

One of the most common questions my clients with workplace injuries ask me is whether they can sue their employer for negligence. This question is not surprising, and it doesn't mean that my clients are litigious gold-diggers. The workers' compensation system provides only a limited recovery to injured workers, without any compensation for pain and suffering or loss of enjoyment in life.

Invariably, I have told my clients, "No, you can't sue your employer." Under North Carolina law, workers' compensation benefits are an injured worker's "exclusive remedy" against his employer. In other words, when an injured worker is eligible for workers' compensation, he cannot sue his employer, even if the employer negligently caused the injury. (In many cases, an injured worker will have a lawsuit against a negligent third-party, but not against his employer.)

After the recent Court of Appeals decision in Allred v. Exceptional Landscapes, Inc., however, I will be changing my answer to this question in a very limited group of cases. The Allred decision opens the door for an injured worker to sue his employer when that employer has failed to secure workers' compensation insurance to cover the injury.

In reaching this conclusion, the Court in Allred cites two statutes in the Workers' Compensation Act. First, the exclusive remedy statute reads:

If the employee and the employer are subject to *and have complied with the provisions of this Article*, then the rights and remedies herein granted to the employee ... shall exclude all other rights and remedies of the employee ... on account of injury or death.

N.C.G.S. 97-10.1 (emphasis added). By its plain language, the exclusive remedy statute applies only when the employer has "complied with the provisions" of the Act. A primary provision of the Act requires employers to "secure the payment of compensation" for injured workers by the purchasing insurance or by obtaining a certificate of self-insurance. N.C.G.S. 97-9. An employer that fails to do so has not complied with the Act and, therefore, is not entitled to the protections of exclusive remedy.

The second statute cited in Allred reads:

Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation ... shall be liable during continuance of such refusal or neglect to an employee *either*

*for compensation under this Article or at law at the election of the injured employee.*

N.C.G.S. 97-94(b) (emphasis added). The statute says, in plain language, that when an employer fails to secure the payment of compensation under the Act, the injured worker can elect to pursue compensation either through workers' compensation or at law. In other words, an injured worker can elect to bring a lawsuit against his uninsured employer.

Judges are, by nature, circumspect, and they typically don't make sweeping new pronouncements when they can decide a case on a firmly established principle. So although the Allred Court notes, carefully, that the statutes cited above "may arguably permit" an injured worker to sue his uninsured employer, the Court avoids giving a definitive answer to the question. Rather, the Court holds that because the plaintiff filed a workers' compensation claim instead of filing a lawsuit, he was stuck with the workers' compensation claim. "When a claim is filed with the Commission and jurisdiction is invoked, the Commission will retain *exclusive jurisdiction* over workers' compensation claims and all related matters." Allred (emphasis added).

As cautious as the Allred Court is, I believe the plain language of the N.C.G.S. 97-10.1 and 97-94(b) indisputably allows an injured worker to file a lawsuit against his uninsured employer. There is no other way to read the statutes.

Moreover, the political climate is right for our courts to hold that injured workers can sue their uninsured employers. After a series of articles in the News & Observer (one, in fact, about the Allred case), both the Industrial Commission and the General Assembly have focused on fixing the problem of uninsured employers. In short, I believe our courts will allow these lawsuits to proceed.

The real question for plaintiffs' attorneys will be *should* they file a lawsuit instead of pursuing a workers' compensation claim. After all, it is often more difficult to recover compensation in a negligence claim. Workers' compensation is a system of "no fault" liability. In contrast, to recover in a lawsuit, the worker must both prove that his employer was negligent and avoid a showing that he also was negligent. Lawyers will also have to consider how likely they are to collect on a successful claim. Does the employer have general liability insurance that would cover a judgment at law? Does the employer have the assets to pay an award of the Industrial Commission? Again, this is a critical decision because, as the *Allred* case shows, once the injured worker decides to file the workers' compensation claim, there is no turning back.