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Primary Issues in Compensation Litigation

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PRIMARY ISSUES IN COMPENSATION LITIGATION

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I. SCOPE

This Article seeks to aid the practicing attorney with hearing preparation and research by identifying fundamental issues—those matters that should be stipulated, or will be litigated, in virtually every workers' compensation case—and the grounds on which they are most commonly controverted. Recent amendments to the operative statutes are noted.[1]

II. LITIGATION CONTEXT

Counsel accustomed to other forums will find contrasts in procedure before the North Carolina Industrial Commission, growing out of its "quasi-judicial" or "administrative" character,[2] as it adjudicates cases arising under the Workers' Compensation Act, N.C.G.S. Chapter 97, Article I (hereinafter "the Act").[3] These include discovery rules that are less restrictive concerning medi-

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1. Particularly note the Technical Amendments of 1991, S.B. 434, ch. 703 [hereinafter, "1991 Amendments"], and the Workers' Compensation Reform Act of 1994, S.B. 906, ch. 679 [hereinafter, "1994 Act"].

2. Winslow v. Carolina Conference Assoc., 211 N.C. 571, 579, 191 S.E. 403, 408 (1937).

3. N.C. GEN. STAT. § 97-91 (1991). The Commission is also "constituted a court" for the purpose of determining claims under the State Tort Claims Act, (*see* N.C. GEN. STAT. ch. 143, art. 31), and generally uses court rules in those hearings. N.C. GEN. STAT. §§ 143-291(a) (1994); 143-300 (1993). Its procedure is more "administrative" (summary) in handling claims under the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act (N.C. GEN. STAT. ch. 143, art. 12A), and the Childhood Vaccine-Related Injury Compensation Program (N.C. GEN. STAT. ch. 130A, art. 17).

cal information,[4] and more restrictive otherwise;[5] pre-hearing agency calculation of the "average weekly wage" on which most awards are based;[6] procedures that allow the hearing record to accumulate in phases by submission of documents following the "live" hearing before the Deputy Commissioner, including submission of virtually all expert testimony by deposition;[7] and, requirements that all settlements,[8] the plaintiff's attorney's fees,[9] and charges for medical compensation[10] be submitted to the Commission for approval. On the other hand, while the Commission is not bound to conform its litigation rules and procedures[11] to conven-

4. N.C. GEN. STAT. § 97-27 (1991); Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 607 (West 1995).

5. Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rules 605(c), 606 and 608 (West 1995).

6. *See* I.C. Form 22; *see also* Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 103(1) (West 1995).

7. Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 612 (West 1995).

8. N.C. GEN. STAT. § 97-17 (1991) and § 97-81 (Supp. 1994); Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rules 501-503 (1995).

9. N.C. GEN. STAT. § 97-90(c) (Supp. 1994).

10. N.C. GEN. STAT. §§ 97-2(19), 97-26, 97-90(a) (Supp. 1994). The definition of "medical compensation," created in the 1991 Amendments, combined the pre-existing definitions of medical treatment in N.C. GEN. STAT. §§ 97-19 (subcontractors), 97-25 (medical treatment and supplies), 97-29 (total disability), 97-59 (occupational disease); and 97-90(a) (medical fee approval). For an example of the dissonance among these definitions, see Roberts v. ABR Assoc., 101 N.C. App. 135, 143, 398 S.E.2d 917, 920 (1990). The language concerning subsequent "artificial members" was added by the 1994 Act. The '94 Act exempted charges to employers of their "managed care" organizations. It also codified the Commission's long-standing rule that health care providers may not bill the parties to a dispute over liability for their medical treatment while the case pends, and tolled the statute of limitations on a suit to recover these fees for that period. N.C. GEN. STAT. § 97-90(e) (Supp. 1994). The 1991 Amendments (N.C. GEN. STAT. § 97-90(a)) and the 1994 Act (N.C. GEN. STAT. § 97-26(g) and 97-90(a)) empowered the Commission to give employers or carriers leave to apply the Commission's published Fee Schedule themselves, without submitting the bill to the Commission for that purpose. This has been done under an electronic transmission project that began in 1992; and, pursuant to rules published January 18, 1995, without any contemporaneous notice to the Commission since February 15, 1995.

11. For a general discussion, see "Industrial Commission Rules and Practices" *Workers' Compensation 1993,* Wake Forest School of Law (CLE) 1993, pp. 120-233.

tional evidentiary rules[12] and motions practice,[13] the Commission's use of these has generally met with judicial approval, and they are normally applied in Commission hearings.[14]

In fact, having evolved before the New Deal and post-World War II rise of bureaucracies, comp litigation may be more similar to the courts than other administrative hearing systems, in both its method of adjudication[15] and in its place in the decision making process.[16] Perhaps because of this, the courts have occasionally questioned,[17] or ignored[18] the Commission's use of its special knowledge and experience, which elsewhere has been considered a primary reason for administrative forums.[19] But in general, Com-

12. N.C. R. CIV. P. 1; Hogan v. Cone Mills Corp., 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985).

13. Conklin v. Hennis Freight Lines, 27 N.C. App. 260, 261, 218 S.E.2d 484 (1975); Tindall v. Furniture Co., 216 N.C. 306, 311, 4 S.E.2d 894, 898 (1939).

14. *See, e.g.*, Maley v. Thomasville Furniture Company, 214 N.C. 589, 595, 200 S.E. 438, 440-41 (1938) (hearsay evidence); *In Re* Hayes, 200 N.C. 133, 138, 156 S.E. 791, 795 (1931) (contempt); *Hogan*, 315 N.C. at 137, 337 S.E.2d at 483 (N.C. R. CIV. P. 60(b)(6)). The most prominent exception is the lack of dispositive motions on the pleadings (N.C. R. CIV. P. 12(b)(6) and 56), since form notices (I.C. Forms 18, 33 and 33R) are used in place of formal pleadings.

15. "The common law exclusionary rules of evidence are [neither] based in Constitutional interdictions" nor required by the Federal Administrative Procedures Act." Willapoint Oysters v. Ewing, 174 F. 2d 676, 690 (9th Cir. 1949).

16. Final decisions by the Full Commission — typically heard on appeal from an Opinion and Award by one of its Deputy Commissioners following a section 97-84 hearing — are reviewable in the North Carolina Court of Appeals. *See* N.C. GEN. STAT. §§ 97-85 (1991), 97-86 (Supp. 1994); Martin v. Piedmont Asphalt & Paving Co., 337 N.C. 785, 787-88, 448 S.E.2d 380, 381-82 (1994). Compare, however, decisions by the Office of Administrative Hearings, which are recommendations to the secretaries of executive departments, whose decisions may be contested in Superior Court. *See generally* N.C. GEN. STAT. §§ 150B-22 to 150B-52 (1991 & Supp. 1994). *See also* N.C. GEN. STAT. §§ 150B-34, 150B-36; 150B-45, 150B-20 (1991) *and* State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 264, 300 S.E.2d 586, 587-88, *cert. denied*, 308 N.C. 548, 304 S.E.2d 242 (1983) (decided under corresponding provisions of Chapter 150A regarding hearing officers, now administrative law judges). The Commission is, appropriately, exempted from the Administrative Procedures Act. *See* N.C. GEN. STAT. § 150B-1(c)(4) (Supp. 1994).

17. *See* Church v. Baxter Travenol Lab., 104 N.C. App. 411, 418, 409 S.E.2d 715, 721 (1991) (Parker, J., dissenting).

18. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 222, 443 S.E.2d 716, 718 (1994).

19. A "significant distinction between judicial and administrative adjudications is that agency hearings tend to produce evidence of general conditions as distinguished from facts relating solely to the respondent." G. Robinson, *The Administrative Process*, pp. 31, 180, and 761-62 (West Publishing

mission knowledge gained outside the formal hearing record has been taken into account,[20] and led to some deference to Commission interpretations of the Act.[21]

Much of the Commission's claims processing is truly administrative—that is, without adjudication—reflecting the success, in the vast majority of cases, of the effort to achieve a system of "swift and sure" compensation for the employee through limited liability for the employer, without regard to fault, unburdened by litigation.[22] In the fiscal year 1990-91, there were 244,616 injuries reported to the Commission — 82,355 by North Carolina Industrial Commission Form 19's, triggering the opening of files, and the remainder reported as "minor medical"— but only 4,157 of those requests were for a hearing over any dispute.[23]

1974). This difference is attributable to "one of the original justifications for administrative agencies — the development of policy." *Id.* This is done primarily through rule-making because "acting only by adjudication. . .is cumbersome and costly" and rule-making allows "all interested persons — not just a few main parties — an opportunity to participate." *Id.* However, "the genius of the common law is its inductive methodology of moving to general principles only after testing them on concrete facts." *Id.* Consequently, adopting the judicial role is frequently the most "useful vehicle for developing and announcing precise rules," even for an agency with administrative powers and responsibilities. *Id.* Concerning the role of rule-making under the Act, and the Commission's rule-making authority, see generally "Industrial Commission Rules and Practices" *Workers' Compensation 1993*, Wake Forest School of Law (CLE), 1993.

20. Smith v. Red Cross, 245 N.C. 116, 121, 195 S.E.2d 559, 564 (1956); Watkins v. Central Motor Lines, 279 N.C. 132, 140, 181 S.E.2d 588, 594, (1971); *Church*, 104 N.C. App. at 418, 409 S.E.2d at 721.

21. Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 278, 293 S.E.2d 140, 143, (1982). Concerning statutory interpretation, *see* "Procedure and the Workers' Compensation Act of 1994", *Workers' Compensation Selected Topics 1994*, Wake Forest School of Law (CLE), pp. 285-286 (1994).

22. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 709, 295 S.E.2d 458 (1982).

23. The 1994 Act codified the Commission's rule that injuries requiring substantial medical compensation — presently more than $2,000 in billings by providers — must also be reported to the Commission, which currently is receiving approximately 95,000 of these reports per year. A substantial number of these actually fall outside these parameters, and are sent because submission triggers Commission scrutiny of medical charges under the Fee Schedule. The student of our system must be wary of statistics without a full explanation of how they were gathered. This is particularly true of the Commission's biannual report, in which most of the numbers are a by-product of other functions. In one recent year, Full Commission decisions were underreported by more than half, because only those set for oral argument were counted. In recent years, the statistics department has not had the staff to "close" and extract information

Once the Commission is found to have jurisdiction of a contested case,[24] it is a fundamental tenet of interpretation[25] that the Act should be liberally construed to effectuate its broad intent to provide compensation for employees sustaining an injury arising out of and in the course of their employment, and no "technical or strained construction" should be given to defeat this purpose.[26] Perhaps reflecting the relative informality of the "quasi-judicial" Commission, and its "power and authority",[27] the court of appeals recently has held[28] that the Commission may extend the time for filing an appeal from the Commission to that court on the grounds of excusable neglect.[29] The holding appears to give the Commission a power to step over the statutory appeal rules akin to the court's *writ of certiorari* power.[30]

The 1994 Act was precipitated by an unsustainable rate of premium cost increases.[31] The debate and controversy began in

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from all concluded cases, and the criteria for selecting those analyzed varied from "first reached" to "most serious", etc., from year to year. Section 97-92(a) requires the employer to record all injuries — traditionally defined as those requiring a doctor's examination or treatment off the workplace premises — and report those causing more than one (1) day's absence from work to the Commission. *See* N.C. GEN. STAT. § 97-92(a) (Supp. 1994).

24. Hayes v. Elon College, 224 N.C. 11, 19, 29 S.E.2d 137, 142 (1944).

25. *Deese*, 306 N.C. at 277, 293 S.E.2d at 142-43.

26. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 592-93 (1930); Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 576, 336 S.E.2d 47, 53 (1985).

27. *See Hogan*, 315 N.C. at 137, 337 S.E.2d at 483.

28. Allen v. Food Lion, Inc., IC No. 066892, 25 October 1993, *rev'd*, 117 N.C. App. 289, 291-92, 450 S.E.2d 571-72 (1994). *Compare* Currin-Dillehay Bldg. Supply, Inc. v. Frasier, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *appeal dismissed and cert. denied*, 327 N.C. 633, 339 S.E.2d 326 (1990) (Appeal dismissed for failure to meet "jurisdictional" requirement of timely written appeal, although oral notice was given in open court.) *with* Taylor v. Foy, 91 N.C. App. 82, 84-85, 370 S.E.2d 442, 443-44 (1988), *aff'd*, 324 N.C. 331, 377 S.E.2d 745 (1989) (per curiam) (dismissing due to late filing of stipulated record on appeal).

29. *See* N.C. R. CIV. P. 60(b)(1).

30. *See* N.C. R. APP. P. 21.

31. According to data from the National Council on Compensation Insurance, our State was 38th among fifty-one jurisdictions in compensation premium costs, but eighth in the rate of increase — 57.39% for the period 1986-1991. Due to the lag in the "development" of statistics utilized by the carriers, these reflected changes in the system in the late 1980s and early 1990s. The single most powerful "cost drive" was medical inflation, with hospitals leading the way. In 1989-91, the per day cost of inpatient treatment for compensation claimants rose 29.7%, 17.6% and 21.0%, respectively — 4% to 7% higher than the hospitals'

earnest after the insurance industry, through the North Carolina Rate Bureau, requested a 58.4% increase, and then implemented a 40.3% increase effective January 1, 1993.[32] Initially, benefits came under pressure, but more as a logical approach to the cost problem than any conviction that they were too high. As both business and labor withstood important political tests of strength—and came to acknowledge the legitimacy of the other's concerns—attention turned to their common interest in strengthening the system's ability to achieve its primary ends. The myriad "technical" provisions that make up the 1994 Act were assembled by people familiar with the system, its needs, and its defects. Unlike many "crisis" states, North Carolina did not roll back benefit levels or eliminate important grounds for eligibility.[33] Undoubtedly, this is due in part to the fact that North Carolina was, and is, a comparatively low cost state for compensation insurance, ranking forty among fifty-one jurisdictions in 1995.[34] Most of the benefit enhancements resulting from both legislation and caselaw survived, but with definitional or procedural boundaries that fit them into the overall scheme of the system.[35]

III. COMMISSION ADJUDICATION

All of the judicial authority and jurisdiction of the North Carolina Industrial Commission resides in its Commissioners, who distribute the dispute resolution tasks by appointment and

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general rate of inflation. (Source: N.C. Database Commission.) As the differential suggests, a primary problem appeared to be overutilization, which the Commission sought to address with systems that paid "by course of treatment" rather than "by procedure" — first per diem (struck down by the courts, *see infra* note 198), then under the 1994 Act and linkage to the State Health Plan (N.C. GEN. STAT. § 97-26(b) (Supp. 1994)), with "diagnostic related groups" (DRGs).

32. The Commissioner of Insurance approved a 23.4% increase, but the law permits the carriers to charge and hold in escrow a larger amount while the rate case pends in the courts. *See* N.C. GEN. STAT. § 58-36-25(b) (1994).

33. Since 1990, according to the National Foundation for Employment Compensation and Workers' Compensation (3/31/95), over twenty-five states have enacted major reform bills aimed at bringing down spiraling workers' compensation costs.

34. "Compensation Premium Rate Ranking, 1994", Oregon Dep't of Consumer & Business Serv. (1995).

35. For a more detailed discussion of the debate leading up to the passage of the 1994 Act, see generally "Procedure and the Workers' Compensation Act of 1994", *Workers' Compensation Selected Topics 1994*, Wake Forest School of Law (CLE) (1994).

assignment.[36] Because the agency is a single unit,[37] either a Commissioner or Deputy Commissioner may conduct the initial trial-like hearing,[38] a Deputy Commissioner may sit on the "Full Commission" review of a hearing officer's decision,[39] a Commissioner or the Full Commission may take and decide a question at a stage when it normally would be decided by one of the Commission's employees,[40] and while the hearing officer's decision is final if a Full Commission review is not sought, the appeal to the court of appeals "for errors of law" can only be taken from a final decision of the Full Commission.[41] The Commission may not delegate administrative duties to a subset of its members where the statute gives the responsibility to "the Commission".[42] For instance, the Act did not permit the Commission to formalize the Chairman's traditional role as personnel manager for the agency by delegation;[43] this was later accomplished by statute.[44] But otherwise, the Commission has broad discretion to organize its employees

36. *See* N.C. GEN. STAT. §§ 97-78(b) (1991) and 98-79(b) (Supp. 1994); Hedgecock v. Frye, 1 N.C. App. 369, 372, 161 S.E.2d 647, 649-50 (1968) (Chief Claims Examiner a "deputy" for approval of agreements.).

37. Compare the Industrial Commission with the General Court of Justice, with various levels having separate original jurisdiction over different types of cases. *See* N.C. GEN. STAT. §§ 7A-25; 7A-240 to 7A-254; 7A-271 and 7A-272 (1989 & Supp. 1994).

38. *See* N.C. GEN. STAT. §§ 97-79 (Supp. 1994) and 97-84 (1991).

39. *See* N.C. GEN. STAT. § 97-85 (1991).

40. *See, e.g.,* Jackson v. Blue Ridge Temporaries, I.C. No. 071377, 16 Oct. 1991; Hyatt v. *Temporary Employee Serv., Inc.*, I.C. No. 073669, 28 Sept. 1992.

41. *See* N.C. GEN. STAT. § 97-86 (Supp. 1994); Martin v. Piedmont Asphalt, 337 N.C. 785, 788, 448 S.E.2d 380, 383 (1994); Watkins v. City of Wilmington, 290 N.C. 276, 280, 221 S.E.2d 910, 913 (1976); Brewer v. Powers Trucking Co., 256 N.C. 175, 182, 123 S.E.2d 608, 614 (1962); Craver v. Dixie Furniture Co., 115 N.C. App. 570, 580-81, 447 S.E.2d 789, 790 (1994); Apple v. Guilford Co., 84 N.C. App. 679, 682, 353 S.E.2d 641, 644, *rev'd on other grounds*, 321 N.C. 98, 361 S.E.2d 588 (1987); Lynch v. Kahn Constr. Co., 41 N.C. App. 127, 129, 254 S.E.2d 236, 238, *cert. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979).

42. *See, e.g.*, N.C. GEN. STAT. § 97-26 (Supp. 1994) (medical fee schedule); N.C. GEN. STAT. § 97-72 (1991) (appointment of advisory medical committee); N.C. GEN. STAT. § 97-80 (Supp. 1994) (rule-making).

43. Opinion of Attorney General to J. Randolph Ward, Commissioner, NCIC, 60 N.C.A.G. 42 (Nov. 8, 1990) (The query was, "may the Full Commission delegate the authority and sole responsibility for [personnel] matters to the Chairman of the Commission?.").

44. N.C. GEN. STAT. § 97-77 was amended to this general effect in 1991 (*see* S.B. 286, 1991 N.C. SESS. LAWS ch. 264 and 483), and again in 1993 (*see* S.B. 1505, 1993 N.C. SESS. LAWS ch. 769 and 870).

and their tasks according to needs, priorities and available resources.[45]

The Act empowers a single Commissioner or Deputy Commissioner to hold the trial-like hearing,[46] and that hearing officer's decision will be final unless the disappointed party seeks a review before the "Full Commission,"[47] which sits in panels of three to resolve the appeals. While the focus of this "review" may be limited to issues raised by the parties,[48] the Full Commission's powers go beyond the appellate standard of review to include those of a trier of fact,[49] and indeed there is no final finding of fact in a case appealed to the Full Commission until made by that body, either originally or by adoption.[50] In recent years, over one-third of the Deputy Commissioner's decisions have been appealed.[51]

The Claims Department handles some two thousand North Carolina Industrial Commission Form 21 and Form 26 agreements weekly, and will track the required paperwork for compensation under the new "payment without prejudice" or "direct pay" provisions of the 1994 Act.[52] Until the recent advent of the Ombudsman program,[53] they also responded to a large number of basic questions from claimants. The Chief Claims Examiner decides motions to change physicians or treatment, based on docu-

45. *See generally Frye*, 1 N.C. App. at 372, 161 S.E.2d at 649-50; *see also* N.C. GEN. STAT. §§ 97-78(b) (1991), 97-79(b), (c), (e) and (f) (Supp. 1994), and 97-80(b), (g) and (h) (Supp. 1994).

46. *See* N.C. GEN. STAT. § 97-84 (1991).

47. *See* N.C. GEN. STAT. § 97-85 (1991).

48. *See Maley*, 214 N.C. at 593, 200 S.E. at 441; *Brewer*, 256 N.C. at 181-82, 123 S.E.2d at 613-14.

49. *See Watkins*, 290 N.C. at 280, 225 S.E.2d at 580.

50. *See Martin*, 337 N.C. at 788, 448 S.E.2d at 382.

51. D. Ballentyne, *Workers' Compensation in North Carolina*, Workers' Compensation Research Inst., p. 66 (1993).

52. *See* N.C. GEN. STAT. §§ 97-18(d), 97-82(b), and 97-47.1 (Supp. 1994). Effective January 1, 1995, defendants are authorized to pay compensation without an agreement/admission of liability, and cease within ninety days without the Commission's leave, if they deny the claim on compensability or liability grounds, only; that is, defendants cannot withhold benefits for leverage in disputes over the amount of compensation due, when the employee should return to work, non-cooperation with treatment, etc. Defendants typically do this — jokingly called "renting the case" in other jurisdictions — to get more time to investigate without causing adversarial attitudes to develop or triggering litigation.

53. *See* N.C. GEN. STAT. § 97-79(f) (Supp. 1994); *see also infra* note 63 and accompnaying text.

mentary evidence submitted by the parties.[54] The Executive Secretary's office handles routine motions in cases not assigned to a Commissioner or Deputy Commissioner for hearing, such as conventional discovery motions and fee approval requests, as well as approval of the compromise settlement agreements— generally referred to as "clinchers".[55]

The Act anticipates that compensation payments will begin shortly after an injury that disables an employee for more than seven (7) days.[56] Since the length of disability cannot be known at that point, the Industrial Commission Form 21 agreement provides that defendants are obligated to continue the payments during "necessary weeks". As the Commission approves these agreements, thus making them its own award,[57] it falls to the Commission to interpret whether its award has been satisfied when the parties disagree over whether disability continues.[58] Most systems basing payment of benefits on a changeable status or condition have summary termination proceedings to provide an interim decision, pending a full evidentiary hearing, when evidence is brought forward that the condition or status has changed.[59] Ours assumed an unusual prominence in the early 1990's due to our case backlog at the hearing level, and the delay between the time the dispute arose and a hearing before a Deputy Commissioner empowered to settle the issue *de novo*.[60] The 1994

54. These issues may also be raised in an informal hearing on termination ("Form 24"). *See* N.C. GEN. STAT. § 97-18.1(e) (Supp. 1994).

55. *See* Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 502 (West 1995).

56. *See* N.C. GEN. STAT. § 97-18 (Supp. 1994).

57. *See* N.C. GEN. STAT. § 97-82 (Supp. 1994).

58. Some defendants have paid benefits without an agreement in order to unilaterally terminate payments without Commission intervention. This has been discouraged by refusing the defendant credit for such payments if liability is eventually imposed, effectively making them pay the compensation twice. *See* Raffield v. United States Air, Inc., I.C. No. 136625, 6 Dec. 1994.

59. *See, e.g.,* Matthews v. Eldridge, 424 U.S. 319 (1976); Dillard v. Virginia Indus. Comm'n, 416 U.S. 783 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970).

60. *See* N.C. GEN. STAT. § 97-84 (1991); Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 404 (West 1995). The delay reached its nadir in 1989 at an average of thirteen months between the filing of a request and a hearing, up from 11.8 months the previous year. Ballentyne, *supra* note 51, at 87. It is a measure of how thin the Commission's ranks were that this "spike" was precipitated in part by the resignation of one Deputy Commissioner, the disability of a second, the inexperience of a newly-hired third, and the decision that the Chief Deputy would cease holding hearings and do only administrative work. Our staff of Deputy Commissioners was boosted by the

Act codified the Commission's Industrial Commission Form 24 procedure, and with the luxury of additional personnel to arrange and hear from the parties firsthand (rather than solely by documentary evidence), improved it significantly by providing for "informal hearings" by telephone.[61]

Harkening back to the original informality of the comp system, and responding to the glut and delay of modern litigation,[62] the Commission has created two mechanisms for consensual resolution of disputes. Based on the universal observation of workers' compensation administrators and researchers that a significant number of cases end up in formal litigation because of misunderstandings or ignorance of the law, the Commission has started an Ombudsman program with personnel assigned solely to respond to questions and resolve minor disputes through information and discussion.[63] Use of "mediation"—the structured assisted settlement conference technique adopted in 1991 in our superior courts—was encouraged in the comp system beginning in 1992,[64] and was formally adopted in 1993.[65] Initial results are somewhat more favorable than the courts, with some three-quarters (¾) of the cases sent to Mediation settled before or during the conference. The impression is that more cases are settling, and cer-

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Legislature from twelve to fourteen in 1989, to sixteen in 1992, and to twenty in 1994.

61. *See* N.C. GEN. STAT. § 97-18.1(d) and (e) (Supp. 1994). For the history and development of this proceeding, its statutory basis and the due process considerations, see Hepler v. Red Bird Cab, I.C. No. 859934, 30 Apr. 1993.

62. For a discussion of the litigation reduction goals of the system, and current stresses, see "Workers' Compensation: Historical Overview", *Workers' Compensation and State Tort Claims: Becoming Conversant*, N.C. Bar Foundation, (CLE) 1994.

63. One Ombudsman position was authorized by the 1992 Legislature, but lost to Administration budget cuts in early 1993, before it could be filled. The program was authorized specifically by statute in the 1994 Act (N.C. GEN. STAT. § 97-79(f) (Supp. 1994)), and four were hired in March, 1995. Similar programs have been started for comp systems in fourteen states in recent years, according to a March, 1995 IAIABC survey. Oregon's — one of the oldest and most successful — was the prototype for ours. The prohibition against hearing representation in the statute was a reaction to a practice in Texas.

64. The N.C. Bar Foundation's CLE program "Mediation for Workers' Compensation Counsel/Workers' Compensation Law for Mediators", September, 1992, was planned and presented by your author and leading members of the compensation bar, and attended by representatives from firms administering well over half the insurance and self-insurance in force in the State, as well as members of the Bar and mediators interested in handling our cases.

65. *See* N.C. GEN. STAT. § 97-80(c) (Supp. 1994).

tainly they are settling faster, freeing the Commission's resources to deal more expeditiously with the remainder.[66] The technique was used most frequently on a voluntary basis in cases involving complex or uncertain issues, or both, and multiple parties, such as those with multiple defendants, *Woodson* claims, or third-party tort-feasor claims with employer negligence issues, and it is likely to be particularly valued by parties seeking to resolve multiple issues without going to all of the forums with exclusive jurisdiction to settle them.[67] In workers' compensation, liability is clearer and "time is money" in a very concrete sense (currently, up to $478 per week), and, perhaps to a greater degree than other litigation systems, "alternative dispute resolution" techniques are likely to become more important.[68]

The Full Commission decisions are reviewable in the North Carolina Court of Appeals "for errors of law".[69] The "well-established rule concerning the role of the appellate court in reviewing an appeal from the Industrial Commission is that the court 'is limited to determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings.' "[70] While the Commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings of fact with respect to those crucial facts upon which the question of the plaintiff's right to compensation depends.[71]

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66. Mediation has also been observed to narrow issues in a significant number of cases that are not settled, leading to more settlements before trial, and less complex hearings. A full analysis of the data is not available at this writing.

67. A workplace injury can spawn concurrent disputes concerning workers' compensation and unemployment compensation (N.C. Employment Security Comm.), wrongful discharge (N.C. Dept. of Labor), the Americans with Disabilities Act (U.S. Equal Opportunity Employment Comm.), a *Woodson* claim, *see infra* note 164 and accompanying text, (superior court), third-party tort-feasors and compensation liens (superior or district courts), Family Medical Leave Act, and age discrimination (federal courts).

68. Your author believes that "early neutral evaluation" may be the next "ADR" technique to find favor in the comp system.

69. *See* N.C. GEN. STAT. § 97-86 (Supp. 1994).

70. *See* Watkins v. City of Asheville, 99 N.C. App. 302, 303, 392 S.E.2d 754, 755 (1990) (citing Barham v. Food World, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980); Guy v. Burlington Industries, 74 N.C. App. 685, 689, 329 S.E.2d 685 (1985)).

71. *See* Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 579, 235 S.E.2d 856 (1977).

When the Commission's jurisdiction to hear a claim for compensation is challenged on appeal, the reviewing court has the power and duty to find "jurisdictional facts", and is not bound by the Commission's.[72] Otherwise, "the findings of fact by the Commission, which are non-jurisdictional, are conclusive on appeal to the court of appeals", even if the evidence might have supported findings to the contrary.[73] Appeals from decisions of the North Carolina Court of Appeals in Commission cases are heard in the North Carolina Supreme Court on discretionary review and on review of decisions by divided panels of the court of appeals.[74]

IV. RESEARCH SOURCES

For an area of law of its present importance,[75] there has been a remarkable lack of practice aids and both primary and secondary sources for research of particular issues. The lack of such materials was due primarily to the low amounts in controversy in compensation cases. Prior to the 1973 amendments, the maximum weekly cash benefit was eighty dollars — with limits of four hundred weeks of cash benefits and $32,500.00 in any one case— and the employee was entitled to medical treatment for only ten days following the injury, unless additional treatment would effect a cure or shorten the period of disability.[76] The most dramatic growth in the value of compensation was more recent. Between 1980 and 1991 benefits paid annually jumped from $131 million to $545 million—an inflation-adjusted 152 percent.[77] Thereafter, average premiums (after settlement and adjustment) increased 15.8% for 1992, 33.0% for 1993, 9.3% for 1994, and (following passage of the 1994 Act) 0% for 1995.[78]

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72. *See* Aycock v. Cooper, 202 N.C. 500, 505, 163 S.E. 569 (1932).

73. *See* Holleman v. City of Raleigh, 273 N.C. 240, 245, 159 S.E.2d 874, 878 (1986); Bailey v. Smokey Mtn. Enter., 65 N.C. App. 134, 136, 308 S.E.2d 489 (1983); Priddy v. Blue Bird Cab Co., Inc., 9 N.C. App. 291, 298, 176 S.E.2d 26 (1970).

74. *See* N.C. GEN. STAT. §§ 7A-30 and 7A-31 (1989); N.C. R. APP. P. 15 and 16.

75. There is currently compensation insurance and self-insurance in force in North Carolina with a premium value of approximately $1.2 billion.

76. *See* Little v. Penn Ventilator, 317 N.C. 206, 211-13, 345 S.E.2d 204, 207-08 (1986).

77. Ballentyne, *supra* note 51, at 32.

78. The settlement between the Rate Bureau and the Commissioner of Insurance setting the amounts for 1993 and 1994 was made late in the year, so most employers actually paid 40.3% more in 1993 and 3.6% more in 1994.

The Commission published its decisions in official reporters from its creation in 1929 through 1934 in three volumes, and then ceased.[79] Anecdotally, this was due to some combination of the Depression, and the belief that court opinions would adequately update the existing body of case law on what was still considered a simple and finite subject. Indeed, the statutes on occupational disease,[80] and many of the other changes that have made the Act more complex, were added later. There is a single volume treatise concentrating on North Carolina compensation law which offers a broad overview.[81] The nation's outstanding treatise in the field, written in Durham, is frequently helpful in addressing the less common factual situations and statutory interpretations.[82] Publication of case synopses of Commission decisions by *Lawyers Weekly*, and copies of full text opinions offered through their case service,[83] have been extraordinarily important due to the lack of other sources, and a depth of understanding of the subject matter rarely associated with periodicals. Committees of the plaintiff and defense Bar organizations have been particularly valuable to practitioners in keeping them informed of the significance and impact of developments in the field, and in influencing their direction. The Commission sells a desk book prepared by the Michie Company that includes the annotated Act, the Commission's rules, name indexes of the Courts' compensation cases, and other related material. The Commission periodically publishes a *Rating Guide and Fee Schedule* assembled for medical providers that contains information that is sometimes useful to counsel. Practitioners periodically obtain from the Commission updated sets of the Commissions rules[84] and forms,[85] which have undergone significant changes in the wake of the 1994 Act. There are some old (and obscure) sources that can be invaluable in understanding the

79. These are in the Supreme Court library, and are cited in annotations to Michie's older editions of the statutes as, e.g., "II I.C. 123".

80. N.C. GEN. STAT. § 97-52 to 97-76 (1991 & Supp. 1994), in their initial form, were enacted 1935.

81. L. JERNIGAN, WORKERS' COMPENSATION IN NORTH CAROLINA (1994).

82. LARSON, THE LAW OF WORKERS' COMPENSATION, (Matthew Bender 1995).

83. Seven (7) of the fifty "best sellers" in 1994 were Commission cases.

84. The Commission's workers' compensation rules are cited, "I.C. Rule 101". These are also published in the annual Michie *Annotated Rules of North Carolina* provided to subscribers to the General Statutes, and in West's annual *North Carolina Rules of Court — State*.

85. *See* Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 103 (West 1995) (listing of forms).

intent of many of the ancient but surviving portions of the Act. The cases in Commission's reporters were authored by people involved with passage of the Act and its initial administration. Students of the Act will find the May, 1929 *Bulletin,* containing the initial rules,[86] a discussion of the purposes of the Act, and an outline of procedures, to be a fascinating document. A published thesis[87] concerning the Act's creation and first decade, based largely on interviews with members of the Commission and their employees during that era, fleshes out the concerns and purposes that preoccupied the framers of the Act. The most authoritative recent study of our compensation system, drawing on sources from all its sectors, is the Workers' Compensation Research Institute's 1993 "administrative inventory".[88]

With the advent of electronic bulletin boards and powerful word search programs, Industrial Commission cases will be more accessible, and thus they are cited throughout this article when they augment or illustrate the point. *Lawyers Weekly* now has all its back issues on disk, and the Commission is beginning to save its cases on electronic media. The Commission is currently developing a "bulletin board" capability through which practitioners should soon be able to access forms, cases and documents of interest. The sheer volume of cases currently being written will make word researches through all of them impractical,[89] but research data bases of selected cases are likely to evolve, perhaps with Commissioners and Deputy Commissioners making a selection from among their own opinions for "publication", as the Federal judiciary does.[90]

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86. The Commission's rules have gone through several format changes, which your author attempted to trace by subject matter in a chart appended to "Industrial Commission Rules & Practices", *Workers' Compensation 1993*, Wake Forest School of Law (CLE).

87. J. Keech, *Workmen's Compensation in North Carolina*, 1929-1940, Duke University Press (1942).

88. *See* Ballentyne, *supra* note 51.

89. With the assistance of "special deputies", the full Commission ran two panels during 1994, as the expanded Commission has been able to continue to do, and filed something over 600 full Commission decisions. Our current staff of twenty Deputy Commissioners will probably file something over two thousand decisions per year.

90. Like many other compensation boards and commissions in the U.S. and Canada, and other agencies that deal with massive amounts of paperwork (the Commission handles more records than any State agency other than the Dept. of Revenue), the Commission is moving towards a "paperless file" electronic media storage system. Funds were first appropriated for an optical disk system in

Because the low amounts in controversy in earlier cases discouraged precedent setting litigation, as well as the series of benchmark cases in the late 1980's,[91] the Commission has dealt with a large number of issues of first impression in applying the law on a case-by-case basis in the early 1990's.[92] Generally, these issues took years to reach the courts, if at all, and the utility of decisions on those that did have often been limited by the facts of the particular case. As a consequence, Commission opinions have sought more frequently to explain the legal basis for decisions. This has had the desired effect of narrowing and refining the issues over which parties have chosen to litigate. In the Deputy Commissioners' decisions,[93] the discussion is normally associated with the conclusions of law, either in the paragraphs so denominated, following the conclusions *per se*, or preceding them in a separate "note" or "commentary". For most of the '90's, the Full Commission decisions that included discussion appeared very much the same as those published in the Depression-era official reporters, with identification of parties and counsel, followed by a discussion of the primary issue,[94] noting the significant facts and the controlling and distinguishable statutes and case law, con-

1992, and it is anticipated that it will be operational by mid-to late 1995. Statutory authority to reproduce documents from electronic media and use them for all purposes like originals was granted in the 1991 amendments (*see* N.C. GEN. STAT. § 97-92(f) (Supp. 1994)), and augmented by references in the 1994 Act (*see* N.C. GEN. STAT. §§ 97-81(a) and 97-92(a) (Supp. 1994)).

91. *See* Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 96-100, 348 S.E.2d 336, 341-42 (1986) (lifetime benefits for scheduled injuries); Gupton v. Guilders Transp., 320 N.C. 38, 38, 357 S.E.2d 674, 677 (1987) (election between permanent partial and wage loss benefits); *Little*, 317 N.C. at 212-13, 345 S.E.2d at 210 (lifetime medicals); Bridges v. Linn-Corriher Corp., 90 N.C. App. 397, 399-400, 368 S.E.2d 388, 390, *cert. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) (vocational total disability). *See also* Ballentyne, *supra* note 51, at 79 and 88.

92. The number of requests for hearing more than doubled from fiscal year 1987 to 1992, and approximately thirty-nine percent of the Deputy Commissioners' hearing decisions were appealed to the full Commission in the latter year. Ballentyne, *supra* note 51, at xviii and 66.

93. An Opinion and Award rendered following section 97-84 hearing proceedings looks generally like a court judgment, with some initial notes on procedural history of the case and the documents submitted following the live hearing before the Deputy (typically doctors' depositions and medical records), the stipulations of the parties, findings of fact, conclusions of law, and the award.

94. Particularly when a narrow audience was anticipated, brief comments of this sort might only supplement the discussion in the Deputy's decision and the parties' briefs, or seek to enlighten concerning one of several issues raised in the case that the attorneys might see again.

cluding with any modifications of the hearing officer's decision and adoption by reference of the remainder. By volume, a majority of the cases affirming the hearing Deputy were brief, *per curiam*-style orders adopting it by reference. Until late 1993, the Commission avoided tinkering with the Deputy's findings, even to correct syntax errors, to avoid the appearance of taking issue where there was none, and to avoid imposing on its less than minimal staff.[95] In response to an opinion by the Chief Judge of the North Carolina Court of Appeals, suggesting it would "enable this court to better understand the Full Commission's opinion and award" if findings were set out again in the Full Commission's decisions, the Commission began incorporating the findings and conclusions under review into its Opinion and Awards—typically verbatim, unless a substantive change in the hearing Deputy's decision was intended.[96] This "*Crump* form" coincided with the acquisition of

95. When your author joined the Commission in February 1989, he and the Chairman's clerk, with less than a year's experience, were the only attorneys regularly involved with doing the Full Commission's work — although one of the other two Commissioners had decades of experience with compensation law — and was first furnished a clerk in December of 1993. The Commission was expanded to seven (7) members (six of whom are attorneys) in October 1994, and each share a clerk and a secretary. Compare Wisconsin, which has a similar rate or frequency of litigation, but three-quarters (¾) the population, whose three (3) commissioners are assisted by 14 staff attorneys. D. Ballentyne, *Workers' Compensation in Wisconsin*, WCRI, pp. 17 & 76 (1992).

96. *See* Crump v. Independence Nissan, 112 N.C. App. 587, 592, 436 S.E.2d 589, 593 (1993). This decision effectively disposed of the perceived doctrine of the "yo-yo" cases, e.g., Hardin v. Venture Constr. Co., I.C. No. 712216, 107 N.C. App. 758, 421 S.E.2d 601 (1992);

Braswell v. Pitt County Memorial Hosp., I.C. No. 706343, 106 N.C. App. 1, 8-9, 415 S.E.2d 86 (1992) (concurrence); Faircloth v. North Carolina Dep't of Transp., I.C. No. 755271, 106 N.C. App. 303, 416 S.E.2d 409 (1992); Vieregge v. North Carolina State Univ., I.C. No. 536600, 105 N.C. App. 633, 414 S.E.2d 771 (1992). In *Harden*, one judge began militantly ignoring all findings of fact adopted by reference by the full Commission, (without commenting on sixty-three years of unbroken contrary practice), and suggested that having the witnesses recapitulate their testimony before the full Commission would speed up the disposition of cases appealed. *See Hardin*, 107 N.C. App. at 761, 421 S.E.2d at 604. These were mixed in with a dozen other decisions from that court that reviewed Commission cases normally, and the anomalous viewpoint was largely ignored, until it was cited as the basis for a *Writ of Mandamus* addressed to the Commission. The court of appeals, in an unpublished decision, had remanded *Johnson v. Standard Sunco, Inc.*, (referencing Commission findings of fact in six places) with a remarkably overt suggestion that the Commission rework its findings to support a different result. (It did not state the findings were not supported by any evidence, or the law mandated a different result based

equipment making it relatively easy to copy Deputy Commissioner's decisions onto the full Commission's word processors for manipulation and reprinting, and the prospect of being able to conveniently store and retrieve Commission opinions on its "local area network" (LAN) and a computer accessible "bulletin board", where the "*Crump* form" gives researchers the advantage of handling one "file" rather than two. But on occasion, particularly when the Commission has modified the hearing officer's findings or conclusions (which typically is noted), researching counsel may find reading the Deputy's decision useful.

As both the number of cases at the Full Commission level and the difficulty of conscientiously reviewing them has increased, so has the temptation to omit discussion of the legal grounds for decisions—abetted by the rationalization that the adjudication has an "administrative" context in a traditionally informal and non-technical forum. As the promulgation of a "Reasoned Decisions Standard" by the International Association of Industrial Accident Boards and Commissions (IAIABC) in 1992 attests, that is not unique to North Carolina. As this document states:

> [T]he absence of reasons in compensation decisions can "give the appearance of erroneous or arbitrary decisions. . . . Predictability is of critical importance, particularly in administrative law, for attorneys and appellate and legislative bodies. . . . Attorneys cannot adequately prepare for trial. . . . They are unable to point to strengths or weaknesses in a case which might discourage false claims or encourage meritorious awards. . . . A rationale describing why and how the decision was reached provides the basis for appellate bodies to gauge the accuracy of decisions. . . . [W]ithout reasons, lawmakers cannot understand why some laws may not be applied in the manner anticipated. . . . It is important to the administrative law process and the public it serves to ensure that parties in similar situations will be treated not only fairly, but equally."[97]

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on the findings.) Johnson v. Standard Sunco, Inc., N.C. App. No. 9110IC711, 7 July 1992. When the Commission reached the same result, the *mandamus* was issued "for the Court" (albeit, without knowledge of some, and perhaps most of its members) stating the Commission had failed to make "any" findings of fact, and citing the four yo-yo cases. I.C. No. 033019, 111 N.C. App. 926, 435 S.E.2d 536 (1993). The Raleigh paper took it literally, and screeched that the Commission was defying the court. See Johnson v. Standard Sunco, Inc., I.C. No. 033019, 22 Oct. 1993 (dissent). *Crump* "explained" the "yo-yo" decisions, and no other party's rights were prejudiced on review in the court due to adoption of findings by reference. The new format memorializes the wisdom of the *Crump* decision.

97. The IAIABC, has a predominantly North American membership.

Full Commission discussion of its legal grounds for decisions has been as important in recent years as when the Act was new, and often for the same reason.[98] The appellate courts' reflections on expressed views of Commissioners has helped produce particularly meaningful and instructive case law.[99]

V. NECESSARY FINDINGS

Students of trial advocacy are often advised to begin their preparations by listing those findings and conclusions it will be necessary for them to prove or refute to achieve the result they seek, and then to outline a theory of the case encompassing such a showing with, and in spite of, the credible evidence and the reasonable inferences that may be drawn from it. Counsel can save themselves considerable effort, and possible assessment of attorney's fees,[100] by stipulation to matters beyond reasonable dispute that one party or the other will seek to prove.

As an example, consider how the stipulations might be drawn in this scenario. Plaintiff has been employed for six years in an occupation requiring the repetitive motion of her wrists. While they have become achy from time to time, she has never lost time from work or suffered any great physical distress. After becoming pregnant, however, she develops numbness, tingling and pain in both arms that wakes her up at night. Then, while riding in her supervisor's car to the company's annual picnic and awards event on March 1, 1994, another motorist runs a stop sign and strikes their vehicle. She suffers a non-displaced fracture of the left arm but is otherwise unhurt. Although the fracture heals without complication, the employee's orthopaedist performs carpal tunnel

98. When the courts are called on to interpret new law or apply it in a new context, "the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal. . .since that administrative body hears and decides all questions arising under the Act." Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 278, 293 S.E.2d 140 (1982).

99. *See, e.g.,* Gupton v. Builders Transp., 320 N.C. 38, 39-40, 357 S.E.2d 674, 675 (1987); Jackson v. Dairymen's Creamery, 202 N.C. 196, 162 S.E. 359 (1932); Craver v. Dixie Furniture, 115 N.C. App. 570, 576, 447 S.E.2d 789, 795 (1994); Parker v. Union Camp Corp., 108 N.C. App. 85, 87, 422 S.E.2d 585, 586 (1992); Church v. Baxter Travenol Lab., 104 N.C. App. 411, 416, 409 S.E.2d 715, 719 (1991); Laughinghouse v. State Ports Ry Comm'n, 101 N.C. 375, 377, 399 S.E.2d 587, *cert. denied*, 328 N.C. 732, 404 S.E.2d 871 (1991); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 357, 304 S.E.2d 762, 764 (1983).

100. *See* N.C. GEN. STAT. § 97-88.1 (1991).

release surgery on both wrists to relieve her debilitating pain, which he attributes to her work activities, and possibly to the trauma to her hands when she extended them to protect herself at impact during the motor vehicle accident. The employer admits liability for injuries received in the motor vehicle accident,[101] and pays benefits in respect to the fracture, but denies the carpal tunnel syndrome diagnosed by plaintiff's physician was work related, or if it was, the plaintiff remains unable to work.[102] The stipulations (in italics) entered into by the parties prior to the hearing to resolve plaintiff's claim might read as follows:

1. *At all times pertinent hereto, the defendant-employer regularly employed three or more employees and was subject to the Act, and Mutual of Omagosh insured its compensation risk.* This covers the requisite jurisdictional finding. The compensation carrier is itself a defendant in compensation cases.[103]

2. *The plaintiff was injured by accident in the course and scope of her employment on March 1, 1994.* Proof of accident and injury are separate matters.[104]

3. *The Form 21 Agreement approved by the Commission on March 18, 1994 is incorporated herein by reference.* This form agreement is normally the first admission of liability, and establishes some factual particulars.[105] Once approved by the Commission, an agreement is tantamount to an award,[106] and can be set aside only upon proof of "fraud, misrepresentation, undue influence or mutual mistake."[107]

4. *Defendant paid compensation at the rate of $434.55 for six and 4/7 weeks, and its lien arising from those payments was satis-*

101. Concerning employer liability for "recreation" injuries, see Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 14-18, 262 S.E.2d 347, 348-49, (1980), and for injuries while being transported in employers' vehicles, see Enroughty v. Black Indus., Inc., 13 N.C. App. 400, 405, 185 S.E.2d 597, 600, *cert. denied*, 280 N.C. 421, 186 S.E.2d 923 (1972).

102. For an excellent discussion of carrying and shifting the burden of proof of continuing disability following maximum medical improvement, see Russell v. Lowes Product Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

103. *See* N.C. GEN. STAT. § 97-98 (1991); Hardin v. Venture Constr. Co., I.C. No. 712216, 1 May 1991.

104. *See* Bigelow v. Tire Sales Co., 12 N.C. App. 220, 222-23, 182 S.E.2d 856, 858 (1971).

105. *See* I.C. Form 21. For instance, the compensation rate may be established, or determined preliminarily, subject to later verification.

106. *See* Pruitt v. Knight Publishing Co., 289 N.C. 254, 258-59, 221 S.E.2d 355, 358 (1976); N.C. GEN. STAT. § 97-82 (Supp. 1994).

107. *See* N.C. GEN. STAT. § 97-17 (1991).

fied when plaintiff's claim against the third-party tort-feasor responsible for the accident was settled. Generally, the plaintiff brings the suit against the third-party tort-feasor, and repays the compensation defendants out of the proceeds (less an attorney fee) for compensation paid "or to be paid" pursuant to an award or the defendants admitted liability.[108] Their lien does not extend to plaintiff's recovery in respect to conditions for which defendants liability has not been admitted or established at the time of the judgment or settlement.[109]

5. *The plaintiff did not earn wages between March 1, 1994 and October 12, 1994, when she returned to work for the defendant-employer for 1 § days at her former wages. Thereafter, she began part-time employment again on November 10 at an average weekly wage of $200.00 per week until the present.* Such facts are vital for specifying an award or disposition under various conclusions, e.g.: if the Deputy Commissioner determines that the employee was capable of remaining employed at former wages, and thus was no longer disabled, or that she made a good faith effort to obtain employment and was incapable of doing so,[110] or that she is entitled to "temporary partial disability", the benefit for diminution in the ability to earn wages, equal to ⅔ of the difference between the pre- and post-injury earnings.[111]

6. *The parties agree that the issues to be determined are whether plaintiff suffers from an occupational disease, and if so, to what benefits is she entitled.* Plaintiff might be more specific about whether they intend to rely on the accident or the occupational disease theory of causation, and defendant might reveal whether they expect to prove that the employment did not place the plaintiff at increased risk of disease, or that the condition had a purely "idiopathic" or non-work related cause.[112] Parties, however, are typically unwilling to stake themselves out with such specificity before taking the depositions of the physicians that will

108. *See* N.C. GEN. STAT. § 97-10.2 (1991) (regarding recovery and distribution of damages from a third party liable to the compensation parties in tort for causing the injury).

109. *See* N.C. GEN. STAT. § 97-10.2(f)(1) (1991); Radzisz v. Harley Davidson of Metrolina, Inc., I.C. No. 048337, 13 Dec. 1994.

110. *See Russell,* 108 N.C. App. at 765-66, 425 S.E.2d at 457 (1993).

111. *See* N.C. GEN. STAT. § 97-30 (1991).

112. Concerning proof of occupational diseases per N.C. GEN. STAT. § 97-53(13) (1991)— that is, maladies not listed by name in that section— see generally Booker v. Duke Medical Center, 293 N.C. 458, 256 S.E.2d 189 (1979).

render the medical causation opinions, which typically are vital to the outcome.[113]

In many cases, other matters determinable from business and medical records that would significantly ameliorate the defendants' liability can be stipulated at defendants' initiative. An employee who had a pre-existing impairment, and was rendered totally disabled by the subject injury, may be entitled to receive benefits primarily from the Second Injury Fund.[114] Employer-financed disability benefits paid while the employer contests liability may be offset against an eventual award,[115] if the necessary facts and circumstances are shown.

In many cases, "medical compensation" is the most valuable benefit. However, since all of the extensive set of services falling within the definition[116] which would "effect a cure or give relief and . . . will tend to lessen the period of disability" for the claimant are automatically available upon proof or admission of liability, with only narrow grounds for forfeiture,[117] it is not normally a topic for stipulation. Within that definition, "rehabilitation" has been considered to include such things as specially modified vehicles and dwellings for paraplegics. However, interpretations of the term cannot be stretched beyond its conventional realm of enabling or facilitating life activities.[118]

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113. *See* Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (concerning when such an expert medical opinion on causation is, and is not, necessary).

114. *See* N.C. GEN. STAT. § 97-40.1 (Supp. 1994). But the fund is liable only if it is capable of paying the benefit. Changes in assessments were necessary in both the 1991 amendments and the 1994 Act to restore the Fund to solvency.

115. *See* N.C. GEN. STAT. § 97-42 (Supp. 1994); Foster v. Western-Electric Co., 320 N.C. 113, 117-18, 357 S.E.2d 670, 674 (1987); Estes v. North Carolina State Univ., 102 N.C. App. 52, 58, 401 S.E.2d 384, 390 (1991); Martin v. Channel Master, I.C. No. 208325, 14 Feb. 1995. The statute was amended by the 1994 Act to specify the method of calculating the offset in light of Evans v. AT&T Technologies, 329 N.C. 787, 408 S.E.2d 519 (1991). For a similar scheme, see the credit for unemployment benefits per N.C. GEN. STAT. § 97-42.1 (1991).

116. *See* N.C. GEN. STAT. § 97-2(19) (Supp. 1994). For the origin of this definition, see *infra* note 9.

117. The Commission may order suspension of benefits while a claimant refuses to accept appropriate treatment or rehabilitation, refuses statutorily authorized examinations or refuses suitable employment. N.C. GEN. STAT. §§ 97-25, 97-27(a), and 97-32 (1991); Watkins v. City of Asheville, I.C. 623502, 8 May 1989, *aff'd*, 99 N.C. App. 302, 392 S.E.2d 754 (1990).

118. See your author's *dissent* in Grantham v. Cherry Hosp., I.C. No. 504381, 1 June 1989, *rev'd*, 98 N.C. App. 34, 389 S.E.2d 822, *cert. denied*, 327 N.C. 138, 394 S.E.2d 454 (1990) (payment of consumer debt, although it would give mental

VI. JURISDICTION OF PARTIES

Many states' workers' compensation laws initially allowed employers to elect not to be covered ("reject the Act"), and remain subject to tort suits for their employees' injuries, but without the common law defenses of contributory negligence and the "fellow servant rule" that generally immunized employers for the intervening negligence of the claimant's co-employees. Most states, including North Carolina in 1935,[119] have repealed these deplorable provisions with the notable exceptions of South Carolina and Texas.[120] New Jersey also allows employers to exempt themselves from the Act, but this is notable only as proof that their compensation system has succeeded in reducing costs for employers. The condition of the exemption is that the employer buy liability insurance for their workplace injuries, and not a single employer in the State does so.[121]

Today, in general, all North Carolina employers with three or more employees are subject to the obligations and benefits of the Act,[122] and required to obtain insurance or qualify to self-insure their liabilities imposed by the Act.[123] When determining the number of employees, proprietors and partners are excluded, and corporate officers included (because the corporation is the "employer"), but they all may choose whether or not to be covered and charged premium for coverage in their policy of insurance.[124] Failure to do so is a misdemeanor, and may result in civil penalties of one hundred dollars a day against the company and a levy against the responsible officer or owner equal to the value of compensation benefits due.[125]

"relief", not authorized). A commentator called the Commission majority's holding "perhaps the most imaginative effort on record to stretch the term." LARSON, THE LAW OF WORKERS' COMPENSATION, § 61.13(a).

119. N.C. GEN. STAT. § 97-10 was repealed, and the exclusive remedy provision restated in a new section 97-10.1. *See* N.C. GEN. STAT. § 97-10.1 (1991).

120. These provisions tend to give financially irresponsible employers a competitive advantage over the others at the expense of injured employees and the taxpayers who finance the "social safety net" into which the disabled often fall.

121. *See* E. Nordman, "Alternatives to Traditional Workers' Compensation Coverage," National Assoc. of Insurance Commissioners/IAIABC Joint Committee on Workers' Compensation (draft paper) (1995).

122. *See* N.C. GEN. STAT. § 97-2(1) (Supp. 1994).

123. *See* N.C. GEN. STAT. § 97-93 (Supp. 1994).

124. *See* N.C. GEN. STAT. § 97-2(2) (Supp. 1994).

125. *See* N.C. GEN. STAT. § 97-94 (Supp. 1994).

The exceptions to the "three or more" employee rule exempt agricultural employments with less than ten "full-time non-seasonal" employees, and an individual operating a sawmill with less than ten employees for less than sixty days during any six month period "whose principal business is unrelated to sawmilling or logging"; but subjects to the Act any employment that exposes even one employee to "the use or presence of radiation".[126] Employees specifically exempted from coverage are railroads workers (compensated under federal law), "casual employees, farm laborers[127] when fewer than ten full-time non-seasonal farm laborers are regularly employed by the same employer, federal government employees . . . and domestic servants."[128]

North Carolina has no cases interpreting the radiation phrase, but since the common light bulb disperses some radiation, to keep this exception from swallowing the rule, it is likely to be found applicable only to instrumentalities whose purpose or by-product is the creation of enough radiation that an accident with it would put an employee at an unconventional risk of a radiation injury. In 1993, your author solicited the opinion of the North Carolina Radiation Protection Commission on occupations that would meet that criteria. They concluded the covered employees would be those who are required by law and regulations to receive special training because of such risks. Thus a tanning bed operator or a nurse who assisted a radiologist with positioning patients and taking x-rays would be considered "in the use and presence of radiation", but a receptionist at those workplaces would not.[129] However, if there is a single radiation employee, all the employees of the business must be covered.

Prisoners who are injured while performing work assigned by the Department of Correction—who are not "employees" because their work is involuntary[130]— are given limited compensation by a special provision of the Act.[131] Despite a reference to the exclu-

126. *See* N.C. GEN. STAT. § 97-2(1) (Supp. 1994).

127. *See* N.C. GEN. STAT. § 97-13(b) (1991). For the distinction between "farm labor" under this statute and "agricultural labor" per section 97-2(1), see Hinson v. Creech, 286 N.C. 156, 158, 209 S.E.2d 471, 473-74 (1974).

128. *See* N.C. GEN. STAT. § 97-13 (1991).

129. These scientists also volunteered that this was a preposterous basis for distinction, and indeed, I have seen more injuries during my tenure from exploding urinals (one) than radiation.

130. *See* Lawson v. North Carolina State Highway & Pub. Works Comm'n, 248 N.C. 276, 279-80, 103 S.E.2d 366, 369 (1958).

131. *See* N.C. GEN. STAT. § 97-13(c) (1991).

sive remedy section of the Act, they have also been allowed to sue the state for negligence under the State Tort Claims Act.[132] This is currently under challenge for the first time in 35 years.[133]

Volunteer firemen, rescue squad members, auxiliary police officers and "senior members of the State Civil Air Patrol" injured in the course and scope of their duties are entitled to compensation, with their benefits calculation based on income from their regular jobs.[134]

Notwithstanding the exclusions, any employer may elect to subject itself and its employees to the Act by purchasing workers' compensation insurance coverage.[135] Many sole proprietors, primarily motivated by the desire for personal coverage or to meet a general contractor's requirements for taking a subcontract, will buy a policy for "miscellaneous" or "occasional" labor and elect to cover themselves. Despite the farm labor exclusion, many farmers comply with federal migrant protection legislation by purchasing coverage for their seasonal work crews.[136]

A person or firm that undertakes a contract with a party to perform work, and lets a subcontract to do a portion of the work to a third person or firm, is thereby generally liable under the Act for injuries sustained by the subcontractor or its employees in the course and scope of that work[137]— a status characterized as "statutory employer".[138] While this section applies to all subcontracts, that business arrangement tends to be associated with construc-

132. *See* N.C. GEN. STAT. ch. 143, art. 31.

133. *See* Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 620, 114 S.E.2d 812, 815-16 (1960); Oxendine v. North Carolina Dep't of Corrections, I.C. No. TA-12513, 16 Dec. 1992; Blackmon v. North Carolina Dep't of Corrections, I.C. No. TA-12025, 15 Mar. 1994, and, Richardson v. North Carolina Dep't of Corrections, I.C. No. TA-12230, 31 Mar. 1994, presently pending before the North Carolina Court of Appeals, presenting this issue.

134. *See* N.C. GEN. STAT. § 97-2(5) (Supp. 1994).

135. *See* N.C. GEN. STAT. § 97-13(b) (1991).

136. *See* 29 U.S.C.S. § 1841(c) (Law. Co-op. 1990 & Supp. 1984).

137. *See* N.C. GEN. STAT. § 97-19 (Supp. 1994).

138. LARSON, *supra* note 82, at § 49.00. The principal contractor referenced in the statute should not be confused with the person or firm licensed as a construction "contractor" per N.C. GEN. STAT. § 87-1 (1991), although the latter's activities frequently bring it under section 97-19. But such a firm that develops its own property for sale, without any prior contractual obligation to perform the work, is not. *See* Mayhew v. Howell, 102 N.C. App. 269, 273, 401 S.E.2d 831, 833-34, *aff'd*, 330 N.C. 113, 408 S.E.2d 853 (1991); Postell v. B & D Constr. Co., I.C. No. 838618, 4 May 1990, *aff'd*, 105 N.C. App. 1, 8, 411 S.E.2d 413, 419 (1992).

tion and some other comparatively risky occupations. Its purpose is to "protect the employees of financially irresponsible subcontractors who do not carry compensation insurance", and avoid the specter of large projects being carried out by a crew atomized into business entities with less than three employees to avoid the substantial overhead cost of compensation insurance.[139]

The principal contractor is relieved of this duty if, at the time the subcontractors let, he obtains a certificate[140] showing the subcontractor has purchased coverage for its employees. In addition, a subcontractor without employees may sign a waiver of his right to coverage and relieve both parties to the subcontract of the obligation to insure.[141] Some self-insurance pools of construction trades employers require their members not accept waivers because of the risk the "sub" will actually have or later get employees on the job—the conventional wisdom being that such employees' rights to compensation from the general contractor would not be affected by the waiver.[142] The standard insurance policies, approved by the Commissioner of Insurance, do not permit insurance carriers to refuse waivers. Note that it is the contractual arrangement, and not any number of employees, that brings parties to subcontracts within the purview of the Act.

Licensing requirements for firms permitted to operate interstate truck freight businesses require that the licensee maintain a degree of control over the drivers operating under that license that, in common law, implies an employer/employee relationship. Consequently, for reasons of public policy, the law requires a firm licensed by the Interstate Commerce Commission (ICC) to operate an interstate freight trucking business assure that all its drivers—including employees of independent businesses leasing trucks to the ICC licensee, or "owner/operators" themselves—are covered by workers' compensation insurance.[143] However, since these parties contract at arms-length for the use of the truck and its driver, they can, and frequently do, contract for the truck's owner/operator will purchase compensation coverage, notwithstanding the prohibition on requiring employees to bear the costs

139. *See* Withers v. Black, 230 N.C. 428, 434, 53 S.E.2d 668, 673 (1949).

140. Issued by the carrier or self-insurance section of the Department of Insurance, a practice legitimized by the 1991 amendments. See Plummer v. Kearney, 108 N.C. App. 310, 312, 423 S.E.2d 526, 528 (1992).

141. Per 1989 amendment.

142. *See* N.C. GEN. STAT. § 97-6 (1991).

143. *See* Watkins v. Murrow, 253 N.C. 652, 658, 118 S.E.2d 5, 9 (1961).

of their compensation coverage.[144] There has been litigation over whether a compensation insurance carrier insuring only the liability of the ICC licensee must pay compensation for an injury sustained by an owner/operator in the course of preparing a leased truck to travel, turning on whether the claimant was performing maintenance in his capacity as the owner/lessor of the vehicle, or as the driver/employee of the ICC licensee.[145]

When an employee is under the concurrent control of two employers, both "joint" employers are liable for compensation due the employee. ("Joint employment" should not be confused with "dual employment" or the "lent employee" situation, wherein the employers have consecutive control and no common interest in the work performed at the time of the injury.[146]) By statute, joint employers are to "contribute to the payment of such compensation in proportion to their wages liability to such employee,"[147] and, in the absence of any contractual arrangements, the court has assessed the dual employers for half each.[148] However, the section contains a proviso that the joint employers may enter into "any reasonable arrangement . . . for a different distribution as between themselves of the ultimate burden of compensation." In the most common joint employment arrangements today—temporary agencies that pay and direct employees to client firms, who then control the performance of the employee's labor—the conventional form contract provides that the agency will pay for all required insurance, as well as wages, withholding, etc., in return for its fee.[149] "Employee leasing" companies, which are legally similar but on a larger scale, have become notorious in other parts of the

144. *See* N.C. GEN. STAT. § 97-6 (1991); *Watkins*, 253 N.C. at 660, 118 S.E.2d at 13-14.

145. *E.g.*, Thompson v. Refrigerated Transp. Co., 32 N.C. App. 693, 697-98, 236 S.E.2d 312, 314 (1977); Thompson v. Southwestern Freight Carriers, I.C. No. 314661, 16 Feb. 1995.

146. *See* Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 459, 204 S.E.2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1994).

147. *See* N.C. GEN. STAT. § 97-51 (1991).

148. *See* Henderson v. Manpower of Guilford Co., Inc., 70 N.C. App. 408, 414, 319 S.E.2d 690, 694 (1984).

149. Unfortunately, *Henderson* has occasionally been misread by carriers to mean that they should be able to collect back half of compensation paid from the client firm with whom the injury occurred. There was no discussion of section 97-51 in that case because, as its record on appeal shows, officers of both employers testified that there was no written agreement or even oral discussion of who would purchase compensation coverage, and the court focused on the employer's relative obligations to pay under those circumstances. *See* Jackson v. Blue Ridge

country for failing to arrange coverage, collapsing financially, and leaving the client employer liable and employees with uncertain prospects of collecting compensation. While the referenced section allows parties to arrange payment of their joint liability "as between themselves", the employee retains the right to seek all of it from either party,[150] whether they are prepared to pay it or not. Employers entering into employee leasing arrangements would be well advised to retain and fulfill the employer's obligation to purchase compensation insurance, or withhold premium from the contract price and pay it themselves, or monitor their contractor's compliance carefully.

The anecdotal evidence suggests the rising cost of workers' compensation insurance has been accompanied by an increase in the number of employers subject to the Act going non-insured.[151] Premiums actually billed employers increased an average of 144% from 1987 through 1993. Unlike many other states, North Carolina has no fund to pay compensation to a non-insured employee, who may seek the assets of the employer itself.[152] The 1994 Act significantly augmented existing sanctions[153] against non-insured employers, with changes notably including a one hundred percent penalty assessable personally against an officer of the employer who willfully fails to obtain coverage, and a requirement that the employer report their carrier and policy number along with their employer tax returns.[154] Due to unfair competition from unin-

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Temporaries, I.C. No. 071377, 16 Oct. 1991; Hyatt v. Temporary Employee Serv., Inc., I.C. No. 073669, 28 Sept. 1992.

150. *See Henderson,* 70 N.C. App. at 413, 319 S.E.2d at 694.

151. A concurrent problem has been the underreporting of "all injuries" — traditionally defined as one serious enough to require a physician's attention off the workplace premises — as required by section 97-92(a). Reports of "medical only" claims have fallen by 60,000 in recent years, presumably due to employers trying to avoid the adverse effect on the "experience modification" formula that sets their premium rate according to risk.

152. *See* N.C. GEN. STAT. § 97-87 (1991); Bryant v. Poole, 261 N.C. 553, 556, 135 S.E.2d 629, 631 (1994); Champion v. Vance County Bd. of Health, 221 N.C. 96, 100-101, 19 S.E.2d 239, 241-42 (1942). If the employee can prove negligence, he or she may elect to pursue the employer in superior court. *See* N.C. GEN. STAT. § 97-94(b) (Supp. 1994) and 97-9 (1991). The employee also has the right to use attachment and other ancillary remedies, although it has no special utility in non-insured cases, as the statute has been interpreted; Nelson v. Hayes, 116 N.C. App. 632, 636-37, 448 S.E.2d 848, 850-51 (1994).

153. *See* Ellerbe v. Karel Co., I.C. No. 279478, 3 Aug. 1993.

154. *See* N.C. GEN. STAT. §§ 97-93(d) and 97-94 (Supp. 1994), and 105-163.7(c) (1993).

sured contractors bidding for jobs with lower overhead, as well as concern for non-insured workers, the Legislature enacted a requirement in 1992 that building inspectors check proof of coverage prior to issuing building permits.[155] A non-insured employer's appeal from an award of the Full Commission does "not act as a *supersedeas* and the plaintiff in such case shall have the . . . right to issue execution or to satisfy the award from the property of the employer pending the appeal" to the North Carolina Court of Appeals.[156]

VII. JURISDICTION OF CLAIMS

The Act provides that the Commission shall determine, "All questions arising under this Article . . . except as otherwise herein provided."[157] This includes all matters directly affecting the right to receive or the duty to pay benefits, and this "ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier."[158] While the Commission routinely gives defendants credit for overpayment of benefits against their liability for future payments,[159] and the question of whether there has been an overpayment is solely for the Commission, the Commission does not have jurisdiction to order a claimant to repay benefits.[160]

The Act provides the exclusive remedy[161] for workplace injuries suffered under compensable circumstances,[162] unless it results from the intentional or willful, wanton, and reckless negli-

155. *See* N.C. GEN. STAT. § 87-14, amended effective July 6, 1992 by S.B. 719, 1991 N.C. SESS. LAWS ch. 840, 152.

156. *See* N.C. GEN. STAT. § 97-86 (Supp. 1994).

157. *See* N.C. GEN. STAT. § 97-91 (1991).

158. *See* Greene v. Spivey, 236 N.C. 435, 445, 73 S.E.2d 488, 496 (1952). This does not extend to whether a contract of insurance should be reformed to show coverage when the plaintiff has not sought to hold the carrier liable and "the rights of the employee were not involved." Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 240, 134 S.E.2d 354, — (1964); North Carolina Chiropractic Assoc. v. Aetna Cas. & Surety Co., 89 N.C. App. 1, 6, 365 S.E.2d 312, 317 (1988).

159. Mackey v. Providence Designer Homes, I.C. No. 221195, 4 Jan. 1995.

160. Travelers Ins. Co. v. Rushing, 36 N.C. App. 226, 243 S.E.2d 420 (1978); Neese v. Hickerson's Cable Installation, I.C. No. 924798, 15 Apr. 1992. Judgment and execution based on the Commission's orders to pay must be pursued through the court, in any case. *See* N.C. GEN. STAT. § 97-87 (1991).

161. *See* N.C. GEN. STAT. §§ 97-9 and 97-10.1 (1991).

162. *See* N.C. GEN. STAT. § 97-2(6) (Supp. 1994) and § 97-53(13) (1991).

gence of a co-employee,[163] or the employer's intentional misconduct undertaken with knowledge that it is substantially certain to cause serious injury or death to employees.[164] However, injuries intentionally inflicted on the employee are "accidental" from the point of view of the employee,[165] and within the meaning of the Act, i.e., "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury,"[166] and the employee may simultaneously pursue tort and compensation remedies.[167] If a timely compensation claim is found not to be within the Commission's jurisdiction, the claimant may refile in the Courts within one (1) year of the dismissal, but there is no mirror provision for claims erroneously filed in the courts.[168]

In addition to accidents occurring within the State, employees may pursue claims here if their contract for hire was made in the State,[169] if their employer is headquartered here, or if they are based here, such as airline crews and interstate truckers associated with a terminal within the State.[170]

The employee must see that the employer[171] has prompt notice of the accident[172] — by written notice, if it does not have actual knowledge—to facilitate investigation and prompt treatment to mitigate the loss.[173] The employee is required to give written notice within thirty days of the accident, unless the employee can satisfy to the Commission that there was a good rea-

163. Pleasants v. Johnson, 312 N.C. 710, 716-17, 325 S.E.2d 244, 248-49 (1985).

164. *See* Woodson v. Rowland, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991). For a contemporaneous discussion of this benchmark decision and its context, see "Caselaw Update", *Workers' Compensation in North Carolina*, Lorman Educ. Services, (CLE, October 18, 1991).

165. *See* Robbins v. Nicholson, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972).

166. *See* Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 726, 153 S.E. 266, 268 (1930

167. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 233.

168. *See* N.C. GEN. STAT. § 97-24(b) (Supp. 1994).

169. Thomas v. Overland Express, Inc., 101 N.C. App. 90, 97, 398 S.E.2d 921, 926 (1990), *discretionary review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991).

170. *See* N.C. GEN. STAT. § 97-36 (1991).

171. Notice to the employer "shall be deemed notice or knowledge. . .on the part of the insurer. . . ." N.C. GEN. STAT. § 97-97 (1991).

172. *See* N.C. GEN. STAT. § 97-22 (1991).

173. Jones v. Lowe's Cos., 103 N.C. App. 73, 76, 404 S.E.2d 165, 167 (1991).

son for not giving earlier notice, and that the employer and carrier have not been prejudiced.[174]

As a condition precedent[175] to the employee's right to ask the Commission to compel the employer and its insurer to pay compensation, the employee must file a timely "claim". Absent a Commission award (i.e., an order to pay benefits or an agreement approved by the Commission),[176] the claimant must file the claim with the Commission within two (2) years following the accident[177] or—effective January 1, 1995 and applicable to "claims pending on or filed after that date"[178] — within two years of the last payment of compensation.[179] Unless there is a Commission award for occupational disease claims, these periods run from the latter of lost time due to the disease or advice from "competent medical authority" that the disease was contracted due, at least in significant part, to workplace exposure. Asbestosis, silicosis and lead poisoning are excluded from the initial notice requirement.[180]

The time for giving notice and filing a claim are tolled by a claimant's minority or incompetency if he or she has no guardian or other personal representative.[181]

In practice, the need for notice is normally met by the employer's actual knowledge of the accident occurring in its facility before other employees.[182] When circumstances make a written notice necessary, it can be given with the Commission's Form 18 "Notice of Accident to Employer and Claim of Employee or His Personal Representative or Dependents".

Claimants typically satisfy the requirement that a "claim" be filed with the Commission with the Industrial Commission's Form 18, or Form 33, "Request that Claim Be Assigned for Hearing". While the "claim" requirement may be met by a simple, informal

174. This may include the claimant's failure to appreciate the seriousness of the injury. *See* Lawton v. County of Durham, 85 N.C. App. 589, 591, 355 S.E.2d 158, 160 (1987); *Jones,* 103 N.C. App. at 75, 404 S.E.2d at 166.

175. *Winslow,* 211 N.C. at 582, 191 S.E. at 412.

176. N.C. GEN. STAT. § 97-82 (Supp. 1994); *Pruitt,* 289 N.C. at 258, 221 S.E.2d at 358.

177. N.C. GEN. STAT. § 97-24(a) (1991) (prior to 1994 amendment).

178. 1994 N.C. SESSION LAWS ch. 679, XI, § 11.1(f).

179. *See* N.C. GEN. STAT. §§ 97-24(a) and 97-47.1 (Supp. 1994).

180. *See* N.C. GEN. STAT. §§ 97-58 and 97-52 (1991); Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 706, 304 S.E.2d 215, 218 (1983).

181. *See* N.C. GEN. STAT. § 97-50 (1991).

182. *See* Chilton v. Bowman Gray Sch. of Medicine, 45 N.C. App. 13, 18, 262 S.E.2d 347, 350 (1980).

letter, it must be from the plaintiff or their counsel, and use the term "claim" or request a hearing or otherwise express a desire or intention to seek the Commission's intervention to compel payment of benefits. The defendants' compliance with the requirement that it file a Form 19 Report of Injury[183] most definitely does not obviate this requirement.[184] Other conduct and indications of a desire to obtain benefits—including negotiations between counsel—have been held insufficient.[185] Prior to the 1994 Act, payment of bills for medical compensation or cash compensation in the absence of an award or admission of liability, would not suffice to give the Commission jurisdiction.[186] Thus the most dangerous malpractice trap in compensation litigation is set: Counsel may be retained by a claimant with a file full of letters from adjusters, copies of forms filed with the Commission bearing a file number, and a history of employer payment of medical and even cash benefits, and proceed to investigate and negotiate about the case until the two years slips by.

A series of notable changes in very recent years is ameliorating this very old problem.[187] Claimants have received relief from such mistakes on an equitable estoppel theory in egregious cases of being lulled into inaction by defendant's representations,[188] and more recently for more conventional misrepresentation.[189] A 1994 case may signal a more dramatic shift to considering the totality of the circumstances affecting plaintiffs' actions when estoppel is

183. *See* N.C. GEN. STAT. § 97-92(a) (Supp. 1994). The requirement encompasses *alleged* injuries and submission and reporting is not considered an admission by the employer of liability or even that an accident or injury occurred.

184. Perdue v. Daniel Int'l, 59 N.C. App. 517, 518, 296 S.E.2d 845, 846 (1982), *cert. denied*, 307 N.C. 577, 299 S.E.2d 647 (1983).

185. Gantt v. Edmos Corp., 56 N.C. App. 408, 410, 289 S.E.2d 75, 77 (1982); Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 86, 401 S.E.2d 138, 139-40 (1991).

186. *Id.;* Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 521, 190 S.E.2d 306, 308 (1972); Biddix v. Rex Mills, Inc., 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953).

187. *See* Collins v. Insight Cablevision of Lincolnton, I.C. No. 114528, 3 Feb. 1995.

188. Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 337, 335 S.E.2d 44, 47 (1985); Dowdy v. Fieldcrest Mills, 308 N.C. 701, 716, 304 S.E.2d 215, 227 (1983).

189. Parker v. Thompson-Arthur Paving Co., I.C. No. 801271, 3 Oct. 1989, *aff'd*, 100 N.C. App. 367, 371, 396 S.E.2d 626, 628-29 (1990); Lauer v. Juvenile Evaluation Center, I.C. No. 805366, 14 Feb. 1995.

pled.[190] Effective July 1, 1992, the Commission began requiring employers or their carriers to give the claimant a copy of the Industrial Commission's Form 19, "Employer's Report of Injury to Employee", bearing information on the notice and claim requirements. Most importantly, as noted above, the two-year period will run from the last payment by the employer in cases "pending on or filed after" January 1, 1995.[191] These developments should diminish the stream of litigation coming out of this atypically technical procedural issue of compensation law.

Because of the ongoing nature of a claimant's entitlement to benefits, often tracking his or her changing medical condition, the Commission retains jurisdiction to carry out its administrative responsibilities, even while issues in the case pend on appeal in the appellate courts.[192] As in integral part of the judicial power vested in the Commission, the Commission has the flexibility and continuing jurisdiction to set aside its former judgments to correct an injustice or make its orders comply with the law.[193]

In the arena of medical compensation,[194] the Commission has exclusive jurisdiction to decide issues of appropriate treatment,[195] claims for payment by health care providers,[196] and challenges to

190. Craver v. Dixie Furniture, I.C. No. 771691, *rev'd*, 115 N.C. App. 570, 578-80, 447 S.E.2d 789, 794-95 (1994). *Compare Gantt,* 56 N.C. App. 408, 289 S.E.2d 75 (1982).

191. Cautious counsel may wish to avoid relying on provisions of the '94 Act that purport to effect pending cases, because it is likely at least some of them will be challenged on the constitutional ground that they increased the burden of vested liabilities. *See* Battle v. New Southern of Rocky Mount, I.C. No. 716256, 16 Feb. 1995. For several reasons, counsel would do well to make a habit of sending a Form 18, showing the facts as plaintiff tells them, with their letter of representation.

192. *See* Schofield v. Great Atl. & Pac. Tea Co., 32 N.C. App. 508, 515, 232 S.E.2d 874, *cert. denied*, 292 N.C. 641, 235 S.E.2d 62 (1977); 43 N.C. 567, 573, 259 S.E.2d 338 (1979), *vacated on other grounds*, 299 N.C. 582, 264 S.E.2d 56 (1980).

193. Hogan v. Cone Mills Corp., 315 N.C. 127, 139-40, 337 S.E.2d 477 (1985); McDowell v. Kure Beach, 251 N.C. 818, 824, 112 S.E.2d 390, 394 (1960).

194. *See* N.C. GEN. STAT. § 97-2(19) (Supp. 1994).

195. *See* N.C. GEN. STAT. § 97-25 (1991); Worley v. Pipes, 229 N.C. 465, 471, 50 S.E.2d 504, 508 (1948).

196. North Carolina Chiropractic Assoc., Inc. v. Aetna Casualty & Surety Co., 89 N.C. App. 1, 4, 365 S.E.2d 312, 314 (1988), *cert. denied*, 327 N.C. 431, 395 S.E.2d 686 (1990).

the application of the Fee Schedule,[197] or to the Fee Schedule itself.[198]

As a part of the executive branch, the Commission probably does not have the authority to decide the constitutionality of statutes in workers' compensation cases.[199]

VIII. AVERAGE WEEKLY WAGE

Since whether a person is disabled and, typically, how much he or she is entitled to be compensated for an injury is determined with reference to loss of wage earning capacity,[200] a primary question is how much the claimant was earning prior to the injury. When defendants have admitted liability for any period of disabil-

197. Bass v. Mecklenburg County, 258 N.C. 226, 235, 128 S.E.2d 570 (1962).

198. *See* N.C. GEN. STAT. § 97-26(a) (Supp. 1994); Wake Co. Hosp. v. Industrial Comm'n, 8 N.C. App. 259, 174 S.E.2d 292, *cert. denied*, 277 N.C. 117 (1970); *but see* Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 210, 443 S.E.2d 716, 723 (1994) (permiting providers to sue the Commission under the Declaratory Judgment Act, decided before — and an inspiration for — section 97-26(a)). The *Charlotte-Mecklenburg* court decided that beginning litigation of the issue before the Commission offered plaintiffs an inadequate remedy because their complaints would have to be raised in a real case or controversy — i.e., one or more of the 8,000 inpatient bills submitted to the Commission annually for approval. Without a real record, the court was left to ruminate about levels of care in the 1920s and scenarios in which the employer might pay less than the prevailing rate. *Id.* at 219-23. While the hospitals financed preferred provider discount contracts with payors who had bargaining power with the help of profits from charges to compensation defendants that exceeded the next highest charged payors — commercial insurers — by 10% to 25% (N.C. Medical Database Commission (FY 1992)), by various measures. Ironically, the *per diem* system that the court found exceeded the Commission's statutory authority was the more generous alternative to the regular Fee Schedule but the superior court had enjoined the abolition of its predecessor ("the BCBSNC rule") obtained a month after plaintiffs had injured their prospects by obtaining an injunction against the *per diem* rule. By the time the supreme court found the second injunction improper eighteen months later, it had cost employers well into eight (8) figures. *Id.* at 228; *see also* N.C. GEN. STAT. § 1-260; R.C. PRO. R. 65(e). Affidavit of Commissioner Ward, 8 Jan. 1993. As they were not parties to the DJA, employers had no recourse to recover these losses.

199. Battle v. New Southern of Rocky Mount, I.C. No. 716256, 16 Feb. 1995; Utilities Comm'n v. Carolina Utility Customer's Assoc., Inc., 336 N.C. 657, 674, 446 S.E.2d 332 (1994); *but see* Heavner v. Town of Lincolnton, II IC 213 (1931), *aff'd*, 202 N.C. 400, 162 S.E. 909 (1932), *appeal dismissed*, 287 U.S. 672 (1932). It probably can when "constituted a court" to hear State Tort Claims Act cases. *See* N.C. GEN. STAT. § 143-291 (Supp. 1994); Oxendine v. North Carolina Dep't of Corrections, I.C. No. TA-12513, 16 Dec. 1992.

200. *See* N.C. GEN. STAT. § 97-29 (Supp. 1994).

ity, it is normally stipulated, either with a specific figure, or by reference to a either a Form 21[201] or Form 26[202] agreement that contains this information. Once approved by the Commission—thus becoming a Commission award[203] — the parties cannot contradict it without showing that it was entered into due to fraud, mistake or undue influence.[204] However, claimants frequently sign an initial Industrial Commission Form 21 like a receipt for their first check for compensation, and the employer's personnel office may simply multiply forty hours times the claimant's hourly rate, not taking into account overtime, vacation pay, etc. To prevent manifest injustice and encourage prompt payment of benefits due, the full Commission has taken the position that, if payroll records show conclusively that the form is mistaken, the agreement misrepresenting actual earnings to the Commission necessarily portrays a mutual mistake (or worse), and therefore can be set aside.[205] More sophisticated parties who have inadequate information will agree to put in an estimated figure "subject to wage verification," and execute the agreement rather than delay payment. The latest revision of the Industrial Commission Form 21 provides the average weekly wage ("AWW") figure is "subject to wage verification" unless otherwise indicated.

Methods for determining a claimant's AWW are set out in the statute in order of preference.[206] The claimant's "average weekly wage" is normally determined by dividing all income received from the employer[207] during the preceding year by fifty-two (52).[208]

201. "Agreement for Compensation for Disability", used in respect to the initial period of disability suffered due to an injury.

202. "Supplemental Memorandum of Agreement as to Payment of Compensation", used for second or subsequent periods of total disability, and for agreements concerning payment of permanent partial, temporary partial, or total disability benefits.

203. *See* N.C. GEN. STAT. § 97-82 (1991); Pruitt v. Knight Publishing, 289 N.C. 254, 258, 221 S.E.2d 335, 346 (1976).

204. *See* N.C. GEN. STAT. § 97-17 (1991).

205. Johnson v. Goodmark Corp., I.C. No. 077324, 22 Dec. 1993; Storey v. Barnhill, I.C. No. 935286, 23 Nov. 1992.

206. *See* N.C. GEN. STAT. § 97-2(5) (Supp. 1994).

207. Only wages from the employment in which the claimant is injured is considered — with tragic results when that is part-time employment, and the claimant is rendered incapable of doing his or her primary job. *See* Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 486 (1976).

208. For instructions on calculating the AWW by this method, see the instructions on the Industrial Commission's Form 22 "wage chart", a/k/a, "Statement of Days Worked and Earnings of Injured Employee", and Workers'

The statute specifies different approaches to determining AWW when the employment has lasted less than fifty-two weeks, subject to considerations of fairness to both the employer and employee. There has been considerable litigation over average weekly wages in cases in which the preferred formula did not apply, notably including claimants who had a promotion while serving the same employer[209] within a year of the injury, and proprietors who, as subcontractors, have become "statutory employees" pursuant to N.C.G.S. § 97-19, but have no regular pattern of "wages".[210] The statute also specifies special methods when the AWW is being calculated for a minor, and for volunteer firemen, auxiliary police, and senior members of the State Civil Air Patrol.

IX. COMPENSATION RATE

The claimant's "compensation rate" — the dollar amount of periodic cash or indemnity benefits — is normally two-thirds of the injured employee's "average weekly wage"[211] as of the date of the accident.[212] However, all benefits payable weekly are subject to a maximum figure equal to roughly 110% of the average wage of employees subject to the unemployment compensation system, as calculated annually by the Employment Security Commission.[213] Some benefits are paid in lump sums without reference to earnings. Benefits for a particular claimant may also be determined

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Compensation Rules of the North Carolina Indus. Comm'n, Rules 404 and 402 (West 1995).

209. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 477, 70 S.E.2d 426, 430 (1952); Early v. Basnight & Co., 214 N.C. 103, 105-07, 198 S.E. 577, 579 (1938).

210. *See* Christian v. Riddle & Mendenhall Logging, I.C. No. 082860, 28 Oct. 1993, *rev'd*, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

211. *See* N.C. GEN. STAT. § 97-2(5) (Supp. 1994); *see also supra* note 206 and accompanying text.

212. Crews v. North Carolina Dep't of Trans., 103 N.C. App. 372, 375, 405 S.E.2d 595, 597 (1991); Wood v. Stevens & Co., 297 N.C. 636, 644 and 650, 256 S.E.2d 692, 697 and 701 (1979). The date of "accident" for occupational diseases is the date when the employee first begins losing wages due to the compensable condition. *See* N.C. GEN. STAT. §§ 97-52 and 97-54 (1991); Taylor v. Stevens & Co., 300 N.C. 94, 98-99, 365 S.E.2d 144, 147-49 (1980); Booker v. Duke Medical Ctr., 297 N.C. 458, 483, 256 S.E.2d 189, 205 (1979). However, a claimant who has been partially disabled and subsequently becomes totally disabled by the compensable condition is subject to the maximum in effect on the date of total disability. Peace v. J.P. Stevens Co., 95 N.C. App. 129, 131, 381 S.E.2d 798, 799 (1989); *but see*, Dowdy v. Fieldcrest Mills, 308 N.C. 701, 713-15, 304 S.E.2d 215 (1983), *reh'ing denied*, 308 N.C. 681, 311 S.E.2d 590 (1984).

213. *See* N.C. GEN. STAT. § 97-29 (1991).

from post-injury capacity to earn, the severity of the physical impairment apart from impact on earnings, or the number of other claimants entitled to share in the award.

With few exceptions, cash benefits are paid for actual or conclusively presumed periods of "disability" — a term of art under the Act defined as the inability to earn pre-injury wages—not physical impairment, *per se*.[214] During periods of total disability, either temporary (TTD) or permanent (PTD), a claimant is entitled to weekly payments at a compensation rate equal to two-thirds (⅔) of his or her "average weekly wage".[215]

When the claimant has reached the end of the healing period and "maximum medical improvement,"[216] has some ability to earn wages, but also retains some impairment, the claimant may elect to receive compensation for his residual disability in one of two forms.[217] "Permanent partial disability" benefits ("PPD") are based on a physician's percentage of impairment "rating" and the schedule of benefits for loss of specific body parts. Claimants receive two-thirds (⅔) of their average weekly wage for a specific number of weeks,[218] typically calculated by multiplying the treating physician's percentage of impairment figure (or the average of two or more physicians' ratings, if they're close, consistent and credible) times the number of weeks for total loss in the statute. Sometimes the carrier agrees to pay out the total cash owed in lump sum. The Commission can order that all or part be paid in a lump sum to cover the employee's accumulated debt, or for other good cause.[219] As has been observed in many states, the degree of certainty this method of calculation brings to the system encourages settlements, and is one of the reasons North Carolina has

214. *See* N.C. GEN. STAT. § 97-2(9) (Supp. 1994); *Bridges*, 90 N.C. App. at 399-401, 368 S.E.2d at 389-91 (inability to compete for jobs); Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 146, 282 S.E.2d 539, 540 (1981), *cert. denied*, 304 N.C. 725, 288 S.E.2d 380 (1982) (mental sequala).

215. N.C. GEN. STAT. § 97-29 (1991). That claimant receives wages in a "make-work" job does not bar his or her claim for TTD or PTD. Peoples v. Cone Mills Corp., 316 N.C. 426, 440, 342 S.E.2d 798, 808 (1986).

216. *Crawley*, 31 N.C. App. at 288-89, 229 S.E.2d at 328-29, *discretionary review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977); Moretz v. Richard & Assoc., Inc., 74 N.C. App. 72, 74-75, 327 S.E.2d 290, 292-93 (1985), *modified and aff'd*, 316 N.C. 539, 342 S.E.2d 844 (1986).

217. Gupton v. Builders Transp., 320 N.C. 38, 38, 357 S.E.2d 674, 677-78 (1987).

218. *See* N.C. GEN. STAT. § 97-31 (Supp. 1994).

219. *See* N.C. GEN. STAT. § 97-44 (1991); I.C. Form 31.

perhaps the lowest rate of litigation in the country.[220] For residual impairment to organs not listed by name, the Commission is authorized to make an "equitable"[221] lump sum award, with a cap of $20,000.00.[222] The Commission is authorized to compensate disfigurement of the face and head or the body, with limits of $20,000.00 and $10,000.00 respectively,[223] if it is so repulsive that it will limit the employee's earning potential[224] and has not otherwise been compensated.[225] The dollar figure caps are just that—and not the equivalent of the weeks of compensation listed for total loss of portions of the body in N.C.G.S. § 97-31 — and the Commission awards an appropriate sum, without multiplying these figures times a percentage of impairment.

Alternatively, the claimant who can return to work, but at lower wages than he or she earned prior to the injury due to residual impairment resulting from the compensable accident,[226] may elect to receive benefits at a weekly compensation rate equal to two-thirds (⅔) of the difference between pre-injury earnings and post-injury capacity to earn wages, while this diminution in wages continues, but not beyond three hundred weeks from the date of the injury.[227] There is a special provision for payment of 104 weeks of compensation to employees discovered in Dusty Trade Program[228] examinations to be showing signs of early asbestosis or silicosis and "ordered out of the dust".[229]

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220. Nine and three-tenths percent (9.3%) of paid indemnity claims. The next lowest is Wisconsin, with 9%. Ballentyne, *supra* note 51, at 75-76.

221. Key v. McLean Trucking, 61 N.C. App. 143, 146, 300 S.E.2d 280, 282 (1983).

222. *See* N.C. GEN. STAT. § 97-31(24) (Supp. 1994).

223. *See* N.C. GEN. STAT. § 97-31(21) and (22) (1991).

224. *See* Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 156-57, 305 S.E.2d 523, 526 (1983).

225. *See* Thompson v. Frank IX & Sons, 33 N.C. App. 350, 355, 235 S.E.2d 250, 253 (1977), *aff'd*, 294 N.C. 358, 240 S.E.2d 783 (1978).

226. *See* Gaddy v. Kern, 17 N.C. App. 680, 683, 195 S.E.2d 141, 143 (1973).

227. *See* N.C. GEN. STAT. § 97-30 (1991); Brown v. City of Fayetteville, I.C. No. 824563, 29 Dec. 1993. Contrast this benefit to compensation for total disability per N.C.G.S. § 97-29 based solely on average weekly wages — that is, on *actual* pre-injury earnings. *See* Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 658, 94 S.E.2d 790, 793 (1956). In theory, all benefits address diminished capacity to earn. *See* N.C. GEN. STAT. § 97-2(9) (Supp. 1994); *Peoples*, 316 N.C. at 435, 342 S.E.2d at 804-05.

228. *See* N.C. GEN. STAT. §§ 97-60 to 97-64 (1991).

229. *See* N.C. GEN. STAT. § 97-61.5(b) (1991).

Death benefits are payable weekly at the rate of two-thirds (⅔) of the decedent's average weekly wage, divided equally among those persons who, at the time of the death, were "wholly dependent" on the employee; or if none, among those "partially dependent"; or if none, the employee's surviving "next-of-kin".[230] Decedent's widow[231] and minor children[232] are conclusively presumed to be wholly dependent.[233] Despite dicta to the contrary in a leading case,[234] it appears to be settled that the class of beneficiaries becomes fixed according to their status "at the time of the accident"[235] or at the date of the decedent-employee's death.[236] All qualifying beneficiaries obtain a vested right to the death benefit, or their share of it, for a period of four hundred weeks following the death, and the estate of a beneficiary that does not survive throughout that period succeeds to their right to compensation.[237] But a surviving spouse who, on the date of death, is unable to support themselves, continues to receive their benefits until death or remarriage,[238] and a minor child will continue to receive benefits beyond the four hundred week period until they attain their majority.[239] The Commission has operated on the assumption, not yet tested in the courts, that benefits owed a minor child beyond the initial four hundred weeks—to "be continued until such child reaches the age of 18"—would terminate with the child's death,

230. *See* N.C. GEN. STAT. § 97-38 (1991).

231. *See* N.C. GEN. STAT. § 97-2(14) (Supp. 1994).

232. *See* N.C. GEN. STAT. § 97-2(12) (Supp. 1994).

233. *See* N.C. GEN. STAT. § 97-39 (1991).

234. *See Deese*, 306 N.C. at 279-80, 293 S.E.2d at 144 (suggesting a reapportionment of the benefit among surviving beneficiaries if one of them dies within four hundred weeks of the employee's death).

235. *See* N.C. GEN. STAT. §§ 97-38 and 97-39 (1991); *see also* Chinault v. Floyd S. Pike Elec. Contractors, 53 N.C. App. 604, 606, 281 S.E.2d 460, 462 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982) (minor child's portion not increased after four hundred weeks); *Deese*, 306 N.C. at 281, 293 S.E.2d at 145 (no reapportionment among dependents after four hundred weeks); Allen v. Piedmont Transp. Serv., Inc., 116 N.C. App. 234, 236-38, 447 S.E.2d 835, 836 (1994).

236. *See* N.C. GEN. STAT. §§ 97-2(10),(12),(13),(14), and (15) (Supp. 1994), and 97-40 (1991).

237. Hill v. Cahoon, 252 N.C. 295, 298-99, 113 S.E.2d 569, 572 (1960).

238. *See* N.C. GEN. STAT. § 97-38 (1991); Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 363, 407 S.E.2d 248, 250 (1991).

239. *See* N.C. GEN. STAT. § 97-38 (1991); Caldwell v. Marsh Realty Co., 32 N.C. App. 676, 681, 233 S.E.2d 594, 597, *cert. denied*, 292 N.C. 728, 235 S.E.2d 782 (1977).

and the child's estate would not have a claim for the additional benefits that would have been paid had the child survived.

Beneficiaries are the proper plaintiff's in a claim for compensation death benefits, and not the decedent's estate or the owner of the policy.[240] Most litigation in this area concerns the "dependent" status of claimants, particularly illegitimate children,[241] and whether the cause of death was related to the employment,[242] including intoxication cases.[243] When an employee dies in the course and scope of his employment of uncertain causes, the plaintiff is aided by a rebuttable "presumption of compensability" that the "death was caused by accident, or that it arose out of the decedent's employment, or both."[244] The court stated that this presumption was fair because of the liberal construction of the Act, the employer's superior knowledge of plans and occurrences in the workplace, and access to reports of the medical examiner.[245] In that vein, the court might have also noted the employer's "right in any case of death to require an autopsy."[246]

X. CONCLUSION

The workers' compensation system has largely succeeded in reducing litigation and giving injured workers a "swift and sure

240. *See* Crawford v. General Ins. & Realty Co., 266 N.C. 615, 617, 146 S.E.2d 651, 653-54 (1966).

241. *See* Rogers v. University Motor Inn, 103 N.C. App. 456, 461-62, 405 S.E.2d 770, 773 (1971) (I.C. No. 729933, 3 May 1990) (parents versus estranged widow); Winstead v. Derreberry, 73 N.C. App. 35, 41-43, 326 S.E.2d 66, 71 (1985) (step-child).

242. *See* Roberts v. Burlington Indus., Inc., 321 N.C. 350, 364 S.E.2d 417, 421 (1988) (good Samaritan); Robbins v. Nicholson, 281 N.C. 234, 241, 188 S.E.2d 350, 355-56 (1972) (domestic shotting in workplace); Petty v. Associated Transp., 276 N.C. 417, 426-28, 173 S.E.2d 321, 329 (1970) (suicide, defended as intentional per N.C.G.S. § 97-12(3) (1991)); Taylor v. Twin City Club, 260 N.C. 435, 438-39, 132 S.E.2d 865, 868-69 (1963); Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 513-14, 442 S.E.2d 370, 376 (1994) (trip for business and pleasure).

243. *See* Sidney v. Raleigh Paving & Patching, 109 N.C. App. 254, 258, 426 S.E.2d 426, 429 (1993); Lassiter v. Town of Chapel Hill, 15 N.C. App. 98, 101, 189 S.E.2d 769, 771 (1972) (trash truck mechanism); Johnson v. Charles Keck Logging, I.C. No. 050761, 23 May 1994; Suggs v. Snow Hill Milling Co., I.C. No. 615498, 21 June 1988, *aff'd,* 100 N.C. App. 527, 531, 397 S.E.2d 240, 243 (1990).

244. *See* Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368, 368 S.E.2d 582, 584 (1988).

245. *See Pickrell*, 322 N.C. at 370, 368 S.E.2d at 587.

246. *See* N.C. GEN. STAT. § 97-27(a) (1991).

remedy." Despite "crises" in many states over the last decade, none has returned workplace injury claims to the liability system. Compensation litigation is simpler due to elimination of the "fault" burdens of proof and defenses. Innovation and a dramatic increase in the Industrial Commission's resources have enabled new quick and informal means of resolving cases. But the breadth of the Act's coverage, its limitations, the variety of gainful activities, the interplay of a given individual's medical and vocational circumstances, and the probability that the parties' rights and duties will evolve with the claimant's medical condition, all create possibilities for disputes and litigation—and the stakes today tend to animate them. Counsel can avoid surprise and narrow the issues with careful pre-hearing preparation and stipulations regarding facts that are undisputed but necessary to determine the claimant's right to compensation.