiff would have continued to earn higher wages with increased hours based on hearing testimony from Defendant-Employer's representative, the Court highlighted that this uncertainty was not different than the uncertainty of any at-will employment. The Court noted that it was undisputed that Plaintiff worked for more than three months at the increased pay and hours following the February 10, 2011 injury. The Court relied on *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), and *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 654 S.E.2d 745 (2008), to determine that utilization of Method 3 was not "fair and just." As such, the Commission's Opinion and Award was reversed, and the case was remanded to utilize Method 5 for calculation of Plaintiff's average weekly wage. A potential key factor was that Plaintiff had already started her job at $10/hour on February 10, 2011, the date of her injury.

Medicaid Eligibility

A. *Williford v. N.C. Dep't of Health & Hum. Servs.*, ___ N.C. App. ___, 792 S.E.2d 843 (October 2016) (Zachary, J.) (Medicaid Eligibility; Medicare Set-Aside Account)

FACTS:
In 2005, a 57-year-old Plaintiff suffered a compensable work injury to her left arm and right knee. Plaintiff received medical and disability benefits as a part of her claim. After several years of medical treatment and no indication that Plaintiff would be able to return to work, the parties participated in mediation and entered into a settlement agreement, which was approved by the Industrial Commission in 2011. The terms of the settlement agreement provided that Defendant would contribute $46,484.12 to fund a self-administered Workers' Compensation Medicare Set-Aside Account (WCMSA). This contribution represented the parties' settlement of all future workers' compensation benefits for which Defendant would be liable and that would otherwise be paid by Medicare.

When Plaintiff reached 65 years of age, she applied for and received Medicaid for the Aged. To qualify for Medicaid benefits, an applicant who is single and over 65 years old may have no more than $2,000 in liquid assets, including bank accounts. In 2013, Plaintiff's eligibility for Medicaid was terminated on the grounds that the funds in Plaintiff's WCMSA (at that point approximately $46,630) were a

countable resource for purposes of determining Medicaid eligibility (bringing Plaintiff's total liquid asset calculation to approximately $48,000).

After an appeal by Plaintiff, Defendant issued a final decision affirming the termination of Plaintiff's Medicaid eligibility. Thereafter, the trial court denied Plaintiff's motion for judicial relief and affirmed Defendant's decision. Plaintiff appealed.

ISSUE:
Whether Defendants properly classified the funds in Plaintiff's Workers' Compensation Medicare Set-Aside Account as a financial resource for purposes of determining Plaintiff's eligibility for Medicaid.

HOLDING:
No. Eligibility for Medicaid in North Carolina is determined by applicable federal standards. These standards establish that in order for a given asset to be a countable resource, the asset must be legally available to the applicant without legal restriction on the applicant's authority to use the resource for support and maintenance.

The purpose of a WCMSA is to allocate a portion of a workers' compensation settlement to pay potential future medical expenses resulting from a work-related injury that Medicare would otherwise pay. If the funds in Plaintiff's WCMSA were used for any purpose other than medical expenses arising from her compensable injury and would otherwise be payable by Medicare, then Medicare would refuse to pay for any applicable medical expenses until Plaintiff had replaced the funds and then depleted them. These limitations amount to legal restrictions.

Since Plaintiff's use of the WCMSA funds was subject to legal restrictions, these funds did not amount to a countable resource to be used in calculating Plaintiff's liquid assets for the purpose of Medicaid eligibility. As such, the trial court erred in affirming Defendant's ruling that the WCMSA was a countable resource.

Form 63/Disability

A. *O'Neal v. Inline Fluid Power, Inc. & Automotive Parts Co., Inc.*, ___ N.C. App. ___, 773 S.E.2d 574 (May 2015) (McGee, J.) (Unpublished) (Form 63; Disability)

FACTS:
Plaintiff was 68 years old and worked for three to four years for Defendant-Employer. His job duties included delivering parts, stocking inventory, and some janitorial tasks. On May 10, 2011, while delivering boxes, Plaintiff injured his low back, right hip, and groin area. He reported symptoms into the right leg. Plaintiff had undergone a prior lumbar fusion surgery in 2008 and had prior complaints of hip pain with numbness and tingling into the right leg. Plaintiff thereafter underwent a total hip replacement in February 2012. After surgery, on April 5, 2012, Dr. Wyker released Plaintiff from his care.

A Form 63 was filed indicating payment of medical compensation only. A Form 61 denying the claim was thereafter filed in February 2012. Plaintiff filed a hearing request. The Deputy Commissioner found that the medical treatment, including the hip surgery, was related to the May 10, 2011 injury and that Defendants were responsible for the medical expenses. The Deputy Commissioner further found that Plaintiff was entitled to temporary total disability benefits until Plaintiff returned to work.

Defendants appealed. The Commission issued an Interlocutory Opinion and Award concluding that Plaintiff was disabled from May 14, 2011 to May 21, 2012, thus entitling him to indemnity benefits during that time. In terms of establishing disability after May 21, 2012, the Commission ordered the parties to present further evidence, by deposition, of Plaintiff's disability within 60 days. The parties then deposed two vocational rehabilitation/disability management experts and filed supplemental briefs. The Commission thereafter issued its final Opinion and Award. The Full Commission affirmed the award of medical benefits, but found that Plaintiff was not entitled to indemnity benefits after May 21, 2012 based on the opinions of Defendants' certified disability management expert. There was a dissent to the Commission's Opinion and Award. Plaintiff appealed to the Court of Appeals.

ISSUES:

1. Whether the Commission erred in considering whether Plaintiff had met his burden of proving disability after May 21, 2012.

2. Whether the Commission erred in determining that Plaintiff had not met his burden of proving disability after May 21, 2012.

3. Whether the Commission erred in determining that the disability determination date was May 21, 2012.

4. Whether the Commission acted beyond the scope of its authority to create Section 2 of the Form 63 allowing for payment of medical benefits only.

HOLDINGS:

1. No. Plaintiff argued that he was entitled to a presumption of disability as a result of the prior Interlocutory Opinion and Award finding that Plaintiff had established disability until May 21, 2012. The Commission did not agree, instead noting that there were limited circumstances where the presumption of disability is allowed (Form 21, Form 26, or proving disability before the Industrial Commission). None of these circumstances existed in this case, and the Court found that the Commission did not err in considering whether Plaintiff had met his burden of establishing disability after May 21, 2012.

2. No. The Court found that the Commission's holding that Plaintiff had failed to prove that it would be futile for him to seek other employment under *Russell* was supported by the evidence. The Commission relied on the opinion of Defendants' disability management expert to determine that Plaintiff had not established disability after May 21, 2012.

3. No. Plaintiff argued that the Commission's finding that Plaintiff's disability ended on May 21, 2012 was arbitrary. The Court found that the May 21, 2012 date came from Dr. Wyker's deposition wherein he testified about Plaintiff's ability to work as of that date. The Court found there was competent evidence to support the Commission's finding that there was no disability after May 21, 2012.

4. No. Plaintiff argued that the Form 63 medical only section allowed employers to escape the provisions of N.C.G.S. § 97-18(d), which provides that an employer waives its right to contest the compensability of a claim if not contested within 90 days from the date the employer had notice of the injury. The Court emphasized that the legislature has provided two distinct types of award under the Workers' Compensation Act: (1) medical compensation; and (2) indemnity compensation. The Court further indicated that the Commission's determination of whether medical compensation is owed under N.C.G.S. § 97-25 is a separate determination from whether indemnity compensation is owed. The Court distinguished between Section 1 of the Form 63, which deals with claims for indemnity compensation under N.C.G.S. §§ 97-2(11) and 18(d), and Section 2, which deals with claims for medical compensation under N.C.G.S. § 97-25. The Court, therefore, held that the Commission did not act beyond the scope of its authority on the Form 63 by creating Section 2.

B. *O'Neal v. Inline Fluid Power, Inc. & Automotive Parts Co., Inc.*, ___ N.C. ___, ___ S.E.2d ___ (December 2016) (Per Curium) (Form 63; Disability)

FACTS:
See above.

HOLDING:
The Supreme Court held that discretionary review was improvidently allowed.

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