NORTH CAROLINA CIVIL LITIGATION REPORTER

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CIVIL LIABILITY

Broad Coverage Afforded By Business Auto Policy

Having determined that Mary Smith was nearing death, her doctor recommended hospice care, for which her niece, Leslie Taylor, contracted with Hospice of Cabarrus. Hospice arranged for Helping Hands Specialized Transport to move Ms. Smith from the hospital to her home in a handicapped accessible van, seated in a Geri-chair. When the van arrived at her home, the driver lowered her in the chair to the driveway with the van's lift, rolled it up to the front steps, transferred her to a wheelchair, and began pulling it up a set of steps. Ms. Smith started sliding, so her niece grabbed one of her legs, while the van's driver put his arm around her to keep her from falling. Once they were on the porch, they discovered a gash on her leg. She died two days later.

After Taylor filed a wrongful death action against Hospice and Helping Hands, alleging negligence proximately resulting in her aunt's injury and death, Helping Hands' business auto insurer, Integon, brought a declaratory judgment action, contending that the policy did not provide coverage because Taylor's claim was not "caused by an accident … resulting from the ownership, maintenance or use" of a covered vehicle. However, the trial court did not agree. It denied Integon's motion for summary judgment and granted Taylor's, finding that Integon was obligated to provide coverage up to its full policy limits for Helping Hands' liability,

In This Issue…

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if any, resulting from the incident and wrongful death claim. Integon appealed.

On May 6, in ***Integon National Insurance Company v. Helping Hands Specialized Transport, Inc.***, the Court of Appeals held that "while there may be genuine issues of fact … material to the issues of negligence and the liability of Helping Hands for the injuries and death of Ms. Smith, none of those factual issues are material to the issue of whether Integon's policy of insurance provides coverage to Helping Hands for any such liability. Thus summary judgment is an appropriate procedure for the resolution of this declaratory judgment action."

The Court found that while the policy language provided coverage for damages "resulting from the ownership, maintenance or use" of a covered vehicle, N.C.G.S. § 20-279.21 requires that auto policies cover damages *arising out of* the ownership, maintenance or use of a covered auto. Quoting ***Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mutual Insurance Co.***, 16 N.C. App. 194 (1972), it held that the words "arising out of" are "broad, general, and comprehensive terms effecting broad coverage" and are of "much broader significance" than "caused by"; they mean "'originating from,' 'having its origin in,' 'growing out of,' … 'flowing from,' … 'incident to,' or 'having connection with' the use of the automobile."

While the Court agreed that Integon's policy was not a "general liability insurance contract" and there must be a causal connection between the vehicle's use and plaintiff's injury, it found that ***Nationwide Mutual Insurance Co. v. Davis***, 118 N.C. App. 494 (1995) and ***Integon National Insurance Co. v. Ward ex rel. Perry***, 184 N.C. App. 532 (2007), liberally applied the principle that "a motor vehicle liability policy will provide coverage if an injury is caused by an activity that is necessarily or ordinarily associated with the use of the insured vehicle."

Applying that principle to the facts of the present case, the Court held that the intended use of Helping Hands' vehicle was to transport plaintiff from the hospital to her residence, and because she was unable to ambulate, "application of the logic contained in ***Davis*** and ***Ward*** leads to the inference that the use of the insured van included moving Ms. Smith into her residence as a part of the transport service." Since it was "unable to draw any meaningful distinction" between ***Davis*** and ***Ward*** and the present case, and even though it "might believe that the extension of coverage in those cases goes beyond the common-sense application of the principles of a causal connection," the Court felt "bound to … hold that there is a sufficient 'causal connection' between the van's use and Ms. Smith's injury requiring Integon's policy to provide coverage."

The Court then turned to Integon's alternative argument that the trial court erred by failing to reform the policy to limit the recovery, if any, to the "statutorily mandated minimum coverage amount." Because, for a party to preserve an issue for appellate review under Rule of Appellate Procedure 10, it must have been presented to the trial court and ruled upon, but in the present case Integon's complaint did not seek reformation of the Helping Hands policy, the Court held that this issue was "not properly preserved for appeal."

Further, noted the Court, while Integon brought its lawsuit under the Declaratory Judgment Act, that Act only "applies to the *interpretation* of written instruments," not their reformation. Therefore, Integon's request to reform Helping Hands' policy went "beyond the scope of the Declaratory Judgment Act." For that reason as well, the trial court's order granting defendants' motion for summary judgment was affirmed.

Consent to Jurisdiction Provision Upheld

Samuel Weiss invested in a number of real estate development deals in different states with a fellow resident of New York, Ezra Beyman. In one of them, Beyman's company, Empirian at Carrington Place, LLC, borrowed $28,290,000 from Deutsche Bank and executed a promissory

note secured by a deed of trust on the property being developed, Carrington Oaks, located in Mecklenburg County, North Carolina. As part of the loan transaction, Beyman and Weiss executed a "Guaranty and Indemnity" agreement in which they individually "unconditionally and irrevocably guarantee[d] up to $6,240,000 of the principal balance" of the Carrington Oaks loan. The agreement also included a "Submission to Jurisdiction" provision, in which they both "submit[ted] to personal jurisdiction in the state in which the property is located over any suit … arising from or relating to this guaranty."

After GECMC came into possession of the Carrington Oaks promissory note, Empirian defaulted on the loan, so GECMC demanded payment from Beyman and Weiss on their guaranty. When they refused to pay, GECMC filed suit in Mecklenburg County Superior Court, seeking the principal amount of the guaranty, plus interest, costs, and attorney's fees. Weiss moved to dismiss under Rules 12(b)(2), (b)(4), and (b)(5), for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process respectively.

The trial court denied Weiss' motions to dismiss for insufficiency of process and insufficiency of service of process and deferred ruling on the motion to dismiss for lack of personal jurisdiction to allow GECMC to "take jurisdictional discovery of Defendant Weiss." After affidavits were submitted by both parties, and GECMC deposed Weiss, the trial court concluded that it had personal jurisdiction by virtue of the agreement in which Weiss "expressly submitted to jurisdiction in the state where the underlying property is situated, North Carolina." It also found that its exercise of jurisdiction "comports with Due Process" and did not offend "traditional notions of fair play and substantial justice," so it denied Weiss' Rule 12(b)(2) motion to dismiss. Weiss appealed.

On May 6, in ***GECMC 2006-C1 Carrington Oaks, LLC v. Weiss***, the Court of Appeals first addressed the interlocutory nature of Weiss' appeal and held that, as in ***Retail Investors, Inc. v. Henzlik Inv. Co.***, 113 N.C. App. 549 (2013), and consistent with the provisions of N.C.G.S. § 1-277(b), "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant …."

The Court then acknowledged the general rule that, as a prerequisite to exercising jurisdiction, the trial court must "make two basic inquiries: '(1) whether any North Carolina statute authorizes the court to entertain an action against the defendant and if so, (2) whether defendant has sufficient minimum contacts with the state so that considering the action does not conflict with "traditional notions of fair play and substantial justice."'" But, noted the Court, a defendant may also consent to jurisdiction, in which case, "the two step inquiry is unnecessary to the exercise of personal jurisdiction over the defendant," and one method for consenting to personal jurisdiction is by including a "consent to jurisdiction" provision in a contract. Such a provision, the Court concluded, "does not violate the Due Process Clause and is valid and enforceable unless it is the product of fraud or unequal bargaining power or … enforcement of the provision would be unfair or unreasonable."

Quoting ***Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.***, 169 N.C. App. 690 (2005), the Court held that, in resolving a Rule 12(b)(2) motion to dismiss, the trial court "may hear the matter on affidavits … [or] direct that the matter be heard wholly or partly on oral testimony or depositions," in which case the appellate court "considers only whether the findings of fact by the trial court are supported by competent evidence in the record."

The Court found that, in the present case, the parties' affidavits and Weiss' deposition established that, as in the other deals in which Weiss invested with Beyman, once the necessary documents were drafted by Beyman's attorney,

Weiss went to the attorney's office and was presented with "a bunch of papers" that he signed without reading, asking questions, or requesting copies. Although Weiss argued that he could not be bound to the consent to jurisdiction provision of the loan guaranty because he did not read it, the Court held, as it did in ***Williams v. Williams***, 220 N.C. App. 806 (1942), that "one who signs a paper is under a duty to ascertain its contents" and, unless he proves that "he was willfully misled or misinformed" about its contents or that they were "kept from him in fraudulent opposition to his request, he is held to have full knowledge and assent as to what is therein contained." Since Weiss made no argument that he had been "willfully misled or misinformed," the Court affirmed the trial court's determination that it had personal jurisdiction over him "by virtue of … [his express submission] to jurisdiction in the state where the underlying property is situated, North Carolina." Therefore, it was unnecessary to determine whether he had sufficient contacts with North Carolina to allow the court to exercise personal jurisdiction over him.

Summary Judgment Reversed In Negligence Action

Eighty-six year old Hazel Sims, a longtime patient of Dr. James Harris, went to his office at Graystone Ophthalmology Associates for a vision exam on November 5, 2007. As usual, she was placed in an armless rolling chair and instructed to move up to the table at which the examination machine was located. After seating herself, she leaned over to place her purse on another chair and, as she shifted her weight back on the chair, it started to roll. She attempted to catch herself, but there was nothing to grab onto. The chair slipped out from under her and she fell, fracturing her right shoulder and hip.

Ms. Sims brought a negligence action against Graystone Ophthalmology, alleging that it knew or should have known that rolling chairs without arms were dangerous to elderly patients. It denied negligence, asserted various defenses, including contributory negligence, and moved for summary judgment. The trial court granted Graystone's motion and Ms. Sims appealed.

On May 20, in ***Sims v. Graystone Ophthalmology Associates, PA***, the Court of Appeals observed that, "to prevail in a negligence action, plaintiff must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." It then reiterated the well-known rule that, when considering a motion for summary judgment, "the trial judge must view the presented evidence in a light most favorable to the nonmoving party."

Applying those principles to the facts before it in the present case, the Court found evidence "sufficient to carry the issue of negligence to a jury," as "the staff of defendant was aware of the dangers of the rolling chair" from a prior incident in which one slid out from under another patient while she was being seated. There was also testimony from the technician who was with Ms. Sims at the time that she usually placed her foot on the bottom of the chair to hold it while the patient was being seated, so as to keep it from rolling, but on this occasion she was facing away from Ms. Sims.

The Court held that, while the manner in which plaintiff seated herself in the chair "may be found by the jury to constitute contributory negligence, … the evidence does not establish contributory negligence as a matter of law." Therefore, it determined that "material issues of fact exist as to whether defendant was negligent and whether plaintiff was contributorily negligent," so "the trial court erred in entering summary judgment in favor of defendant."

Additional Opinions

Huttig Building Products obtained a judgment for $31,985 against Angus McDonald in Wake County District Court. It then moved for, and obtained, an order from the Wake County Clerk

of Court compelling BB&T to release $9,089 from multiple bank accounts McDonald jointly held with other members of his family. After he unsuccessfully appealed the Clerk's order in Wake County Superior Court, McDonald appealed to the Court of Appeals, contending that he had no interest in the bank accounts in question because his elderly mother and teenage children contributed all of the funds in them. On May 20, in ***Huttig Building Products, Inc. v. McDonald***, the Court, quoting ***Langley v. Gore***, 242 N.C. 302 (1955), held that it was "unable to consider defendant's argument because 'only a "party aggrieved" may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court.'" McDonald's admission that he had no interest in the bank accounts in question meant that he had no interest that would allow him to appeal the trial court's order, so the Court dismissed his appeal.

On May 6, the Court of Appeals issued ***City of Asheville v. Aly***, which involved the termination of police officer Roger Aly's employment by Chief of Police William Hogan. After the City Manager upheld Chief Hogan's decision, Aly appealed to the Asheville Civil Service Board, which found that while he had "violated … the City's policies and … rules of conduct, … the violations were not so severe as to warrant termination." The City then appealed to Superior Court for a trial *de novo* under § 8(a) of the Civil Service Act (2009 N.C. Sess. Laws ch. 401 § 8). Following a bench trial, Judge James Downs issued an order reinstating Aly to his former rank with "back pay … and all other rights as if the termination had not occurred," at which point the City appealed to the Court of Appeals. In affirming Judge Downs' order, the Court found that, under the Civil Service Act, the dispositive issue was whether Aly's termination was "*justified*," and as to that question, the applicable standard of review was (1) whether there was competent evidence to support the judge's findings of fact and (2) whether those findings supported his conclusions of law. As the answer to both questions was in the affirmative, Judge Downs' order was affirmed.

On May 20, in ***Tyll v. Berry***, after plaintiffs David and Jennifer Tyll obtained a civil no-contact order under Chapter 50C, defendant Berry's "NOTICE OF APPEAL" was dismissed because it contained an admission that the time for appealing had expired and because the notice itself was, in the Court's words, a "nullity," since it did not give notice of appeal, it gave "notice of intent to appeal." The Court also affirmed the denial of Berry's request that the trial court appoint counsel to represent him during the civil contempt hearing at which he was found to be in contempt of court and fined $2500. While N.C.G.S. § 7A-451(a)(1) entitles indigent parties to counsel in cases in which "imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged," Berry did not attend the contempt hearing, so he failed to obtain the ruling on his request for counsel that he needed to preserve the issue for appellate review. The Court also affirmed the trial court's decision to award the $2500 fine not to the court, but to plaintiffs, explaining that "[w]hile *damages* or *costs* may not be awarded … in a civil contempt proceeding, … a person found in civil contempt may be required to pay a fine to the opposing party" (emphasis added). At the same time, the Court found that the trial court erred in failing to make findings as to whether Berry had the ability to pay the $2500 fine because "a person [must] have the present ability to comply with the conditions for purging the contempt" before he can be fined or imprisoned for civil contempt. Since no such findings were included in the trial court's order, it was reversed and the case remanded for appropriate findings to be made.

WORKERS' COMPENSATION

Court of Appeals Splits Over Legal Obligation to Provide Adaptive Housing

Santos Tinajero, an undocumented worker from Mexico, suffered a C4-5 fracture at work that left

him quadriplegic. After being treated at the Shepherd Center in Atlanta, he was transferred to the Briarcliff Haven assisted living facility. While there, he filed an "Emergency Motion for Medical Treatment," contending that Briarcliff Haven was not a suitable living environment, and sought entry of an order directing the defendants to provide him with an apartment and 24-hour attendant care. After requesting a hearing, he located and moved into an apartment across the street from the Shepherd Center.

The deputy commissioner who heard Tinajero's claim awarded lifetime benefits, but also found that the life care plan prepared by Michael Fryar was not objective and unbiased; held that the defendants were not obligated to purchase, construct, or lease adaptive housing, as they were already providing suitable housing at Briarcliff Haven; and concluded that the medical evidence failed to establish that it was necessary for Tinajero to leave Briarcliff Haven.

On appeal, the Full Commission ruled that the defendants were "responsible for providing handicapped accessible housing" and it was in Tinajero's "medical best interest" for it to be "suitable for the maximum possible level of independence," *i.e.*, somewhere other than in a skilled nursing home or long-term care facility. It also held that placing Tinajero at Briarcliff Haven was not appropriate, as it "endangered his physical and psychological health." Since he owned no property that could be adapted, the Full Commission concluded that "[r]easonable handicapped accessible housing" for him was "an apartment which can accommodate the necessary 24-hour daily attendant care."

As for Tinajero's request for adaptive transportation, the Full Commission found that since he never possessed a driver's license or owned a motor vehicle, and as the defendants were providing transportation for medical visits, therapy, recreation, and social activities and bought him a MARTA pass for the public transportation system where he lived in Atlanta, they were not obligated to buy him a vehicle, but *would* be obligated to modify one to make it accessible for his needs, if he bought it himself.

While the Full Commission agreed with the deputy commissioner that Michael Fryar's life care plan "was not an unbiased, objective, fair, and balanced assessment," it ordered the defendants to pay for a life care plan by a "well-qualified and certified life care planner with long-standing experience dealing with catastrophic life care planning."

The defendants appealed to the Court of Appeals and Tinajero cross-appealed, but their appeals were dismissed as interlocutory, since final resolution of the medical issues required completion of a satisfactory life care plan. After the parties agreed that Susan Caston would prepare the life care plan, Tinajero moved to depose Ms. Caston and a second witness to authenticate the Michael Fryar life care plan, but his motion was denied. Both parties appealed.

On May 6, in ***Tinajero v. Balfour Beatty Infrastructure, Inc.***, a 2-to-1 majority of the Court of Appeals held, in an opinion authored by Judge Geer, that defendants' appeal was timely under Rule of Appellate Procedure 3(d) and N.C.G.S. § 1-278 and that, because plaintiff was totally and permanently disabled, he was owed lifetime "medical compensation," as that phrase is defined in N.C.G.S. § 97-2(19), *i.e.*, "medical, surgical, hospital, … *and other treatment*." Judge Geer cited ***Derebery v. Pitt County Fire Marshall***, 318 N.C. 192 (1986) and ***Timmons v. N.C. Department of Transportation***, 123 N.C. App. 456 (1996) as authority for holding that "other treatment" includes wheelchair accessible housing. Therefore, ruled the Court's majority, the Full Commission did not err when it ordered the defendants to "pay the rental cost of reasonable handicapped accessible housing."

The Court also found no error in the Commission's denial of plaintiff's request for an "adaptive van." While "[u]nder … ***Derebery***, an employer may be required to provide adaptive

transportation … if … plaintiff's existing access to transportation is not satisfactory," in this case, the Commission found that "the transportation services currently being provided by defendants are reasonable" and there was evidence to support that finding, so it was affirmed.

However, the Court found that the Full Commission erred when it denied plaintiff's request to depose Susan Caston because, while a party does not have the right to require the Commission to hear additional evidence and the question of whether to reopen a case for that purpose "rests in the sound discretion of the Industrial Commission," plaintiff's due process rights *were* violated when Caston's report was received into evidence without affording him the opportunity to cross-examine her. Quoting ***Allen v. K-Mart***, 137 N.C. App. 298 (2000), the Court found that "[t]he opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system." Therefore, although the Commission did not err when it denied plaintiff's request to take the second deposition "to rehabilitate Mr. Fryar and his life care plan," "an issue that has already been ruled upon," it *did* err when it denied plaintiff's motion to depose Ms. Caston.

In dissent, Judge Dillon took issue with the Commission's award of the full cost of a handicapped accessible apartment. Citing ***Espinoza v. Tradesource, Inc.***, ___ N.C. App. ___ (2013) (see *North Carolina Civil Litigation Reporter*, December 2013, p. 8), he observed that, before plaintiff was injured, he was repaying rent, and while "he [now] requires a more expensive apartment that is handicapped accessible and which allows for 24-hour care," a portion of the cost of renting it is "an ordinary expense of life." Because the defendants were ordered to pay "weekly wage-replacement benefits" for the remainder of plaintiff's life, Judge Dillon is of the opinion that, by classifying the entire lease expense as "other treatment," the Commission erroneously awarded him a double recovery.

Claim for Additional Benefits Time-Barred by N.C.G.S § 97-47

Willie Johnson injured his back at work. Southern Tire Sales and Service and its insurer accepted liability and paid medical and indemnity compensation, including vocational rehabilitation services aimed at locating suitable alternative employment, but when Johnson's rehabilitation counselor registered him for a program with Johnston County Industries, he refused to participate and either failed to attend job interviews or sabotaged them through "extreme pain behavior."

Deputy Commissioner Theresa Stephenson suspended payment of compensation, effective February 9, 1999, after finding that Johnson unjustifiably refused to cooperate with vocational rehabilitation, but the Full Commission reversed and awarded TTD beginning in January 1997. The Court of Appeals affirmed in ***Johnson v. S. Tire Sales & Serv.***, 152 N.C. App. 323 (2002) ("***Johnson I***"), but the Supreme Court held in ***Johnson v. S. Tire Sales & Serv.***, 358 N.C. 701 (2004) ("***Johnson II***") that the Commission erred in operating under a presumption of continuing disability and in applying an incorrect legal standard to its analysis of whether Johnson had constructively refused suitable employment.

On remand, the Full Commission found that Johnson was not totally and permanently disabled and, having unjustifiably refused to cooperate with vocational rehabilitation, failed to establish that he was disabled after February 9, 1999. He appealed, but the Court of Appeals affirmed in ***Johnson v. S. Tire Sales & Serv.***, ___ N.C. App. ___ (July 19, 2011) ("***Johnson III***").

Johnson then requested another hearing, again claiming totally disability after February 9, 1999. He also filed a motion to compel vocational rehabilitation, which Deputy Commissioner Mary Vilas granted. But, the Full Commission reversed in an opinion and award that denied

both his request for vocational rehabilitation and his claimed entitlement to additional weekly benefits, so he entered another appeal.

On May 6, in ***Johnson v. Southern Tire Sales and Service, Inc.*** ("***Johnson IV***"), the Court of Appeals affirmed. It found that since vocational rehabilitative services only meet the definition of "medical compensation" in N.C.G.S. § 97-2(19) when they either "effect a cure or give relief" or "tend to lessen the period of disability," the Full Commission "correctly reasoned that because vocational rehabilitation … cannot effect a cure or give relief in a medical sense, it must lessen the period of disability in order to meet the statutory definition of medical compensation." As a consequence, the Full Commission correctly ruled that "disability, or a 'diminished capacity to earn money,' must be shown before vocational rehabilitation services can be awarded … as part of a workers' compensation claim."

The Court also agreed that Johnson failed to prove disability after February 9, 1999, first of all because between that date and the Commission's prior opinion and award, "the issue of whether plaintiff established disability was … addressed … [in ***Johnson III***, so] the law of the case doctrine applies." And, as for the time thereafter, the record contained competent evidence supporting the Commission's finding that Johnson failed to establish an inability to work under the four-prong test for disability established in ***Russell v. Lowes Product Distribution***, 108 N.C. App. 762 (1993). Therefore, as "no period of disability existed when plaintiff filed his request to reinstate vocational rehabilitation," the requested services "could not serve to lessen a period of disability" and were not owed.

The Court also found no merit in Johnson's argument that defendants' statute of limitations defense under N.C.G.S. § 97-47 was "not properly presented to the Commission for determination." While the opinion and award of the original hearing officer, Deputy Commissioner Vilas, only addressed the question of whether the defendants should be ordered to reinstate vocational rehabilitation, N.C.G.S. § 97-47 provides that, "[u]pon its own motion or … application of any party …, the … Commission may … make an award ending, diminishing, or increasing the compensation previously awarded." As a consequence, the Court of Appeals held in ***Perkins v. U.S. Airways***, 177 N.C. App. 205 (2006) that "the [F]ull Commission has the duty … to decide all matters in controversy between the parties … even if those matters were not addressed by the deputy commissioner." Therefore, since Johnson was seeking additional benefits, the Court found that "it was proper for the Full Commission to consider whether [he was] time-barred by section 97-47."

In reaching that conclusion, the Court rejected Johnson's argument that N.C.G.S. § 97-47 did not apply because his benefits were suspended under N.C.G.S. § 97-25, rather than N.C.G.S. § 97-32, and ***Scurlock v. Durham County General Hospital***, 136 N.C. App. 144 (1999) held that cases "pending under section 97-25" are not "change of condition case[s] under section 97-47." The Court found ***Scurlock*** distinguishable because, in the present case, the Supreme Court cited N.C.G.S. § 97-32 when it remanded the case to determine whether plaintiff constructively refused suitable employment in ***Johnson II*** and the Full Commission cited the same statute when it concluded that he unjustifiably refused to cooperate with defendants' vocational rehabilitative efforts.

Because N.C.G.S. § 97-47 provides that change in condition claims must be filed within "two years from the last payment of compensation," and as defendants' last payment of compensation was made on April 27, 2000, whereas Johnson's Form 33 was not filed until August 4, 2011, more than two years passed between the final payment of compensation and the filing of plaintiff's claim for additional benefits. That being so, the Court affirmed the Commission's conclusion that Johnson was "time-barred by section 97-47 from receiving [additional] compensation."

Death Benefits Awarded Following Drug Overdose

Mark Willard came under the care of Dr. Andrew Koman after injuring his left thumb at work and was eventually diagnosed with "post-trauma complex regional pain syndrome," for which he was prescribed Vicodin and methadone. After an office visit with Dr. Koman on August 6, 2009, he filled his methadone prescription at a Rite Aid Pharmacy, received 90 ten-milligram tablets, and took one before he arrived home. The prescription called for him to take "ten milligrams, three times per day as needed to manage his pain."

Later that day, Willard reported to his wife, who was visiting her mother at the time, that he had taken a second methadone tablet. His brother subsequently spoke to him by telephone and found his speech "very slow." When asked if he was "okay," Willard responded "I don't know …. My throat feels funny." A short time later, his wife returned home and found him slumped over the kitchen table and unresponsive. When emergency personnel arrived, they confirmed he was dead.

Mrs. Willard subsequently filed for death benefits under N.C.G.S. § 97-38, but the defendants denied her claim on grounds that his death was not related to his thumb injury and his claim was barred by the provisions of N.C.G.S. § 97-12, which precludes the recovery of benefits when an employee's injury or death is proximately caused by being under the influence of a substance listed in the North Carolina Controlled Substances Act.

Before Mrs. Willard's claim was heard, the parties agreed that her expert witness, toxicologist Dr. Andrew Mason, would be deposed after they took the depositions of the state's Chief Medical Examiner, Dr. Deborah Radisch, and its Chief Toxicolgist, Dr. Ruth Winecker. They also agreed that if Dr. Mason's testimony "attack[ed] the toxicology report," the defendants would be given the opportunity to redepose Drs. Radisch and Winecker, and if necessary, could designate and introduce evidence from a rebuttal toxicologist.

After a hearing before Deputy Commissioner Phillip Holmes, testimony was taken by deposition from Drs. Radisch and Winecker, and then from Dr. Mason. At that point, the defendants moved to "extend the record" to offer rebuttal testimony from Drs. Radisch and Winecker and an expert witness for the defense, toxicologist Dr. Brian McMillen, but their motion was denied. They then moved to make an offer of proof, so as to preserve for appellate review the rebuttal deposition testimony of Drs. Radisch, Winecker, and McMillen, but that motion was also denied by Deputy Commissioner Holmes, who awarded death benefits in an opinion and award which found that the defendants failed to prove their affirmative defense under N.C.G.S. § 97-12 because the evidence did not establish that the deceased employee took his methadone in a manner contrary to the prescribed use.

Defendants appealed to the Full Commission, moved to reopen the record to include the rebuttal testimony from Drs. Radisch, Winecker and McMillen, and in the alternative, requested permission to submit the doctors' deposition testimony as an offer of proof. After the Full Commission denied both motions and entered an opinion affirming Deputy Commissioner Holmes' award, the defendants filed a motion for reconsideration, but it, too, was denied, as were later motions to reopen the record and for leave to make an offer of proof. The defendants then appealed to the Court of Appeals.

In December 2013, the Court entered an order holding defendants' appeal in abeyance, pending remand to allow the defendants to make an offer of proof consisting of the anticipated rebuttal testimony of Drs. Radisch, Winecker, and McMillen. That offer of proof was submitted in February and the Court issued its opinion in ***Willard v. VP Builders Inc.*** on May 6.

In that opinion, the Court agreed with the defendants that it was error for the Commission to deny them the opportunity to make an offer of proof. Quoting from ***State v. Jacobs***, 363 N.C. 815 (2010), and ***State v. Walston***, ___ N.C. App. ___ (2013), the Court explained that "in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." While "the rules of procedure and evidence that govern in our general courts of justice generally do not apply to the Industrial Commission's administrative fact-finding function," the Commission "must conform to court procedure and evidentiary rules where required to preserve justice and due process." Like the right to cross-examine an opposing party's witnesses, which was found necessary to "preserve justice and due process" in ***Allen v. K-Mart***, 137 N.C. App. 298 (2000), the Court held that, "upon request, the Commission must afford a party in a workers' compensation proceeding the opportunity to make an offer of proof regarding the substance of evidence that has been excluded unless the substance of the evidence and its significance are readily apparent."

Nevertheless, when it reached the question of whether the Commission committed reversible error in this case when it denied defendants' motion to reopen the record to receive rebuttal testimony from Drs. Radisch, Winecker, and McMillen, the Court answered in the negative. Because the standard of review for trial court rulings on motions to receive additional evidence is "abuse of discretion" and the test for abuse of discretion is "whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision," the Court concluded that "the Commission did not abuse its discretion in denying Defendants' motion." While their offer of proof revealed that Dr. McMillen would have testified that he could make a scientifically reliable determination from tissue samples that the deceased employee consumed between four and eight 10-milligram tablets of methadone, the rebuttal testimony of Drs. Radisch and Winecker would have reaffirmed their previous testimony that neither could state to a reasonable degree of medical certainty that he had consumed more than two methadone tablets.

As for the parties' agreement that if Dr. Mason "attack[ed] the toxicology report" when he testified, the defendants would be given the opportunity to redepose Drs. Radisch and Winecker, the Court found that Dr. Mason "did not attack the toxicology report itself." Rather, he merely "offered his opinion as to what information could be extrapolated from … data contained in the report." For that reason, and as the defendants' "two primary witnesses – Drs. Winecker and Radisch – would have … reaffirmed their opinions that tissue concentrations do not provide scientifically reliable determinations of methadone dosage," the Court concluded that the defendants "failed to show actual prejudice" from the denial of their motion, so it affirmed both the Commission's opinion and award and its order denying defendants' motion for reconsideration.

The full text of the appellate decisions summarized in this newsletter can be located at www.nccourts.org.

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