

Marking NCCI's Centenary

Top Five Appellate Cases

Analyst Tom Robinson recently listed on NCCI's website what he considers the 10 most-significant appellate decisions in the last 100 years. We discuss below his top five cases. Robinson is co-author of *Larson's Workers' Compensation Law*.

Total Disability – *Lee v. Minneapolis St. Ry. (1950)*

As analysts have concluded, “total disability” is not to be interpreted as utter and abject helplessness. Evidence a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability, nor require that it be reduced to partial disability as sporadic employment is not inconsistent with total disability.

Mental-Mental Injuries – *Bailey v. American Gen. Ins. Co. (1955)*

For decades after enactment of workers' compensation laws it was an open question whether an employee could recover benefits because of a mental injury from work-related mental trauma. The Texas Supreme Court said yes.

The claimant was on a scaffold when it gave away, plummeting a co-worker to death. He tried to resume employment but suffered health issues, including nightmares. As Robinson notes, in ruling for the claimant the court said in effect: obviously the worker's body no longer functions properly; therefore, can you say that a body which no longer functions properly has suffered no harm to its physical structure? The body is not mere bones and tissues - it is an interrelated, living, functioning organism.

“Substantially Certain” Rule - *Mandolidis v. Elkins Industries, Inc. (1978)*

In *Mandolidis*, the West Virginia Supreme Court held the state's statute permitting damage suits against the employer if an injury or death results from the employer's deliberate intent also permits such suit for “willful, wanton, and reckless misconduct.”

Injury vs. Occupational Disease - *Booker v. Duke Medical Center (1979)*

The Supreme Court of North Carolina held that the fatal serum hepatitis contracted by the lab worker could be considered occupational disease because it was sufficient the workers' job increased the risk of contracting the infectious disease.

Deceit by the Employer - *Johns-Manville Products Corporation v. Contra Costa Superior Court (Rudkin) (1980)*

Plaintiff alleged the employer concealed from him, and from the doctors treating him, that he was suffering from an asbestos-related disease. Hence his condition was aggravated by further exposure, and made worse because he was prevented from receiving treatment he would have obtained.

The Supreme Court of California held that if the employer's only alleged misconduct was concealing the initial hazard of the work environment, and failing to provide protective devices, the only remedy would have been under the workers' compensation act, even if governmental regulations on dust levels were violated. But the second injury—concealing the existence of the first, and thereby inflicting additional harm—was an independent wrong and hence not within the exclusive remedy clause.

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CASE LAW UPDATE

By Lindsay Underwood



A common frustration that arises in workers' compensation claims revolves around the legal premise that you take your claimant as you find them. This principle can result in extensive, and seemingly unrelated, treatments that can delay a maximum medical-improvement assessment, stall return to work efforts, and result in extensive additional exposure.

One such recommendation that arises frequently is the physician's opinion that the claimant needs to lose weight before undergoing surgery. This can range from the claimant needing to lose a few pounds, mandatory enrollment in a weight loss program or with a nutritionist, or can result in an expensive weight loss surgery. Fortunately, a new opinion from the North Carolina Supreme Court will help the parties parse out what should actually be the responsibility of defendants when it comes to these kinds of recommendations.

In *Kluttz-Ellison v. Noah's Playloft Preschool*, the claimant sustained a compensable knee injury. Though she had already undergone a number of other knee surgeries, the authorized treating doctor opined that claimant was obese, and needed to undergo bariatric surgery before she could have the next knee surgery. Claimant's providers previously diagnosed her with obesity and recommended treatments ranging from changes to her diet to prescription weight-loss medications. Under the Act, an employee who suffers a compensable injury in a workplace accident may receive compensation for any medical treatment that "may reasonably be required to effect a cure or give relief." Thus, opposing counsel alleged that the bariatric surgery was necessary to effect a cure such that defendants should be responsible for paying for the surgery.

The Supreme Court disagreed, and held that for an employee to receive workers' compensation for a medical treatment, the treatment must be directly related to the workplace injury. This means there must be a sufficiently strong causal relationship between the condition that requires treatment and the workplace injury. The court identified three criteria to meet this standard: 1) the workplace injury caused the condition that requires treatment, 2) the condition was aggravated by the workplace injury, or 3) the condition did not require medical treatment before the workplace injury but now requires treatment solely due to the workplace injury. If any of these criteria are met, the treatment is directly related to the workplace injury and is compensable. If not, the treatment is, at most, indirectly related to the workplace injury and is not compensable under the workers' compensation system.

The Court noted that neither the Industrial Commission nor the Court of Appeals applied this test. Instead, they focused on whether the bariatric surgery was medically necessary for the plaintiff to undergo knee surgery. The Supreme Court stressed that the lower courts focused on the treatment (bariatric surgery), not the condition (obesity). Therefore, the Supreme Court reversed the decision of the Court of Appeals and remanded the matter to the Industrial Commission for further proceedings applying the correct legal standard.

This opinion provides a much clearer standard for evaluating and examining these issues moving forward. Specifically, the Court included an excellent quote, noting that, although an employer takes the employee as they find her with all her pre-existing infirmities and weaknesses, but should not "convert our compensation law into a system of compulsory general health insurance." Though it is certainly helpful for Defendants, and a step in the right direction, there are some practical implications that could still create issues for Defendants.

For example, if, as is likely the case in this claim, the claimant is out of work waiting on a knee surgery that cannot be completed until she undergoes a weight loss surgery, Defendants will have to explore other options for mitigating exposure while claimant continues to collect indemnity benefits. It is hard to imagine the Commission will compel a claimant to undergo a weight loss surgery if they have no personal insurance/would have to pay out of pocket. Thus, this decision is not a full "get out of surgery" free card for Defendants. That said, this is an excellent claim for cases in which the claimant is not receiving out of work benefits, and received a recommended for an unrelated condition. Finally, this case analysis can be applied to other unrelated conditions for which treatment is recommended, like a smoking cessation program, or a medication prescription to control blood pressure in advance of a surgery.

Lindsay Underwood is an attorney in Teague Campbell's Raleigh office. She is a graduate of Cleveland State University and Wake Forest University School of Law.

Self-Driving Trucks are on the Highways

Two major companies plan to launch fully autonomous trucks in Texas by the end of 2024, ushering in some of the biggest changes in decades in the nation's supply chain.

In recent years several companies have been testing autonomous trucks in Texas but usually with a human minder. Aurora, a leading player, has been transporting packages for FedEx, Uber Freight, and others. The company says by the end of this year it plans to have about 20 fully autonomous trucks on the 240-mile stretch between Dallas and Houston. Kodiak Robotics also plans to launch a fleet of trucks by the end of the year, while Daimler Trucks says it plans to launch a driverless fleet in the U.S. by 2027.

Robot trucks offer several advantages over a human driver – they don't have to stop for breaks, they don't get distracted, and they don't rack up "deadhead miles" returning home at the end of a shift. Proponents note the vehicles' laser and radar sensors can see farther than human eyes and will likely lower the toll from truck crashes, which claim about 5,800 lives a year, representing

13 percent of traffic deaths. Data from the National Highway Traffic Safety Administration shows that 94% of all motor vehicle accidents involve driver-related factors like impaired driving, distraction, or illegal maneuvers.

Steve Viscelli, a sociologist at the University of Pennsylvania who studies the trucking industry, commented to the *Washington Post* autonomous trucking could "change the geography of our economy in the way that railroads and shipping did." Richard Steiner, head of policy and communications for self-driving truck firm Gatik, told *Investor's Business Daily* "this is the present, not the future. It's happening now. Over the next few years, you're definitely going to see autonomous trucks become increasingly commonplace across multiple markets."

Self-driving trucks may have an easier time of it than self-driving cars because they are being introduced in the south and southwest – where the weather is favorable – and on highways, which are more structured than city streets.

Comp Patients are Healthier, Fare Worse after Back Surgery

A recent article in *Risk & Insurance* raises the question why workers' comp patients fare worse after back surgery than patients with health insurance, even though comp patients have fewer co-morbidities and are younger and healthier. However, workers' compensation patients were more than twice as likely to be smokers.

The analysis by Dr. Gerry Stanley of Harvard MedTech and Dr. Adam Seidner of The Hartford is based primarily on two large studies published in *The Journal of Neurosurgery: Spine* comparing lumbar and cervical spine surgery patients. The authors contend one reason for the disparities is that psychosocial risk factors are poorly managed in workers' compensation. Besides, the financial incentives are strikingly different: Under traditional health insurance, patients have to pay premiums and a co-pay but in workers' compensation a \$100,000 surgery costs the patient nothing.

"For a \$100,000 surgery in group health, you're paying the first \$17,000 plus 20% of the next \$83,000. So, you have an incentive to say, 'I can't afford this twice, so I need to get better,'" Dr. Stanley commented to *Risk & Insurance*.

The authors emphasize that injured workers may be more vulnerable to depression, anxiety, or PTSD following a traumatic

accident. Treatment itself is traumatic, Dr. Stanley says. "Everybody prescribes a personal ethos to their job, and when you get injured in workers' compensation, you lose that. You've lost who you are, and you've lost your social support, the people you spend eight hours a day with. It disrupts the foundation of who you are, so there's a psychosocial trauma, and then someone cutting on your body to fix something," he noted.

Other studies have noted the association between compensation status and poor clinical outcomes. In one study for instance, workers' compensation patients were approximately four times more likely to have worse outcomes after common orthopaedic procedures, including shoulder acromioplasty, carpal tunnel release, lumbar fusion and lumbar discectomy.

Psychosocial forces that influence recovery include factors that impact how people deal with difficult situations - attitudes, beliefs, education, habits, and social support. As mental health professionals note, most people have adequate coping skills for normal setbacks but psychosocial forces become critical when progress is thwarted, an injured worker's coping capacity is impaired, or external factors become overwhelming (e.g., job loss).

coming up

Wednesday, March 26- Friday, March 28, 2025

NCASI Annual Conference 2025

Holiday Inn Resort Lumina on Wrightsville Beach

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NC Industrial Commission Update

By Tracey L. Jones

There has not been a lot of news coming out of the North Carolina Industrial Commission since our last quarterly update. The two biggest updates are the following:

Governor Roy Cooper has reappointed James C. Gillen to serve a second six-year term as a Commissioner on the North Carolina Industrial Commission beginning July 1, 2024, subject to confirmation by the North Carolina General Assembly.

Gillen began his legal career with the Industrial Commission in 1994, working as an Agency Legal Specialist under several Commissioners and as a Special Deputy Commissioner in the Executive Secretary's Office. Gillen then served as a Deputy Commissioner from 2005 until he was confirmed to serve his first term as Commissioner.

Gillen received his B.A. degree in English from North Carolina State University in 1991 and his J.D. degree from Campbell University School of Law in 1994.

Finally, the Industrial Commission has implemented a new integrated case management system that went live in March of 2024. The system is touted to be an improved, modernized, and user-friendly system to its external stakeholders. You will need to register for it. Registration is simple and easy instructions will be available on the Commission's website, and it should take you less than five minutes to register.

External users will be able to make a variety of requests electronically, including requests for secure leave, hearing audio, and Rehabilitation Professional course registration. External users also will be able to update their contact information electronically, upload bulk form filings, file an expanded list of documents electronically, and search the Commission's hearing dockets to find their hearings. Additionally, electronic versions of the Form 18 and Form 33 will be available to use.

The Commission will be sending out periodic updates about its new integrated case management system and training opportunities via email. If you are not currently subscribed to receive these updates via email, you can subscribe now at www.ic.nc.gov/SubscribeNCIC.html.

If you have feedback about the new integrated system, please email feedback@ic.nc.gov. Please note, however, that all requests for technical assistance with the new system should be emailed to support@ic.nc.gov. The feedback@ic.nc.gov email address should be used only for non-urgent feedback about the new system.

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