



**CRANFILL SUMNER
& HARTZOG LLP**

THE DEFENSE NEVER RESTS.

RALEIGH

Phone (919) 828-5100

Fax (919) 828-2277

CHARLOTTE

Phone (704) 332-8300

Fax (704) 332-9994

WILMINGTON

Phone (910) 509-9778

Fax (910) 509-9676

www.cshlaw.com



2007 Case Law Update Part I

Jonathan Anders
jca@cshlaw.com

ACCIDENT / COURSE AND SCOPE / ARISING OUT OF

- **Frost v. Salter Path Fire and Rescue**
(Ct. App. 2006)
 - 2001 Injury result of go cart accident at “Fun Day”



- Plaintiff was EMT Captain
- Community donations used to treat volunteers at amusement park
- Operating budget funds not used
- Admission and lunch paid by Dept. out of community donations fund
- Attendance voluntary - Plaintiff felt obligated as EMT Captain
- Many volunteers did not attend
- Attendance taken to calculate bill
- One tangible benefit according to plaintiff: improving morale



- **FC and Ct. App. Reverse Deputy:**
 - FD sponsored Fun Day
 - Event voluntary, but P felt obligated to attend
 - Record of attendance
 - FD financed event
 - Volunteers regarded Fun Day as benefit
 - P intended to make thank you speech

N.C. Supreme Court Reverses Court of Appeals

- Attendance Voluntary
- Salter Path F&R not a social organization
- “Fun Day” was a social event
- Chilton not adopted as law
- SC declined to expand list of activities that are in course and scope



- **Rose v. City of Rocky Mount – Ct. App 2006**

- Police officer since 1987
- Signed out for lunch to run personal errands
- Drove personal vehicle
- Wearing uniform



- Rear ended by drunk driver
- Drunk driver about to flee scene
- P used training to approach drunk driver
- Tapped hood of car to leave fingerprints
Drunk driver struck and ran over P
- Witnesses – Drunk driver aimed car at P

- FC – Found drunk driver motivated to assault P due to her status as PO
 - Found injuries sustained as result of assault, not MVA
 - D's appealed

Did injury arise out of and occur within the course and scope of her employment as a police officer?



Ct. App. – Affirmed FC

- Standard of review? – Any evidence to support findings
- P at IR of assault due to PO status
- P acting in Law Enforcement capacity by following training
- Contrast to Dodson (Road Rage Case) – all drivers at risk of road rage





- **Fuller v. Clear Channel Communications – Ct. App. 2006**
 - Fuller was program director for radio station – hosted a morning show
 - Fuller planned trip with wife and friends to Myrtle Beach to attend Bike Week

- Planned to be wedding anniversary celebration
- Fuller repeatedly discussed plans on air often in conjunction with paid ads for Harley Davidson dealership
- Fuller eventually made on air promise to do a live telephone call in to the show from Myrtle Beach during Bike Week



- His show did not air on weekends, so he left on Thursday rather than Friday as originally planned so he could call in Friday morning
- Required his absence during a ratings period which was rare
- Fuller dies in MVA



Did death arise out of and occur within the course and scope of Fuller's employment?



- **FC and Ct. App - YES**

- Relevant question – Was Fuller acting for the benefit of his employer to any appreciable extent when the accident occurred?
- Answer: YES
- Evidence was that P was trying to increase the station's listenership by appealing to motorcycle enthusiasts – IE within the course and scope

- Not barred by Coming and Going rule b/c work required travel away from employer's premises, thus continuously within course and scope during such travel unless there is a distinct departure for a personal errand
- No such departure
- Some evidence to support FC's findings, so Ct. App. must affirm



OCCUPATIONAL DISEASE

- Chambers v. Transit Management – NCSC 2006
 - P Bus Driver for 30 years
 - Used both hands 90-100% of time
 - P developed severe pain in arm, shoulder and neck



- Dx: Left Ulnar Neuropathy and Cervical spine condition
- Medical statements:
 - Slightly higher risk than general public
 - Bus Driver at risk for repetitive use of arm and elbow, and UN correlates to some degree
 - Unaware of factors that would increase P's risk of developing cervical spine condition
 - Bus Driving could be causative or aggravating factor related to UN

Compensable OD?

– FC said **Yes**

NO – Ct. App. reversed FC

- Testimony speculation
- Dr. did not differentiate between *contracting* and *aggravating* the UN
- P's Burden: Prove IR of contracting, not aggravating





- **Thomas v. McLaurin Parking Co. – Ct. App. 2007**
 - P assigned to work from gatehouse and check persons in and out of parking lot
 - P sat on small metal stool
 - P began experiencing pain in hip
 - Dx: Degen. Arthritis

– Medical Testimony:

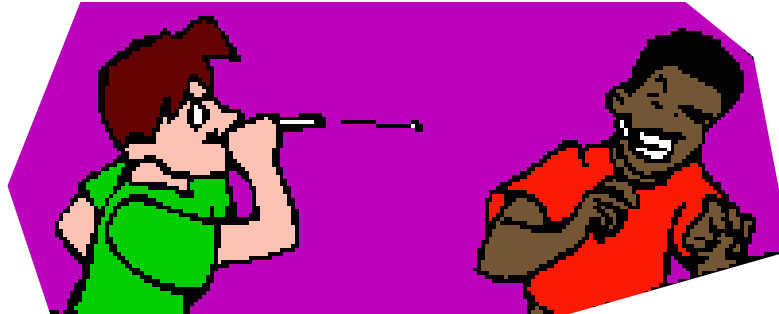
- P more likely at an IR of developing an aggravation of arthritic condition than member of General Public due to getting up and down a couple of hundred times a day
- P at IR of injury to hip due to PE arthritis

Compensable OD?

- FC says **NO** based on Chambers case

Ct. App. – Affirmed FC

- No evidence that employment placed him at greater risk for contracting arthritis of the hip than the general public.



- **Hassell v. Onslow County BOE – Ct. App. 2007**
 - P school teacher since 1987, sixth grade teacher since 1996
 - Can't keep order in class
 - Weekly disciplinary incident
 - Students verbally disrespectful, physically harassed and intimidated P

- Students walked out without permission
- Students threw spitballs and wads of paper at P
- P hit in back of head by object at assembly, so began sitting at top of bleachers with back to wall
- Referred high number of students to principal prompting comments from Admin. about performance

- Negative performance reviews, numerous parent complaints
- P required by “Action Plan” to show progress with performance
- P resigned
- P contends that she was unable to continue working due to stress and anxiety
- P diagnosed with Generalized Anxiety Disorder by psychologist
- P medically excused from work
- P’s “job was driving her crazy”



Psychologist testified:

- Ps job increased P's risk of developing generalized anxiety disorder
- Did not ID specific factors unique to job that led to condition
- Did not review school records or investigate validity of P's complaints
- Said his primary role was to be supportive
- P contends subjected to dangerous and volatile work environment

Full Commission – Denied Claim



Compensable OD?



NO – Ct. App. not allowed to re-weigh evidence

- Must affirm FC if findings supported by any evidence
- FC gave psychologist's opinion little weight
- FC determined that P presented no evidence that stress related to job characteristic of teaching profession
- Causes may be, but stress itself is not
- IC and Appellate Courts reluctant to find Occ. Stress OD claims compensable
- Judge Wynn dissented, so P has automatic appeal to SC if she so chooses



PROVING DISABILITY

- **Everrett v. Well Care Nursing Services – Ct. App. 2006**

- Compensable MVA
- Arthroscopic surgery to wrist
- Form 60 – TTD paid – 10% PPD
- 11 weeks after surgery, P leaving house and slipped on back steps, fell, and fractured left ankle



- P contends unable to break fall due to wrist injury
- “I didn’t have the strength in my hand to grab the doorknob or security bar...”
- P testified that she was not physically able to work, but never asked her doctor his opinion
- P testified that she had not looked for any work
- Doctor did not address the disability issue through depo or record



**Is P entitled to ongoing TTD? –
Did P carry her burden of
proving disability?**



- **Let Us Review - How can P satisfy her burden?**
 - Medical evidence of total incapacity to work due to injury. OR
 - Capable of some work, but unsuccessful RTW after reasonable effort. OR
 - Capable of some work, but attempt futile due to PE conditions (age, inexperience, lack of education). OR
 - RTW at lesser wage

FC – Yes and Yes



Ct. App. – No and No

- Must have medical evidence of disability**
- Plaintiff's testimony alone is not enough**
- No effort to RTW**



- **Williamson v. Fluor Corp.** – FC 2007
 - P ironworker and boilermaker falls and suffers compensable back injury
 - Back surgery – minimally invasive microdiscectomy
 - FCE invalid due to submaximal effort



- Dr. could not explain ongoing symptoms
- MRI completely normal
- 10% rating and 50 lb. lifting restrictions – P released from care
- Subsequent doctor unable to explain additional symptoms
- Both doctors agreed that P “unenthusiastic about returning to work.”

**Is P entitled to ongoing TTD? –
Did P carry her burden of
proving disability?**



FC – NO

- Form 60 – P has burden
- No evidence of total disability, or reasonable attempts to RTW without success due to compensable injury
- Ds entitled to credit for overpayment of TTD



- **Plott v. Bojangle's – Ct. App. 2007**

- P unit manager tripped on hose, caught himself, and injured back
- Ds never accepted compensability, and never paid P TTD
- P out of work then released with light duty restrictions



- P contends that Bojangle's could not accommodate restriction
- Bojangle's contends suitable employment offered and refused by P
- IC found injury compensable

Has P carry her burden of proving ongoing disability?

Or have Ds proven that P refused suitable employment and thus no longer disabled?

**FC – Claim compensable, but P
refused suitable employment,
and thus not owed ongoing
TTD**



Ct. App – Reversed on issue of disability

- Cannot suspend TTD under 97-32 (refusal of suitable employment)
- 97-32 allow suspension for refusal of suitable employment where an employer seeks to “***discontinue disability payments.***”
- Ds had not accepted compensability and were not paying TTD
- Judge Tyson dissented – probably going to SC





- **Freeman v. J. L. Rothrock** –
FC 2006
 - P truck driver sustained an STI while cranking a dolly
 - Accepted on a Form 60
 - MRI – Disc herniation – nonsurgical – restrictions assigned

- Medical testimony that P no longer able to work as a truck driver for employer
- At time of hearing, P had not attempted to secure other employment
- P testified that he had not submitted any applications in a field within his work restrictions

**Is P entitled to ongoing TTD? –
Did P carry his burden of
proving disability?**



FC – YES

- P searching for jobs as a truck driver without success
- P not certain that he was unable to perform job as truck driver, and was willing to try
- Thus job search not unreasonable



Dissent - Chairman Lattimore

- P failed to prove ongoing disability
- P has not proven incapable of work in any employment due to injury
- P failed to make a reasonable job search



POST MMI INDEMNITY

- **Harris v. American Rockwool, Inc – FC 2007**
 - Compensable injury
 - PPI assigned
 - P receiving TTD beyond MMI
 - TTD suspended due to P's unjustified refusal to cooperate with Voc. Rehab.
 - At time of suspension, P had received more in TTD than he could have received for his PPI
 - P demands payment for PPI



Is P entitled to additional indemnity benefits?



FC – NO!

- Post MMI, P not entitled to ongoing total disability benefits AND permanent partial disability benefits
- P is entitled to elect the more favorable remedy

MEDICAL TESTIMONY

- Upchurch v. Goodyear
 - FC 2007
 - P suffered from severe degenerative cervical spine dating back to MVA six years earlier



- Developed neck pain 8 weeks prior to alleged accident and sought chiro treatment day before alleged accident
- P described numerous symptoms indicative of natural progression of degen. Neck
- P did not mention being knocked to ground during accident until 1 year after incident

- Dr. Bullard, treating physician, testified:
WRI did aggravate PE cervical condition
 - Assumed that P knocked to ground
- Dr. Fulghum reviewed meds only, and testified that P's condition and disability were not related to WRI, but rather to natural progression of PE degen.
Condition



Did P carry his burden of proving causation through competent medical testimony?

FC – NO - Disability denied

- FC gave little weight to Dr. Bullard's testimony because FC found he based his opinion on inaccurate mechanism of injury



- **Seay v. Wal-Mart – Ct. App. 2006**
 - P worked in inventory control
 - Felt twinge in back while lifting
 - Went to ER after work

- Triage note says onset of pain 5-6 weeks earlier
- Treating physician described LB pain over past 4-6 weeks worsening over last two days
- P later treated with Dr. Davidson who found herniated disc and performed a 2 level discectomy
- Medical records inconsistent as to P's history of back pain

- Dr. Davidson testified: “Assuming facts as stated (no radiating pain prior to DOI), it would be my medical assumption that his on-the-job injury of 4/4/03 should be implicated as the culprit of his thoracic disc herniation and secondary symptoms thereafter.”
- No attempt to clarify by PA



**Did P carry his burden of
proving causation
through competent
medical testimony?**



FC and Ct. App.: NO!

- Medical testimony insufficient to prove causation
- Must be “reasonable scientific probability” that stated cause produced stated result
- IE – Dr. Davidson speculation
- Dr. Davidson also assumed facts not supported by evidence, and was not told of conflicting evidence re: onset of P’s pain.

SETTING ASIDE CLINCHERS

- **Marsh v. General Glass International Corp – FC 2006**
 - At Hearing, P was 46 yrs old, had 6th grade education, married 31 yrs, had driver's license, owned car, owned her own home, and had children



- Working for GG since 2000
- Compensable injury to left thumb
- Surgery, degen. OA of CMC joint, permanent restrictions
- RTW at prior job
- GG's business beginning to slow down
- 1 week after RTW, GG asked E/ees if interested in taking voluntary lay off



- P advised that GG would bring her back if business picked back up
- P accepted a vol. temp. lay off – GG processed P's unemployment benefits
- Business had not increased as of date of hearing
- MMI – 12% PPI to the hand
- Adjuster negotiated \$6,000 settlement with P



- Told P that Dr. rated thumb, not hand
- Offered \$4,000 and said this amount equaled rating plus add'l consideration
- Told P that \$4,000 was max authority
- Told her that an atty would not get her any more and would take part of settlement
- P told adjuster that Dr. said she had 15% rating to hand – said she would call Dr. to verify



- Later negotiations based on 12% rating to hand worth \$5.120.16
- Adjuster offered P \$5,700
- P asked if GG was going to bring her back
- Adjuster told P that when she talked to GG, they had no plans to bring anyone back for a while

- **IC Findings of Fact**

- Adjuster presented Info to P that was false and misleading
- Adjuster stmts deprived P of competent legal advice
- P led to believe that she was offered max authority
- Adjuster knew that recall to work important to P



- The words “for a while” falsely indicated there would be a recall
- P relied on these misrepresentations to her detriment
- Clincher approved 3/23/04
- P learned layoff permanent in the summer of 2004



- Dr. Apollo said IQ score is 67 – below 70 is considered mentally retarded
- P lacked cognitive functioning ability to determine whether Ins. Adjuster making false and misleading statements
- P working under restrictions when accepted vol. layoff, and was wrongfully led to believe that she would be called back to work



AWARD – Clincher set aside -
Ds get credit for \$6,000 paid.



SANCTIONS / REFUSAL OF SUITABLE EMPLOYMENT

- Howard v. UNC-Chapel Hill – Ct. App. 2007
 - P electrician suffers compensable rt. elbow injury
 - Surgery – RSD – Depression – Emaciated



- P provided light duty in which P apparently did nothing
- P left light duty program due to severe pain and anxiety
- Ds refused to reinstate TTD

**FC – Sanctioned Ds for
unreasonably defending
claim – Ds appealed**



- **Ct. App.** – P never offered suitable e/ment so P never had burden of proving ongoing disability – P continuously disabled
 - 2 pain doctors opined that P unable to work in any productive e/ment since he left
 - IC has discretion to issue sanctions, and did not abuse its discretion
 - Findings supported by evidence



**CRANFILL SUMNER
& HARTZOG LLP**

THE DEFENSE NEVER RESTS.

RALEIGH

Phone (919) 828-5100

Fax (919) 828-2277

CHARLOTTE

Phone (704) 332-8300

Fax (704) 332-9994

WILMINGTON

Phone (910) 509-9778

Fax (910) 509-9676

www.cshlaw.com