Workers' Compensation Update

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New and Emerging Legal Issues

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EMERGING LEGAL ISSUE: COVID-19

- As of December 4, 2020, 3,499 workers' compensation claims had been filed for COVID-19 by claimants employed across a wide range of industries. Some claims have been accepted as compensable, but many more have been denied. None of the denied claims have been tried and decided yet, but they will be in the coming year and it is likely that many will be appealed to the Court of Appeals.

ANALYZING COVID-19 AS AN OCCUPATIONAL DISEASE

- N.C. Gen. Stat. 97-53(13) defines an occupational disease as:
  - Any disease which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

Can A Virus Be an Occupational Disease?

- *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

The employee worked for Duke performing diagnostic procedures on blood. Despite precautions, he routinely spilled blood on his fingers. Every day one or more of the blood samples he tested was infected with serum hepatitis, a viral disease that frequently afflicts members of the general public. In other words, it is an "ordinary disease of life." Nevertheless, the North Carolina Supreme Court held that it was a compensable occupational disease under N.C. Gen. Stat. 97-53(13).

The *Booker* Test:

- To be compensable as an occupational disease, it must be:
- "(1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be 'a causal connection between the disease and the [plaintiff's] employment."
- *See, also, Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983), which held that the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally.

Ordinary Disease of Life or Peculiar to the Trade or Occupation?

- Under *Booker*, a disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. The disease need not be "one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations."
- "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation."

Causation under *Booker*:

- "In the case of occupational diseases, proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history."

Causation, continued:

- The employment need not be the sole causative factor. It need only be shown to have been "a significant contributing factor" to the development of the disease, based upon "the preponderance of the evidence in view of the entire record." See *Rutledge* and N.C. Gen. Stat. 97-84.
- The mere possibility of causation, as opposed to the probability of causation, is insufficient to support a finding of compensability. *Whitfield v. Laboratory Corp. of America*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003).

Proving Causation

The Requirement of Expert Testimony:

When "the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

Proving Causation

Competency of Expert Testimony:

Expert opinion testimony that is based merely upon speculation and conjecture . . . is not sufficiently reliable to qualify as competent evidence on issues of medical causation. *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

Mere possibility has never been legally competent to prove causation. Although medical certainty is not required, the failure of an expert to express an opinion to any degree of medical certainty is insufficient to prove causation. *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750(2003).

Causation in COVID-19 Cases

- Factors that might bear on the issue of causation:
  - The frequency, intensity and proximity of exposures at work
  - The use of PPE at work
  - The extent of possible exposures outside of the workplace

Emerging Legal Issue: Claims for Extended Compensation

- For claims arising prior to June 24, 2011, there is no cap on the number of weeks the employee can receive total disability benefits, and no limit on the types of injuries that can qualify for lifetime benefits, typically referred to as permanent and total disability.

- In addition, for employees who are receiving full Social Security retirement benefits, the employer does not get a credit for those benefits against the total disability workers' compensation benefits due.

Claims for Extended Compensation

For claims arising on or after June 24, 2011, N.C. Gen. Stat. Section 97-29 was amended to provide that “”the employee shall not be entitled to compensation [for total disability] greater than 500 weeks from the date of first disability unless the employee qualifies for extended compensation . . . .”

In addition, if after attaining retirement age an employee is receiving extended compensation, “the employer may reduce the extended compensation by one hundred percent (100%) of the employee’s retirement benefit,” excluding any cost-of-living increases.

Entitlement to Extended Compensation

- Pursuant to N.C. Gen. Stat. Section 97-29(c), "an employee may qualify for extended compensation in excess of the 500-week limitation on temporary total disability . . . only if (i) at the time the employee makes application to the Commission to exceed the 500-week limitation, . . . 425 weeks have passed since the date of first disability and (ii) . . . the employee shall prove by a preponderance of the evidence that the employee sustained a total loss of wage-earning capacity."

Disability under the Workers' Compensation Act: *Griffin v. Absolute Fire Control, Inc.*, __ N.C. App. __, 837 S.E.2d 420 (2020)

- Facts of *Griffin*:
- Plaintiff was 49 years old, had a ninth grade education, and worked for Defendant-Employer as a pipe fitter, a position which required him to lift pipes weighing up to 300 pounds.
- In 2014 sustained an injury to his back that resulted in permanent work restrictions of no lifting over 20 pounds
- Defendant-Employer offered Plaintiff a job in the fabrication shop, which Plaintiff performed without any problem for 2 years. It was within his restrictions and paid him the same wages as he was earning prior to the injury. This was not a position that was specifically created for Plaintiff. Defendant-Employer has a regular and constant need to keep this position staffed. However, Defendant-Employer testified that they would not hire someone off the street for this job if the person had a 20-pound lifting restriction, and neither party offered any evidence that other employers had similar fabrication jobs for which Plaintiff might be hired.

Facts of *Griffin*, continued:

- After Plaintiff went out of work for a non-work-related heart issue, he asked Defendant-Employer if he could come back to a job working as a field helper, which he thought would be good for his heart. Defendant-Employer accommodated Plaintiff's request.
- While Plaintiff was continuing to work for Defendant-Employer as a field helper, he filed a request for hearing, contending that he was totally disabled. Plaintiff's position was that the fabrication shop job that he had successfully performed for 2 years, and the field helper job, were "make work" and therefore not indicative of his earning capacity.
- Defendants' position was that they were not make-work positions and that Plaintiff failed to carry his burden of proving disability under the Act.

Griffin v. Absolute Tire Control, Inc., continued:

- At the Industrial Commission, the Deputy Commissioner and the Full Commission on appeal denied Plaintiff's claim, finding that he had not carried his burden of proving disability. More specifically, the Full Commission found that Plaintiff had not made a reasonable job search (in fact, Plaintiff had not applied for any jobs because he was still employed and working for Defendant-Employer) and that Plaintiff had failed to prove that it would have been futile for him to look for other work due to preexisting conditions such as age, education, and work experience.

Griffin v. Absolute Fire Control, Inc., continued

- On appeal, the Court of Appeals held, in a decision written by Judge Brook, that while the Full Commission had not erred in finding that Plaintiff had not conducted a reasonable job search, it had erred in finding that there was no evidence to support Plaintiff's claim of futility and that the fabrication job constituted suitable employment.
- Judge Tyson dissented, finding that the Commission's Opinion and Award was supported by the facts and that the majority's opinion disregarded the standard of appellate review on the issue of futility by reweighing the evidence.
- No decision from the North Carolina Supreme Court yet.

Standard of Review

- Appellate review of an opinion and award of the Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014).
- The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence "even if there is evidence to support a contrary finding." *Nale v. Ethan Allen,* 199 N.C. App. 511, 514, 682 S.E.2d 231, 234 (2009)
- The Commission's conclusions of law are reviewed *de novo. Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74 (2011).

DISABILITY

- Disability means incapacity because of injury to earn the wages the employee was receiving at the time of the injury in the same or any other employment. N.C. Gen. Stat. Section 97-2(9).

- This definition "specifically relates to the incapacity to earn wages, rather than only to physical infirmity.", 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). *Medlin v. Weaver Cooke Construction, LLC*

- The burden is on the employee to prove diminished earning capacity as a result of the work-related injury. *Harvey v. Raleigh Police Dep't.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989).

Disability: The *Hilliard* Factors

- A determination of disability is a conclusion of law that must be supported by specific findings which show:
  - (1) plaintiff was incapable after his injury of earning the same wage he had earned before his injury in the same employment;
  - (2) plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment; and
  - (3) the incapacity to earn was caused by plaintiff's injury.

  Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982).

Disability: The *Russell* Factors

- The employee may offer proof of the first two *Hilliard* factors by producing evidence that:
  - (1) he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; or
  - (2) he is capable of some work, but after reasonable effort on the part of the employee, has been unsuccessful in efforts to obtain employment; or
  - (3) he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment; or
  - (4) he has obtained other employment at a wage less than that earned prior to the injury.

  Russell v. Lowes Product Distribution, 108 N.C. App. 762, 756-66, 425 S.E.2d 454, 457 (1993).

Suitable Employment

- Once the employee presents evidence that he is incapable of earning the same wages in the same or any other employment, the burden shifts to the employer to show that the employee is capable of suitable employment. *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446-47 (1997).
- Suitable employment is "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000).
- Suitable employment is also defined in N.C. Gen. Stat. Section 97-2(22) as "employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of the injury . . . ."

Make Work is not Suitable Employment

- The fact that an employee is capable of performing employment tendered by the employer post-injury is not, as a matter of law, an indication of plaintiff's ability to earn wages. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749(1997).
- If the job has been so modified because of the employee's limitations that it does not accurately reflect the employee's ability to compete with others for wages, or it is not "ordinarily available on the competitive marketplace," then it is not suitable employment and does not reflect the employee's wage-earning capacity. *Peoples v. Cone Mills Corp*., 316 N.C. 426, 342 S.E.2d 798 (1986).
- If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

The *Griffin* Disability Analysis under *Russell*:

- First factor inapplicable, because no doctor had written Plaintiff out of work entirely; i.e., Plaintiff is capable of some work
- Second factor, i.e., capable of some work but after making a reasonable effort to find another job he was unsuccessful. The majority and the dissent agreed that the Commission's finding that Plaintiff had not made a reasonable effort was supported by competent evidence. Plaintiff testified that he had not looked for other work "because he likes who he is working for and enjoys working for Defendant-Employer."

Futility: The Third *Russell* Factor

- The Commission held that "No evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment."
- However, the *Griffin* majority noted the following findings made by the Commission:
  - Plaintiff is 49 years old and has only a 9th grade education
  - Plaintiff has permanent work restrictions of no lifting more than 20 pounds, alternate sitting and standing, no bending, and wear a brace while working
  - On some days Plaintiff has to leave work because of increased pain;

  After reviewing the facts of other appellate cases in which the Court of Appeals upheld the Commission's determination of futility and disability, the majority stated that "these findings clearly constitute evidence consistent with a holding of disability as they implicate every factor stressed in Russell's discussion of futility."

Griffin and Suitable Work

- The Court held:
- "[T]he Commission's findings and conclusions failed to address the central tenet of the make-work analysis: whether the job is available with employers other than Defendant. There is no evidence in the record and no findings by the Commission as to whether the fabrication shop position exists in the competitive job market. Furthermore, there is no evidence that any employer, other than Defendant, would hire Plaintiff in the same or similar job."

Griffin Dissent:

- The dissent discussed the standard of review, i.e., that it is not the role of the Court of Appeals to re-weigh the evidence, and stated that the findings of fact of the Commission were supported by competent evidence and were therefore binding on the Court on appeal.
- The dissent also stated that the majority misconstrued and misapplied the holding of *Russell* and improperly shifted the burden of proof to Defendants.