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2008  
WORKERS' COMP  
CASE LAW UPDATE

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# INJURY BY ACCIDENT



# Moseley v. Wake County Full Commission - 2008



# Facts:

- Plaintiff Animal Control Officer
- Used mace and tranquilizer gun on dogs about once a month
- Normal job duties involved dealing with aggressive dogs
- Plaintiff prepared as if all dogs aggressive



- DOI – Pit Bull ran at her and jumped around her with open mouth
- Pit Bull did not bite plaintiff
- Plaintiff used her mace and tranquilized the Pit Bull with her tranquilizer gun
- Plaintiff fought off Pit Bull by kicking at it while she retreated to her truck
- Says she had never dealt with a situation like this before
- Plaintiff alleges that she developed PTSD
  - One physician testifies related



# Assuming PTSD real, was PTSD the result of an accident?

- **Accident**

- “An unlooked for and untoward event which is not expected...”
- “The interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences...”

# **NO ACCIDENT!**

- Approaching and handling aggressive dogs was part of plaintiff's normal work routine and her normal work conditions
- Plaintiff handled this aggressive dog as she had handled others in the past

# OCCUPATIONAL DISEASE

# Hassell v. Onslow County Board of Education / NCSC - 2008



# Facts:

- 1987 – 2002 – Plaintiff employed as a school teacher
- 1996 became middle school teacher
- Consistent problems managing classroom and maintaining order
- Unlike other teachers of same students
- Plaintiff dreaded going to work
- Students disrespected her



- Verbal and physical harassment
- Negative performance reviews
- Four “Action Plans” mandated by law due to performance
- Plaintiff failed to improve quality of performance
- Refused to sign warning letter, left school, never RTW, and later resigned
- Psychologist opined that job “driving her crazy”, major stressor



# N.C. Court of Appeals

- Affirmed Commission's Denial of OD - Found for Defendants
- Dissent – Judge Wynn
- New Principal caused much of Plaintiff's anxiety
- Plaintiff felt that new Principal was going to find something wrong with everything she did
- Dr. Chestnut: "Plaintiff's difficulty with the administrator increased her anxiety... to push it to a clinical syndrome"



# Occupational Disease?

## **N.C. Gen. Stat 97-53(13)**

### **Plaintiff's Burden of Proof**

- Job duties placed her at an increased risk of contracting the disease as compared to a member of the general public not performing her job duties
- Job duties significantly contributed to her contraction of the disease



# N.C. Supreme Court / N.C. Ct. App. Standard of Review?

- Commission's findings "shall be conclusive and binding as to all questions of fact" and "are conclusive on appeal when supported by competent evidence, even though there is evidence that would support findings to the contrary"
- Appellate Courts cannot re-weigh evidence
- IE must affirm if **ANY** competent evidence supports Commissions findings



**NCSC Affirms Commission**  
**and Ct. App. – No OD**



**Morris v. Kelly Springfield**  
**Full Commission - 2008**



# Facts:

- Plaintiff 65 years old
- Completed 6th grade and went to work for 15 years in a brickyard
- 1970 – began working for Kelly – Forklift operator
- First 17-19 years, P hauled materials from mixing area of plant



- Plaintiff covered in “carbon black” dust at end of each shift
- When he coughed or blew his nose – black discharge
- Smoking history – 1 ½ - 2 ½ packs per day for 50 - 55 years – started when 16
- Diagnosed with lung cancer 1997 – cut back to ½ pack per day
- Plaintiff died 5/11/05 due to lung cancer



# Medical Evidence

- School of Public Health Professor – IR based on 16 tire industry studies
  - (All 16 studies dealt with plants older than Fayetteville plant)
- Epidemiologist – IR (Unfamiliar with job duties and smoking history)

- **Tyler, Texas plant study published in Journal of Occ. Medicine**

- Performed by certified Industrial Hygienist and Former Head of OSHA and certified Epidemiologist with Ph.D. in experimental pathology
- Assessed whether early 1960's improvements reduced workplace exposures
- Included investigation and analysis during visit to Fayetteville plant



- Conclusion: Exposures in plants after 1960's improvements and 1970 (when OSHA came into effect) did not lead to diseases that were once prevalent
- Fayetteville plant even cleaner and more high tech than Texas plant
- Carbon Black not proven to be a carcinogen to humans
- No IR of lung cancer



# Occupational Disease?

# NO!

- Smoking caused lung cancer
  - Panel: Chair Young, Commissioners Lattimore and McDonald

# Kelly v. Duke University COA - 2008



# Facts:

- 4/11/97 – Stipulated DOI found as fact by FC in 2004 (litigation related to medical treatment dispute)
- 12/99 – IC O&A found that P's work related stress was OD
- IC further found stress aggravated diabetes (No Appeal)
- 4/11/07 – First date that P's diabetes began causing blindness
- Acc. to O&A, disability began 1999; P Perm/ Total
- P died 1/10/04



# Issue?

Is Plaintiff's death compensable?



## **N.C. Gen. Stat. §97-38**

### **Death claim viable if:**

- Death occurs within 6 year of DOI, OR
- Death occurs within 2 years of final determination of disability (Perm/Total)

(Whichever is later)



# Analysis:

- Final Determination of Disability – 1999

**When was DOI in this OD claim?**  
**Stipulated DOI or Date of Disability?**

- G.S. 97-38 says DOI for OD “shall be” the date of disability



## **NC Ct. App.**

### **Stipulated DOI has no effect**

- DOI is date of disability
- Death Claim Viable
- No Dissent – We have asked NCSC to hear case



# MEDICAL TESTIMONY

# Kelly v. Duke University COA - 2008



# Facts:

- P treated for diabetes for many years
- Diabetes aggravated by compensable OD – So Duke paying for treatment
- 10/03 – regular follow up, doing OK
- P had history of problems controlling glucose levels

- P died 1/10/04
- During 3 weeks prior to death – P had pneumonia according to sister
- 3 days prior to death, P called MD and MD called in Z pack (antibiotic)
- MD did not ask P to come in for exam
- MD signed death certificate stating cause of death was “complications of diabetes”
- No autopsy

# Medical Testimony

- Diabetes significantly contributed to death
- Why? Data indicates that women with diabetes are 4 times more likely to die of “sudden death” than women without diabetes
- Sudden death = cardiovascular event like HA or Stroke

- MD does not know whether P actually had a HA or stroke
- Does not know what actually caused death
- Must speculate based on data
- Autopsy would have revealed cause of death
- Death not caused by pneumonia (of course not)

# Law

- Expert testimony that a work-related injury 'could' or 'might' have caused further injury is insufficient to prove causation when other evidence shows the testimony to be a guess or mere speculation

**Is medical testimony  
sufficient to prove  
causation?**

# YES!

- According to IC and Ct. App.
- Ignored testimony indicating speculation
- Doctor said over and over that diabetes significantly contributed to death
- Not until Cross-exam did doctor explain basis – data
- No Dissent - we have asked NCSC to hear case

**TWO YEAR LIMIT TO  
FILE CLAIMS  
N.C.G.S. §97-24**



**Gore v. Myrtle / Mueller**  
**NCSC - 2007**



# Facts:

- Employer representative testified as follows:
  - She remembered filling out a Form 18 and a memo with Plaintiff
  - She could not recall what she did with the forms

\*No forms ever filed with the IC



- Plaintiff testified as follows:

- Under reasonable belief that IC Forms filed with IC
- Relied to her detriment on her perception that IC Forms would be filed with IC

\*IC found as fact that Plaintiff  
filed her claim more than two  
years after DOI



# Law

- 1965 case seemed to indicate that without a showing of bad faith, detrimental reliance on actions of employer in not filing a claim within two years does not extend two year limit
- Where an Employer, of its own volition, pays medical bills, the two year rule still applies

**Does N.C.G.S. §97-24 bar**  
**Plaintiff's claim?**



# NO!

- NCSC created exception to two year rule
- G.S. 97-24 is **NOT** a SOL
- G.S. 97-24 is a “condition precedent” to the right to compensation
- No showing of bad faith needed
- “Condition precedent” may be waived by beneficiary party by virtue of its conduct
- 4 to 3 decision with scathing dissent
- Expect more litigation on claims that would previously have been barred



# Lesson

- Employers should complete Form 19 and send to carriers
- Employers are required to provide Form 18 to Employee when injury reported
- Employer and/or Carrier should document notice to P of P's responsibility to file Form 18 with IC



# JUDICIALLY COGNIZABLE TIME

# Gregory v. W.A Brown & Sons COA - 2008



# Facts:

- Alleged back injury on morning of 10/11/01
- Time records show P did not work on morning of 10/11/01
- 2005 O & A - IC found that “P did suffer an injury on an unknown date that same week”
- 2007 O & A – “P sustained a back injury as a result of a STI on or before 10/10/01”



- P testified that STI occurred between 9:40 and 12 noon on 10/11/01
- 10/11/01 time records – P worked 6:59 am to 8:31 am, then returned at 12:05
- P testified that plaintiff's co-worker came over and asked "what is wrong?"
- P testified that supervisor then gave her a back brace
- Co-worker corroborated, but could not state STI occurred on 10/11/01
- P first treated at Pro Med on 10/14/01
- Medical testimony – STI aggravated PE degenerative condition



# Compensable STI?

# Law

- “Events which occur contemporaneously, during a ***cognizable time period***, and which caused a back injury, fit the definition [of STI] intended by the Legislature”
- P not required to allege a “specific hour or day of the injury”

Do facts = STI during a  
judicially cognizable  
time period?

# YES!

- P's testimony, co-workers testimony, and meds prove STI within a judicially cognizable time period



# Always remember the Ct. App. Standard of Review

- COA must affirm FC if there is **ANY** evidence to support findings
- COA cannot make new findings
- FC not shackled in this way – it can reverse even on credibility issues

# INTOXICATION DEFENSE

# Gratz v. Hill / COA – 2008



# Facts:

- P worked as a roofer
- P bought beer on way to job site at convenience store
- Driver watched P “chugging away” in rear view mirror
- Only P wanted to work on steep roof as it was cold and windy



- P climbed piece of equip. with sign that said “**Do Not Climb**”
- P did not use safety equipment because he said it was “for pansies”
- P fell from roof 5 - 10 minutes later
- Multiple injuries – two week hospital stay
- Co-worker, paramedics, and hospital personnel smelled alcohol after fall



- Toxicology revealed blood alcohol level of .11 five to seven hours after fall
- Urine test showed pot and cocaine
- Expert – blood alcohol likely .22 when he fell
- Expert – P impaired and impairment was proximate cause of injury
- FC found as fact that P intoxicated at time of fall

# Intoxication Law per 2005 Statutory Amendment

- “Intoxication” = consumed enough beverage or controlled substance to cause appreciable impairment to body or mental faculties IE .08 in NC
- Result consistent with “intoxication” = rebuttable presumption of impairment



# Issues

- Are FC findings of intoxication and rebuttable presumption of impairment supported by **ANY** evidence? **YES**
- Are FC findings that P failed to rebut that presumption supported by **ANY** evidence? **YES**

# SUITABLE EMPLOYMENT

# Wiles v. Waffle House Full Commission – 2008



# Facts

- P employed as a cook / waitress
- Compensable slip and fall
- Back accepted, shoulder denied
- P released for back with permanent restrictions, not released for shoulder
- Waffle house prepared LD job description



- Duties: cash register, hostess, light food preparation, auditing tickets to make sure food on plates matched items on tickets
- Physician approved only the ticket auditing task
- P offered the LD position and told P when to RTW
- P did not report for work or call
- No question that LD job not contemplated to be permanent, “suitable” employment
- P offered no evidence of inability to work in any capacity after MMI



# Issues

1. Was P justified in refusing a temporary LD position prior to MMI?
2. If not, did P carry her burden of proving continuing disability?

# 1. NO!

- P not justified in refusing pre-MMI rehabilitative position within her restrictions
- After MMI, rehabilitative employment no longer suitable

## 2. NO!

- P failed to meet burden of proving nature and extent of disability
- Did not prove:
  - Incapable of any employment, OR
  - Looked for work without success for reasons related to injury, OR
  - Futile to look for work due to pre-existing conditions

**MEDICAL EXPENSES /**  
**LAWN CARE**

# Scarboro v. Emery Worldwide Freight / COA – 2008



# Facts:

- P utility driver suffers compensable back and shoulder injury
- 50% PPI to back, 40% PPI to shoulder
- Treating Doc said unlikely P will ever RTW
- P paid \$4,700.58 for a life care plan (LCP)
- LCP recommended lawn care services, among other things



- Treating Doc agreed that LCP recommendations were reasonable and medically necessary
- Ds refused to reimburse P for LCP and pay for lawn care service
- FC later ordered Ds to pay for LCP – Ds appealed
- FC also reversed Deputy Decision requiring Ds to pay for lawn care service
- P appealed



# Issue

**Are LCP and lawn care services  
“Medical compensation” that shall  
be provided by the employer?**



# Law

- Medical Compensation = medical, surgical, hospital, nursing, and ***rehabilitative services***, and medicines, sick travel, and ***other treatment*** reasonably required to effect a cure or give relief for such additional time as will tend to lessen the period of disability.



Plaintiff argues that lawn care service is *other treatment* -

**Is it?**



# NO!

- FC findings supported by D's evidence that lawn care services were an ordinary expense and not medical compensation
- COA cannot reweigh evidence even though P presented LCP and medical testimony supporting argument that lawn care services were medically necessary



Defendants argue that LCP is not a *rehabilitative service*.

**Is it?**



# YES!

- FC findings supported by some evidence even though no authorized treating doc recommended the LCP
- FC has broad discretion to determine whether a rehabilitative service will affect a cure, give relief, or lessen the period of disability

