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Injury by Accident in Workers' Compensation: Alternatives to an Outmoded Doctrine

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COMMENT

Injury by Accident in Workers' Compensation: Alternatives to an Outmoded Doctrine

In the winter of 1975 Thomas Pulley was employed by the Migrant and Seasonal Farmworkers Association as a job counselor and relocator.[1] As part of his job he helped move clients' household possessions into homes near new job sites. On January 28 Pulley was on his job moving kitchen furniture from the back of a truck to the porch of a client's house. As Pulley stooped and attempted to pick up a 500 pound refrigerator " 'a catch caught [him] in the back and the refrigerator slid down onto the porch.' "[2] He went to a doctor that night, and the injury was diagnosed as an acute intervertebral disc rupture. Pulley had surgery three weeks later that left him with a ten percent permanent disability of the back. His subsequent application for workers' compensation benefits was contested. At the initial Industrial Commission[3] claim hearing before a single deputy Pulley testified that he had moved similar refrigerators before, and that nothing unusual had occurred at the time of the injury except the sustaining of the injury itself. Benefits were denied on the ground that Pulley did not sustain an injury by accident as required by North Carolina's Workers' Compensation Act.[4]

Pulley appealed to the full Industrial Commission. After examining the evidence, the Commission added a finding that " '[a]s the plaintiff was picking up his side of the refrigerator, it slipped and he got a catch in his back.' "[5] The Commission then concluded, upon the facts in the amended record, that Pulley had sustained an injury by accident and consequently was entitled to compensation.[6]

On appeal, the North Carolina Court of Appeals held that Pulley had not sustained an injury by accident and was not entitled to benefits after all.[7] The court said the case was controlled by the well-established North Carolina rule that an injury caused by an unexpected external event, such as a slip, is an

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1. Pulley v. Migrant & Seasonal Farmworkers Ass'n, 30 N.C. App. 94, 95, 226 S.E.2d 227, 228 (1976).

2. *Id.* (quoting Industrial Commission hearing record).

3. The North Carolina Industrial Commission is the executive agency charged with administering the North Carolina Workers' Compensation Act, N.C. GEN. STAT. §§ 97-1 to -122 (1979). *Id.* § 97-77. Claims for benefits are first ruled on by a Commission claims deputy. *Id.* § 97-84. Upon proper appeal, the full Commission must review the initial decision. *Id.* § 97-85. The Commission's findings of fact are conclusive. Appeals for errors of law may be made to the North Carolina Court of Appeals. *Id.* § 97-86.

4. Pulley v. Migrant & Seasonal Farmworkers Ass'n, 30 N.C. App. 94, 95, 226 S.E.2d 227, 228 (1976).

5. *Id.* (quoting Industrial Commission findings of fact). Industrial Commission decisions are not reported. The full Commission has the power to amend the findings of a hearing deputy and to reverse the initial decision. *See* N.C. GEN. STAT. § 97-85 (1979).

6. 30 N.C. App. at 95, 226 S.E.2d at 228.

7. *Id.* at 97, 226 S.E.2d at 229.

injury by "accident," but an injury that results from performing ordinary job duties in the usual way is not an injury by "accident."[8] After reviewing the record the court struck the amended finding because it concluded that, in the true sequence of events, Pulley first had injured his back and then let the refrigerator slip.[9] The court explained that Pulley had not sustained an injury by "accident" because the balance of the record did not reveal that the injury had a fortuitous external cause, but rather that Pulley had been injured while performing his usual job in his usual way.[10] If, on the other hand, Pulley had slipped with the refrigerator first and then sustained the injury, instead of sustaining the injury first and then slipping, he would have incurred a compensable "injury by accident."[11]

The phrase "injury by accident" is part of the North Carolina Workers' Compensation Act's[12] critical compensation formula, which requires "injury by accident arising out of and in the course of the employment."[13] An injury is not compensable unless it meets that full statutory requirement.[14] *Pulley v. Migrant & Seasonal Farmworkers Association*[15] is a good illustration of the North Carolina construction of the "injury by accident" component of the statute. In general, the construction distinguishes between the concepts of accidental cause and accidental result.[16] To be an injury by accident the injury must be more than the unexpected result of job activity (the accidental result); the injury must also have had an unexpected external cause (the accidental cause). Although the court has never expressly so stated, it would appear that under its interpretation the statutory component thus serves as an extra causation test to ensure that compensation is awarded for only those injuries that are truly work related.[17] The test is based upon a presumption that work relatedness is less likely if an injury does not have an external cause, and it operates arbitrarily to deny compensation when an injury does not have such a cause, even if the injury may in fact have been work related. The extra causation requirement applies to all injuries, but it is not often an issue in compensation claims because most industrial injuries are clearly caused by unexpected external events associated with employment. The "injury by accident" requirement becomes crucial, however, in claims for injuries that are often associated with natural degenerative body conditions, such as heart attacks and

8. *Id.* at 96-97, 226 S.E.2d at 229. *See* text accompanying notes 128-38 *infra*.

9. 30 N.C. App. at 96, 226 S.E.2d at 228-29.

10. *Id.* at 97, 226 S.E.2d at 229.

11. A slip that leads to injury is a fortuitous external cause. *See* Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953). *See also* Robbins v. Bossong Hosiery Mills, Inc., 220 N.C. 246, 17 S.E.2d 20 (1941) (a fall is an "accident").

12. N.C. GEN. STAT. §§ 97-2(6), -52 (1979).

13. *Id.* § 97-2(6). The compensation formula is found in the definitions section of the Act as part of the basic definition of the word "injury." *Id.*

14. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

15. 30 N.C. App. 94, 226 S.E.2d 227 (1976).

16. *See* note 53 and accompanying text *infra*.

17. The injury by accident external cause requirement can be said to test causation because it is arguably more likely that an injury was actually caused by work if it was produced by an external cause. *See* text accompanying note 149 *infra*.

hernias, which frequently occur without obvious external events, such as heart attacks and hernias. It is the difficulty of determining causation for some of these types of injuries that provides the rationale for employment of the extra "injury by accident" causation requirement.

This Comment will examine the origins of the injury by accident rule, its justifications and the well-deserved criticisms that have been directed against the rule. Finally, proposals for reform will be presented. The current rule needs prompt change, so that deserving claimants like Pulley will have a fair chance to recover compensation.

I. ENGLISH WORKERS' COMPENSATION AND THE INJURY BY ACCIDENT REQUIREMENT

Workers' compensation systems were enacted in Europe and England in the last half of the nineteenth century to alleviate the often desperate plight of industrial workers who had suffered work-related injuries but could not recover damages.[18] Operating under a basic principle that responsibility for work-related injuries should be assigned to working conditions and not to personal fault, workers' compensation laws imposed liability without fault on employers for losses due to employment injuries.[19] The cost of injury compensation was to be treated as a cost of production that ultimately would be distributed to society in the form of increased prices.[20] It was hoped that the new systems would ensure that workers received prompt and certain compensation for their injuries.[21]

England passed a workers' compensation act in 1897.[22] Using a now fa-

18. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952), in which the origin of workers' compensation is traced. The number of industrial accidents greatly increased in the nineteenth and early twentieth centuries. In order to recover damages at common law, however, workers had the often difficult task of establishing employer fault and overcoming several defenses. It has been estimated that in the United States only 15% of injured workers ever recovered for job-related injuries under the common law. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 11 (1973) [hereinafter cited as COMPENDIUM].

One early response to this problem was enactment of employers' liability statutes. These statutes limited the availability of defenses, but were generally very narrow in scope. They were not an attempt to create a new system of liability. *See id.* at 13-14. Dissatisfaction with limited reforms led to enactment of workers' compensation schemes. Germany adopted the first modern compensation system in 1884. Several European countries, including England in 1897, followed suit. The workers' compensation movement began at a later date in the United States. New York adopted the first system of general application in 1910. By 1920 42 jurisdictions had enacted workers' compensation legislation. *See id.* at 14-18.

19. *See* E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 12 (1961). This new approach was necessitated, in part, by the advent of the modern factory system and the increasing level of technology. Industrial injuries were frequently unavoidable and resulted from the methods of carrying on business and not from the fault of the employer. *Id.*

20. *See* Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951). *See also* COMPENDIUM, *supra* note 18, at 21-26.

21. Litigation of damage claims under the common law was wasteful and unpredictable. Awards were inconsistent, uncertain and subject to high legal fees. See Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 330-32 (1912).

22. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, §§ 1-10.

mous phrase that was subsequently copied in most American jurisdictions,[23] the act declared that "if in any employment . . . personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation."[24] The injury by accident component of the English statute received an authoritative and liberal interpretation in the early case of *Fenton v. J. Thorley & Co.*[25] In *Fenton* the injured worker had suffered an internal rupture while turning a wheel, an activity that was part of his usual job duties.[26] There was no indication that the worker had slipped, although there was evidence that the wheel was missing a spoke. The employer contested the claim on the ground that the rupture was not an injury by accident.[27] The employer argued that the statutory requirement was not satisfied if the injury was only an unexpected result of employment activity and that an injury was not "by accident" unless it had an unexpected external cause.[28]

The House of Lords rejected the employer's construction of the statute. Lord Shand stated that the phrase "injury by accident" did not impose an external cause requirement and that the unexpected sustaining of an injury fully satisfied the statutory language.[29] "Accident" was defined by Lord Macnaghten as "an unlooked-for mishap or an untoward event which is not expected or designed."[30] Moreover, although the employer had cited insurance cases in support of his position, the House of Lords distinguished these cases as having little bearing on the proper construction of the statute.[31] The worker had argued in the alternative that, if the unexpected injury itself was held not to constitute an injury by accident, an element of fortuitous external cause was supplied by the unusual condition that the wheel was missing a spoke.[32] This approach was dismissed as unprofitable and unnecessary.[33] A

23. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 6.10 (1973); 1B *id.* § 37.10.

24. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1(1).

25. [1903] A.C. 443.

26. *Id.* at 445.

27. *Id.*

28. *Id.* at 444. The employer argued that the "accident must be in the means by which the result is brought about and not in the result itself." *Id.*

29. *Id.* at 451.

30. *Id.* at 448. Lord Macnaghten continued:

> If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him.

Id. at 446. The words "by accident" were added, Lord Macnaghten reasoned, to ensure that injuries that could be expected, such as those that were self-inflicted, would be excluded. *Id.* at 448.

31. *Id.* at 449-50. The different contexts of the legal problems, construing insurance contracts on one hand and interpreting remedial legislation on another, bring different considerations into play. Workers' compensation acts should be liberally construed. *Id.* Insurance cases were of little relevance in interpreting the Act, Lord Macnaghten said, because they turned on the meaning of policy language carefully framed by insurers. *Id.*

32. *Id.* at 445.

33. *Id.* It was stated that the nature of external conditions surrounding the injury did "not affect the question in the least." *Id.*

later case reaffirming the *Fenton* holding stated that

> [n]o doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. . . . I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel.[34]

II. THE NORTH CAROLINA WORKERS' COMPENSATION ACT AND THE INJURY BY ACCIDENT REQUIREMENT

North Carolina passed its workers' compensation act in 1929.[35] The clause defining the scope of compensable injuries was taken verbatim from the English act.[36] Under the North Carolina statute every covered employer was required to compensate his employees when they sustained "personal injury or death by accident arising out of and in the course of [the] employment. . . ."[37] The word "accident," however, was not defined in the act.[38]

The North Carolina Supreme Court adopted a liberal approach in its early decisions construing the Act in general and the "injury by accident" component of the recovery clause in particular. The court stated that the act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."[39] In the second case decided under the Act, *Conrad v. Cook-Lewis Foundry Co.*,[40] the court

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34. Clover, Clayton & Co. v. Hughes, [1910] A.C. 242, 246. In this case Lord Macnaghten stated that " 'injury by accident' meant nothing more than 'accidental injury.' " *Id.* at 248.

35. Law of March 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117.

Workers' compensation came to North Carolina after a long and hard struggle. *See* J. KEECH, WORKMEN'S COMPENSATION IN NORTH CAROLINA (1942). The strict common law of negligence prevailed for industrial injuries prior to passage of the Act, and virtually all previous legislative attempts to modify the common-law rules had been failures. *Id.* at 13-16.

In 1929, however, the political climate was more receptive to enactment of a workers' compensation system. Some of the factors that helped create this atmosphere were the active efforts of a pro-compensation governor, the increasing industrial growth of the state, favorable newspaper opinion, the planning and lobbying of the North Carolina Conference for Social Service, and the agreement of labor and management officials to unite and support a single compromise bill. Widespread support of the compromise bill led to its enactment by a nearly unanimous vote. On March 11, 1929 North Carolina became the forty-fourth state to enact a workers' compensation statute. *Id.* at 13-34.

The legislative history of the Act is well told in J. KEECH, *supra*. The only other source is Henninger, *Passing the North Carolina Workmen's Compensation Law*, 36 AM. FEDERATIONIST 225 (1929).

36. *See* text accompanying note 24 *supra*.

37. N.C. GEN. STAT. § 97-3 (1979). The statute requires proof of five additional items when compensation is sought for hernia. *Id.* § 97-2(18); *see* note 187 *infra*.

38. In 1935, the statute was amended to provide for coverage of occupational diseases. Law of March 26, 1935, ch. 123, §§ 1-3, 1935 N.C. Sess. Laws 130. The amendment provided a negative definition of the word "accident" by providing that "accident" should "not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment. . . ." N.C. GEN. STAT. § 97-52 (1979).

39. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). *See also* Williams v. Thompson, 200 N.C. 463, 464, 157 S.E. 420, 430 (1931); Rice v. Denny Roll & Panel Co., 199 N.C. 154, 157-58, 154 S.E. 69, 70-71 (1930).

40. 198 N.C. 723, 153 S.E. 266 (1930). In *Conrad* a claim was filed after the worker was shot by a fellow employee. The court reached the liberal conclusion that the injury, upon the facts

defined the phrase "injury by accident" in broad and liberal terms as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury."[41] This was the basic definition given in *Fenton v. Thorley*.[42] The court also stated that it would construe "injury by accident" in a manner consistent with the statute's broad remedial purpose and that it would not be bound by the law of negligence.[43] In another early case, *McNeely v. Carolina Asbestos Co.*,[44] the court reaffirmed the liberal *Conrad* definition and stated that the injury by accident requirement should be interpreted "in its common sense every-day [sic] conception as referring to an injury produced without the design or expectation of the workman."[45] The court stated that all accidental injuries except those occasioned by intoxication or wilful intent should be compensable.[46] The North Carolina courts' early construction appears to have been clearly in line with the prevailing English view that the injury by accident component required nothing more than an unexpected injurious result and not an external cause. Although the courts' definition of the phrase was susceptible to contrary interpretations[47] and an injury by accident question had not been seriously raised in a case involving injury without

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before it, did satisfy the requirements of the compensation formula, but remanded for a finding on whether claimant's injury was occasioned by a prior wilful intent to injure the assailant. If the injury had been so occasioned the award was improper. *Id.* at 727-28, 153 S.E. at 269.

Conrad constituted the court's first occasion to construe the language of the Act's compensation formula—"injury by accident arising out of and in the course of the employment. . . ." N.C. GEN. STAT. § 97-2(6) (1979). Examining the historical perspective of workers' compensation, the court concluded that labor and management had struck a quid-pro-quo requiring liberal construction. The court stated that both workers and employers had

> suffered under the old system, the employer by heavy judgments, . . . the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it.

198 N.C. at 725-26, 153 S.E. at 268 (quoting Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 590, 158 P. 256, 258 (1916)). The court gave liberal definitions to all components of the compensation formula. The "arising out of" component was said to require some causal relationship between work and injury, but the court stated that the cause need not have been forseeable when the injury occurred. *Id.* at 726, 153 S.E. at 269. To satisfy the "in the course of" component the worker had to be performing his job at the proper time and place and under reasonable circumstances. *Id.* at 727, 153 S.E. at 269.

41. 198 N.C. at 726, 153 S.E. at 268.

42. *See* text accompanying note 30 *supra*.

43. 198 N.C. at 725-26, 153 S.E. at 268.

44. 206 N.C. 568, 174 S.E. 509 (1934). *McNeely* involved a common-law action for damages from exposure to asbestos dust. The trial judge had sustained a motion of nonsuit. The court affirmed, holding that the injury was an "accident" compensable under workers' compensation and that, consequently, the exclusive remedy was a compensation claim. *Id.* at 575, 174 S.E. at 512-13. The action was brought before specific statutory provision was made for compensation of occupational diseases and the *McNeely* court's liberal determination that an occupational disease could be an accident expanded coverage of the Act. Referring to the "injury by accident" requirement, the court also stated that "it is obvious that the word must not be used in its restricted and technical sense, but in a wider and practical sense necessary to give workable effect to the proper and just administration of the compensation law." *Id.* at 573, 174 S.E. at 512.

45. *Id.* at 575, 174 S.E. at 512-13.

46. *Id.*

47. *See* note 53 and accompanying text *infra*.

an obvious external cause,[48] the courts clearly had adopted a liberal interpretation of the "injury by accident" requirement.

In 1936, in *Slade v. Willis Hosiery Mills*,[49] however, the court changed direction and rendered a very conservative definition of "injury by accident." In *Slade* a claim was made for death from pneumonia following exposure to heat and cold. The worker had been cleaning very hot dye machines on a hot day, a job he had done before. The work involved hosing the machines with water and collecting and carrying ashes outside. There was medical testimony that the employment exposures caused the pneumonia, and the Commission awarded compensation.[50] The court reversed the award on the ground that the injury was not an "injury by accident."[51] In considering the definition of "injury by accident," the court reaffirmed the *Conrad* and *McNeely* definitions, then stated "[d]eath from injury by accident implies a result produced by a fortuitous cause. . . . There must be an accident followed by an injury by such accident . . . before it is compensable under our statute."[52] The *Slade* court thus held that an injury could not be "by accident" unless it had a fortuitous external cause. Under the *Slade* rule the required accident can only be found in an external event that causes the injury; the sustaining of the injury does not itself satisfy the accident requirement.[53] The court said that the injury was not caused by an external fortuitous event and therefore the worker's death was not by accident.[54]

The *Slade* court introduced this far-reaching new rule in a very casual manner. It did not acknowledge or announce that it was changing prior interpretations nor did it give any reasons for the change. The only support

48. The supreme court decided its first two cases dealing with injuries that arguably lacked an external cause shortly after *McNeely*. Both injuries were of the type that are often related to natural body degeneration. In both cases the court affirmed denials of awards, but the specific question whether there had been an injury by accident was not discussed in either opinion. In Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934), the Commission's denial of compensation for heart attack because of lack of causal connection between work and injury was affirmed as a binding finding of fact. *Id.* at 713, 175 S.E. at 96. In Leggett v. Cramerton Mills, 206 N.C. 708, 175 S.E. 95 (1934), the Commission denied compensation for hernia because of lack of causation and because of lack of an accident. The latter ground for denial is the first indication in North Carolina that the "injury by accident" component might require more than the sustaining of an unexpected injury. The court did not discuss or specifically approve of this ground. It merely held that the Commission's findings were determinative. *Id.* at 710, 175 S.E. at 96. Although it had the opportunity, the court did not alter its liberal "injury by accident" rule in either case. Both cases illustrate that the Act's causation requirements, exclusive of the currently restrictive "injury by accident" requirement, are effective in screening out nonemployment-related claims.

49. 209 N.C. 823, 184 S.E. 844 (1936). Chief Justice Stacy wrote the opinion.

50. *Id.* at 824, 184 S.E. at 844.

51. *Id.* at 826, 184 S.E. at 845.

52. *Id.* at 825, 184 S.E. at 845.

53. The *Slade* holding was possible because of the ambiguity of the original definition of an "injury by accident" as an unlooked-for event. The required unlooked-for event could be further defined as either an untoward cause or an untoward result. If the untoward result could be the unlooked-for event, as was held in *Fenton*, then the sustaining of an unexpected injury would be an "injury by accident." If, as the *Slade* court held, however, the unlooked-for event could only be an external cause, something more than the unexpected result was necessary to meet the "injury by accident" requirement.

54. 209 N.C. at 826, 184 S.E. at 845.

presented for adoption of the new rule consisted of citations without discussion to two North Carolina cases[55] and to cases from other jurisdictions.[56] Moreover, one of the North Carolina cases[57] had involved the application of insurance law, which, as was pointed out in *Fenton v. J. Thorley & Co.*, constitutes a poor guide for construction of workers' compensation legislation.[58] Finally, the other North Carolina case does not stand for the proposition for which it was cited,[59] and none of the cases from other jurisdictions support *Slade*'s broad proposition that, to be compensable, all injuries must have fortuitous external causes.[60]

The supreme court decided *Neely v. City of Statesville*[61] eighteen months after *Slade*. In *Neely* a claim was made for death by heart attack. The worker had been assisting in and supervising the fighting of an intense fire when he suddenly collapsed and died. Although the worker had a pre-existing heart condition, medical testimony indicated that the proximate cause of death was the employment-related excitement and compensation was awarded.[62] In a cursory opinion the court reversed the award, stating that its decision was con-

55. *Id.* at 825, 184 S.E. at 845 (citing Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935); Cabe v. Parker-Graham-Sexton Inc., 202 N.C. 176, 162 S.E. 223 (1932)).

56. *Id.* at 825-26, 184 S.E. at 845 (citing Chop v. Swift & Co., 118 Kan. 35, 233 P. 800 (1925); Hoag v. Kansas Independent Laundry Co., 113 Kan. 513, 215 P. 295 (1923); Ferris v. City of Eastport, 123 Me. 193, 122 A. 410 (1923); Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 128 A. 635 (1925); Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925)).

57. Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935). In *Scott* a claim was brought on an insurance policy that provided for benefits only if death resulted " 'directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means.' " *Id.* at 164, 179 S.E. at 436. The court held that plaintiff could not recover under the policy for death resulting from infection after an ordinary and skillfully performed dental operation because death was not brought about by external accidental means. The court discussed different methods of interpreting "accident" and concluded that an accident had to be defined as an external cause. *Id.* at 166-67, 179 S.E. at 438.

58. The House of Lords in *Fenton* had rejected insurance cases as a guide to construction of the English Workers' Compensation Act because of the widely differing policy contexts of the two bodies of law. *See* note 31 and accompanying text *supra*. Indeed, the difference in the language of the insurance contract construed in *Scott*, *see* note 57 *supra*, and the workers' compensation formula interpreted in *Slade*, supports that argument.

59. In the cited case, Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932), the court affirmed an award for a miner's death from inhalation of poisonous air and gas. The principal question was whether death had resulted from injury by accident, as the court ultimately held, or from occupational disease. *Id.* at 184, 162 S.E. at 228. The court did not discuss possible distinctions between external cause and unexpected result.

60. With the exception of Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 128 A. 635 (1925), the cases cited from other jurisdictions do support the limited proposition that unexpected external circumstances must surround the catching of a disease from exposures to heat or cold in order to render the resulting injury a compensable injury by accident. Chop v. Swift & Co., 118 Kan. 35, 36-37, 233 P. 800, 800-01 (1925); Hoag v. Kansas Independent Laundry Co., 113 Kan. 513, 516-17, 215 P. 295, 296-97 (1923); Ferris v. City of Eastport, 123 Me. 193, 195-96, 122 A. 410, 411-12 (1923); Lerner v. Rump Bros., 241 N.Y. 153, 155, 149 N.E. 334, 335 (1925). The courts in these cases applied a requirement similar to the external cause requirement in a very limited area. In contrast, the *Slade* opinion contained no language limiting application of its interpretation to a particular type of injury. In Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 128 A. 635 (1925), the court discussed possible different interpretations of the requirement and held that, under the Maryland statute providing compensation for accidental injuries, an unexpected injury alone is compensable. *Id.* at 381-82, 128 A. at 639-40.

61. 212 N.C. 365, 193 S.E. 664 (1937).

62. *Id.* at 366, 193 S.E. at 665.

trolled by *Slade*.[63] The court held that the worker's death was not the result of an injury by accident because the evidence revealed that the injury was not caused by an external fortuitous event.[64] The actual occurrence of the heart attack did not satisfy the new construction of the "injury by accident" requirement.

Slade and *Neely* stand together as the first holdings in North Carolina that an injury is not "by accident" unless it is caused by a fortuitous external event. Under the *Slade* rule the unexpectedness and fortuity of the occurrence of the injury do not make it an "injury by accident." In essence *Slade* and *Neely* overruled the liberal construction of "injury by accident" that had been adopted in prior cases. The principal difficulty raised by the new external cause requirement was, of course, the problem of delineating the circumstances under which it could be said that an injury had an external cause.[65]

The court responded to this problem in *Moore v. Engineering & Sales Co.*[66] In that case, claimant suffered a hernia when he attempted to lift a heavy steel pipe. Although his job involved work similar to the type he was performing when injured, he had never lifted that particular type and weight pipe before. In addition, claimant had attempted to lift the pipe in the absence of the full contingent of regular workers. The court affirmed the Commission's award and held that an injury sustained under these conditions was an "injury by accident."[67] The *Slade* requirement of an external cause was met, said the court, because a number of unusual conditions surrounded the employment activity that resulted in the injury.[68] The court explained that the external cause providing the necessary accident element "might be inferred" because there was "evidence of the interruption of the routine of work, and the

63. *Id.* Although the *Slade* court did not limit application of the rule to particular types of injuries, the *Slade* holding could have been distinguished as applying only in cases involving diseases resulting from exposure. The *Neely* court, however, applied the rule in a heart attack case. Since *Neely*, the *Slade* rule has been applied to all types of injuries.

64. *Id.* at 366-67, 193 S.E. at 665.

65. In both *Slade* and *Neely* the court offered a clue that suggested how the court might handle the external cause requirement in the future. In *Slade*, the Commission's decision that the "injury by accident" requirement had been met may have been based upon a finding that the injury occurred under "unusual conditions" of heat and exposure. 209 N.C. at 825, 184 S.E. at 845 (quoting Commission findings). Although it did not state that the presence of "unusual conditions" would satisfy the external cause requirement, because the court discussed the nature of the external circumstances surrounding the injury, the court appears to have assumed that an injury sustained under "unusual conditions" might be compensable. The court concluded that the conditions of heat and exposure in *Slade* were not, in fact, unusual. *Id.* In *Neely*, the court also discussed the nature of surrounding conditions and determined that they were not unusual. 212 N.C. at 366, 193 S.E. at 665. Neither court entered into an extended examination of the conditions at the time of injury or the legal significance that the presence of unusual conditions might have. It seems, however, that the court would not have discussed the nature of the conditions surrounding the injuries if they might not have affected its decisions. The discussion of unusual conditions provided a basis for development of the external cause requirement in later cases.

66. 214 N.C. 424, 199 S.E. 605 (1938).

67. *Id.* at 430, 199 S.E. at 608.

68. *Id.* In so holding, the court explicitly adopted the alternative argument presented by the worker in *J. Fenton v. Thorley & Co.* and the approach hinted at in *Slade* and *Neely* as legitimate methods by which to determine whether there was an "injury by accident." The approach had been rejected in *Fenton* because it was held there that the unexpected result alone was compensable regardless of external conditions. *See* text accompanying notes 32-33 *supra*.

introduction thereby of unusual conditions likely to result in unexpected consequences."[69] The unusual conditions that established the occurrence of an external accident were: 1) the absence of most regular workers and the consequent necessity to lift without accustomed help; and 2) claimant's unfamiliarity with the type and weight pipe lifted.[70]

The "unusual conditions" rule can be understood only by examining it within the context of prior decisions. If the rule appears illogical, it must be remembered that it arose as a liberal response to the harsh *Slade* rule. Injury by accident was originally defined as an unlooked-for and untoward event, apparently to ensure that compensation was granted when the injury was simply the unlooked-for and untoward result of job activity.[71] The *Slade* court applied the same definition, but held that the necessary unlooked-for or untoward event had to be an external cause and could not be an internal result.[72] The *Moore* court realized that many injuries are not caused by unexpected external events and that the claims of many deserving workers would be denied if the *Slade* rule went unmodified. Moore's claim presented just such a case. The court's response was to conclude that, by definition, an injury had a fortuitous external cause when conditions surrounding the occurrence of the injury were sufficiently unusual.[73] The presence of unusual conditions was the required external cause. Although it is difficult to justify the assertion that the presence of unusual conditions establishes that an injury had an external cause,[74] as a matter of justice, the unusual conditions rule was a commendable modification of *Slade*. After *Moore*, a claimant unable to prove that his injury was caused by an external event, such as a slip, could recover if sufficiently unusual conditions surrounded his injury. A claimant not so fortunate to have sustained his injury under unusual conditions, however, remained uncompensated, even after *Moore*.[75]

The *Moore* opinion reveals that the court was dissatisfied with the construction of "injury by accident" adopted in *Slade*. Promulgation of the unu-

69. 214 N.C. at 430, 199 S.E. at 608.

70. *Id.*

71. *See* text accompanying notes 39-48 *supra*. This definition excludes injuries that are the result of intentional or wilful acts.

72. *See* note 53 and accompanying text *supra*.

73. The following language from *Moore* illustrates how the court came to identify the presence of unusual conditions as being equivalent to the required external cause: "The injury sustained by the plaintiff was an injury by accident in which the fortuitous and unexpected happenings arose from the changed conditions in which the plaintiff was required to work." 214 N.C. at 430, 199 S.E. at 608. The *Moore* court did not insist that the injury have a direct unexpected cause. It was enough to say an injury had an external cause if its occurrence was surrounded by unexpected happenings, unusual conditions or a change in circumstances.

74. The "unusual conditions" and "external cause" requirements measure vastly different degrees of connection between external circumstances and the resulting injury. A good illustration of this is the injury in *Moore* which, though surrounded by unusual conditions, was certainly not directly caused by the unusual conditions. The requirements are related, however, because both measure the impact of external circumstances on the injury. The difference remains simply one of degree. Satisfaction of either requirement is some assurance that external conditions were abnormal, and this arguably adds some assurance that job conditions were a cause of the injury.

75. The "unusual conditions" rule is the primary one used today to determine the "injury by accident" question. *See* text accompanying notes 128-38 *infra*.

sual conditions rule mitigated the harsh effects of *Slade* and undercut its reasoning. Yet, by examining external conditions to determine whether there was an injury by accident, the unusual conditions rule accepted *Slade*'s basic premise that the sustaining of an injury alone was not an "injury by accident." Apparently not entirely satisfied with its own mitigating rule and concerned that its action in adopting the unusual conditions rule might be interpreted as an acceptance of *Slade*'s premise, the *Moore* court indicated that it was unwilling to concede that *Slade* had foreclosed the possibility of compensation upon proof of the unexpected injury itself. Although it was willing to rest its decision upon an application of the unusual conditions rule,[76] the *Moore* court warned that it was "not prepared to say that there are no conceivable conditions under which the breaking down of body tissues might not become a constituent element of accident under the present statute."[77]

With its 1940 decision in *Smith v. Cabarrus Creamery Co.*,[78] the court took the step it had foreshadowed in *Moore* and effectively overruled *Slade*. In *Smith* claimant was performing his usual job duties when he suffered a hernia while lifting a small box out of a larger one. Compensation was awarded.[79] Justice Seawell wrote a unanimous opinion sustaining the award.[80] The court stated that the award could be sustained under the unusual conditions rule, the unusual condition being claimant's body contact with the big box as he lifted the smaller box.[81] Rather than rely on his inconsequential distinction, however, the court declared that it would not "evade an issue which is squarely laid before us, and is likely to arise again and again"[82] and held that "in considering the constituent elements of 'accident' it is competent to take into consideration the sudden and unexpected rupture of the parts supporting the viscera . . . as a part of the fortuitous circumstances making up the accident."[83]

From this language it is not entirely clear whether the court intended to hold that the occurrence of an unexpected injury would by itself satisfy the "injury by accident" requirement or whether the court intended to modify greatly the unusual conditions rule so that the sustaining of an injury could be considered as a relevant unusual condition.[84] Under either interpretation,

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76. 214 N.C. at 430, 199 S.E. at 608.

77. *Id.* This is an ambiguous statement. *See* note 84 and accompanying text *infra*.

78. 217 N.C. 468, 8 S.E.2d 231 (1940).

79. *Id.* at 471, 8 S.E.2d at 232.

80. *Id.* at 473, 8 S.E.2d at 234.

81. *Id.* at 471-72, 8 S.E.2d at 233. The court also stated that there was a "reasonable inference" that the lifting was done in a constrained position and that this condition also contributed to a finding of unusual conditions. *Id.* at 473, 8 S.E.2d at 233. Finding sufficient unusual conditions on these facts stretches the concept of "unusual conditions" to the extreme. Under this lenient approach, practically any event could constitute conditions sufficiently unusual to invoke the rule.

Defendants introduced claimant's prior sworn statement in which he admitted that he was performing his job in the usual manner and that nothing unusual occurred at the time of injury. The court did not find claimant's admission controlling. *Id.* at 471, 8 S.E.2d at 232.

82. *Id.* at 471, 8 S.E.2d at 233.

83. *Id.* at 473, 8 S.E.2d at 234.

84. The ambiguity stems from the court's statement that there are "constituent elements of 'accident' " and that the unexpected injury could be considered "as part of the fortuitous circum-

however, *Smith* effectively overrules *Slade*.[85] The first interpretation forthrightly overrules *Slade* because it permits an unexpected injury to constitute an "injury by accident" whether or not the injury had an external cause. The alternative interpretation effectively overrules *Slade* because it allows the sustaining of an injury to be considered an unusual condition. Since occurrence of an injury is an unusual event in practically all work situations, the sustaining of an injury by itself would presumably provide sufficient unusual conditions to satisfy the rule and entitle the claimant to compensation even if there were no other unusual conditions.[86] This interpretation would have been a great modification of the unusual conditions rule because under prior interpretations only the external work environment was considered in determining the existence of unusual conditions.[87]

The *Smith* court presented several arguments in support of its holding. First, the court asserted that despite the clear holding in *Slade* it was free to promulgate the liberal rule because the court had "never attempted definitely to align itself with the minority view"[88] that the sustaining of an injury could not be considered an "element of accident."[89] Second, the court reviewed definitions of the word "accident" and found that they all emphasized unexpectedness.[90] The court reasoned that the unexpectedness of the occurrence of the injury could make an injury "by accident" and stated that there was "no sound reason to believe that the Legislature intended to put . . . other refinements" upon the requirement.[91] Third, the court stated that the *Slade* rule was not in keeping with a liberal construction of the Act because it relieved employers of much liability.[92]

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stances making up the accident." *Id.* Because this language seems to imply that an accident can be made up of many parts, it arguably could support the position that the injury could be considered as one of many unusual conditions surrounding the accident. It seems equally plausible, however, that the court intended that the unexpected injury would itself satisfy the requirement. *See* Edwards v. Piedmont Publishing Co., 227 N.C. 184, 187-88, 193, 41 S.E.2d 592, 594, 598 (Seawell, J., concurring). The court probably realized that making a clear distinction was not of great practical importance because the effect of either interpretation was to make the unexpected injury itself compensable. *See* text accompanying notes 85-87 *infra*.

85. *Slade* was not expressly overruled. In fact, despite the incompatibility of the holdings on similar facts, the *Smith* court attempted to distinguish *Slade*. *See* note 92 *infra*.

86. The sustaining of an injury at work is usually an unexpected and unusual event because people generally do not intentionally persist at job activity that they expect to produce immediate or certain injury.

87. *See* Moore v. Engineering & Sales Co., 214 N.C. 424, 430, 199 S.E. 605, 608 (1938), in which the court found that the unusual conditions "arose from the changed conditions in which the plaintiff was required to work." *Id.* The *Smith* court assumed that prior decisions required unusual conditions to be found in external circumstances. 217 N.C. at 471, 8 S.E.2d at 233.

88. 217 N.C. at 472, 8 S.E.2d at 233.

89. *Id.* This statement is misleading because under the *Slade* rule the mere sustaining of an injury clearly is not enough to satisfy the "injury by accident" requirement. Moreover, the *Slade* court did intend to adopt the minority view that an external cause was required. *See* Slade v. Willis Hosiery Mills, 209 N.C. 823, 825, 184 S.E. 844, 845 (1936).

90. 217 N.C. at 472, 8 S.E.2d at 233. The court referred to dictionary definitions and to a restatement of the "injury by accident" definition first presented in Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

91. 217 N.C. at 472, 8 S.E.2d at 233.

92. *Id.*

The court also attempted unpersuasively to distinguish *Slade* and *Neely* from the holding in

In a case decided shortly after *Smith*, *Fields v. Tompkins-Johnston Plumbing Co.*,[93] the court implicitly accepted the overruling of *Slade*, at least for "exposure" cases. The facts in *Fields* were virtually identical to those in *Slade*.[94] Compensation was sought and awarded for death by heat exhaustion.[95] The worker had been caulking pipe joints with hot lead on an unusually hot day. In affirming the award,[96] the court appears to have assumed that the injury by accident requirement posed no bar to compensation. The court ignored the injury by accident requirements laid down in *Slade* and *Neely* and failed to explain why they were not relevant.[97] Yet, the death in *Fields*, like the one in *Slade*, did not result from a fortuitous external event.[98] The *Fields* court's failure to insist that the *Slade* external cause requirement be met could be interpreted to mean that the court was following *Smith* in abandoning the *Slade* rule altogether, or it could be given a more limited but still significant meaning as a decision not to impose the external cause requirement in "exposure" cases.[99]

With the 1947 decision in *Edwards v. Piedmont Publishing Co.*,[100] however, the court once again began to retreat from its liberal interpretation of the injury by accident requirement. *Edwards* has been cited as the case that finally established that an unexpected injury alone cannot be considered either

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Smith. *Id.* The court stated that the *Slade* rule applied in the rare situation when both the external conditions and the sustaining of the injury could be considered usual or probable consequences of the work. On the other hand, the court said, the *Smith* holding applied to cases in which the sustaining of the injury was an unusual and unexpected consequence of the work. This distinction is unconvincing because the facts of the cases do not support it. The injury in *Smith* was no more or less a probable consequence of the work than the injuries in *Slade* and *Neely*. Although the injuries in *Slade* and *Neely* could not be said to be probable consequences of the work, the *Slade* rule nevertheless was applied to deny compensation.

93. 224 N.C. 841, 32 S.E.2d 623 (1945). The opinion was written by Chief Justice Stacy, the author of *Slade*.

The *Fields* opinion appears to be exclusively concerned with the issue whether the injury arose out of the work. The court discussed the special causation problems associated with injuries that are sustained in employment that subjects workers to particular hazards from the elements. The court adopted a causation test under which compensation was proper if employment subjected the worker to greater risk of exposure than that to which he would otherwise be exposed. *Id.* at 843, 32 S.E.2d at 624.

94. In both cases the worker died after exposure to extreme working conditions. The deaths did not result from obvious external causes and in both cases regular work was performed in the customary manner.

95. 224 N.C. at 842, 32 S.E.2d at 624.

96. *Id.* at 843, 32 S.E.2d at 624.

97. The court mentioned *Slade* and *Neely* only for the purpose of stating that language in those cases was not relevant to the question at issue in *Fields*—whether the injury arose out of the worker's employment. *Id.* The question whether there was an external cause or unusual conditions was simply not addressed.

98. Of course, the hot working conditions constituted an external cause, but similar working conditions were found in *Slade* not to be the type of external cause that satisfied the injury by accident requirement. The death in *Fields*, therefore, lacked an external cause as defined in *Slade*.

99. It is difficult to determine the court's intent because it simply did not address the injury by accident question. Because *Fields* was an "exposure" case, the position that assigns the more limited meaning to the case can be maintained with more certainty.

There have been no "exposure" cases in North Carolina since *Fields*. It is thus arguable that *Fields* is current authority for the proposition that the injury by accident requirement does not apply in "exposure" cases.

100. 277 N.C. 184, 41 S.E.2d 592 (1947).

an injury by accident or an unusual condition.[101] It is arguable, however, that the court did not go quite so far. Claimants in *Edwards*, a pressman, ruptured a disc while twisting to hand a pressplate to another worker. Making this motion was part of claimant's usual job, and there was no evidence that he had slipped. Compensation was awarded,[102] and the court affirmed upon a finding of unusual conditions.[103] In discussing compensability the court did not even consider whether the sustaining of the injury might itself satisfy the injury by accident requirement. Such a holding was certainly a possibility after *Smith* and *Fields*. Although its language is unclear, the court arguably found two unusual conditions: 1) the handing of the plate in a twisted position,[104] and 2) the sudden occurrence of the internal injury itself.[105] It is thus possible that the unexpected injury itself was a consideration in the court's analysis of whether unusual conditions did exist. Such an interpretation would be consistent with one of the possible interpretations of the ambiguous *Smith* holding.[106]

In a lengthy and eloquent concurrence,[107] Justice Seawell protested that the *Edwards* court had overruled *Smith* without so stating and without explanation.[108] He stated that the court's approach showed it had adopted the minority position that an unexpected injury could be neither an injury by accident nor an unusual condition.[109] Seawell listed numerous reasons why adoption of the minority view was poor public policy[110] and he concluded that sustaining an unexpected injury alone satisfied "every essential definitional

101. Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 279, 98 S.E.2d 289, 293 (1957).

102. 227 N.C. at 185, 41 S.E.2d at 592.

103. *Id.* at 187, 41 S.E.2d at 594. In a concurring opinion Justice Seawell stated that the injury was not sustained under unusual conditions. He asserted that the plate was handled in a usual manner and that the evidence was "clear of any pretense that the work was not being done in the . . . ordinary way." *Id.* at 188, 41 S.E.2d at 594 (Seawell, J., concurring). Justice Seawell's conclusion on the unusual conditions issue was perhaps somewhat overstated because he argued further that, despite the lack of unusual conditions, compensation was proper upon the occurrence of the unexpected injury alone. *See* text accompanying notes 107-11 *infra*.

104. *Id.* at 186-87, 41 S.E.2d at 594.

105. *Id.* at 187, 41 S.E.2d at 594. The court stated that "evidence of the sudden and unexpected displacement of the plaintiff's intervertebral disc under the strain of lifting and turning as described" lent support to the conclusion that the injury was an injury by accident. *Id.* This language is ambiguous because it is not clear whether it was the unexpected injury itself or injury under stressful unusual conditions that lent support to the conclusion. If it was the latter, then the occurrence of the injury was not a consideration in the court's finding of unusual conditions.

106. *See* text accompanying notes 86-87 *supra*.

107. Justice Seawell concurred in result but dissented from the principle on which the result was reached. His view was that compensation was proper because of the unexpected injury alone.

108. 227 N.C. at 188, 41 S.E.2d at 595 (Seawell, J., concurring). Justice Seawell stated, "I do not question the right of the Court to overrule or disregard Smith v. Creamery Co., . . . without assigning any reason for it. It cannot be distinguished." *Id.*

109. *Id.* at 187, 41 S.E.2d at 594.

110. The following arguments against adoption of the minority view were presented: 1) it was contrary to the original English construction; 2) it was contrary to the majority construction in the United States; 3) it was contrary to the early North Carolina construction; 4) it was impossible to apply; 5) it offended the basic humanitarian purpose of the Act; 6) it deprived workers of benefits fairly bargained for in enactment of the system; 7) it violated the rule of liberal construction; and 8) it was not necessary if the rationale behind adoption of the view was the desire to ensure that only job-related injuries were compensated. *Id.* at 189-93, 41 S.E.2d at 595-98 (Seawell, J., concurring).

requirement of 'injury by accident' within the meaning of the Compensation law."[111]

Justice Seawell's fear that *Edwards* would fortify the *Slade* rule and the restricted version of the unusual conditions rule was well-founded. In post-*Edwards* cases over the next ten years the court required either an external cause or external unusual conditions.[112] Despite the ambiguous language in both *Smith* and *Edwards* indicating that the injury itself might be an unusual condition, only external conditions, and not the occurrence of the injury itself, were considered in the unusual conditions analyses of subsequent cases. This approach was simply accepted as proper, and the court did not attempt to justify it in light of *Smith* or contrary policy considerations.[113]

It was not until 1957, in *Hensley v. Farmers Federation Cooperative*,[114] that the court reviewed and attempted to reconcile its prior injury by accident cases. The *Hensley* court entrenched the *Slade* rule and the restricted version of the unusual conditions rule as the definitive construction of "injury by accident" in North Carolina. In *Hensley*, claimant had suffered a hernia when he twisted to lift a basket of chickens. Lifting chickens with a twisting motion was part of claimant's usual job, and nothing unusual surrounded the work at the time of injury. Compensation was awarded, presumably because the twist was the external unusual condition.[115]

In a lengthy opinion the court reversed the award, determining that the injury was not an injury by accident because it was not the result of an external cause nor were there any unusual conditions surrounding its occurrence.[116] The court reviewed its previous injury by accident cases[117] and concluded that before *Smith* the injury by accident requirement was not met absent an external cause or external unusual conditions.[118] The *Hensley* court then examined *Smith* and concluded that, despite its clear holding, the *Smith* court had not overruled the previous decisions.[119] This conclusion was "ap-

111. *Id.* at 188, 41 S.E.2d at 594-95 (Seawell, J., concurring).

112. *See, e.g.*, Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); West v. N.C. Dept. of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948); Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947).

113. In Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 404, 82 S.E.2d 410, 415 (1954), the court did acknowledge that its interpretation was in the minority.

114. 246 N.C. 274, 98 S.E.2d 289 (1957).

115. *Id.* at 275-76, 98 S.E.2d at 290.

116. *Id.* at 278-81, 98 S.E.2d at 292-94.

117. The court discussed *Conrad*, *Slade*, *Neely*, *Moore*, *Smith* and *Edwards*.

118. 246 N.C. at 278, 98 S.E.2d at 292. The court restated the liberal definition of "injury by accident" adopted in *Conrad*, but failed to discuss the court's early liberal interpretation of the requirement.

119. *Id.* at 279-80, 98 S.E.2d at 293. The court stated that the *Smith* court used

> language which lends support to the argument that the Court intended to adopt a new rule and hold the injury and accident were equivalent . . . . [Nevertheless, t]hat the Court did not intend to abandon the rule announced in previous decisions that compensation could not be awarded unless the injury was produced by an accident seems apparent.

Id. at 279, 98 S.E.2d at 293.

parent"[120] for two reasons. First, *Buchanan v. State Highway & Public Works Commission*,[121] decided shortly before *Smith*, and *Edwards*,[122] decided seven years after *Smith*, both applied the pre-*Smith* rule. Second, said the court, the contested language in *Smith* was dictum[123] because on its facts *Smith* fit within the traditional unusual conditions exception.[124] These reasons are unpersuasive in light of the clear holding in *Smith*.[125] The *Hensley* court should have acknowledged that it was merely formalizing the effect of *Edwards*[126] by expressly overturning *Smith* and adopting the *Slade* and restricted unusual conditions rules.[127]

Since *Hensley* the court has consistently employed the *Slade* and unusual conditions rules to determine whether there was an injury by accident. This issue arises regularly and, when there is no external cause, the court has developed a standardized shorthand method for determining whether unusual conditions exist. An injury is "by accident" if surrounding external circumstances cause an "interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences."[128] An injury is not "by accident" if the claimant was "merely carrying on the usual and customary duties in the usual way."[129] Such factors as unusual twists,[130] overexertion,[131] working in restricted positions,[132] working shorthanded,[133] and

120. *Id.* at 279, 98 S.E.2d at 293.

121. 217 N.C. 173, 7 S.E.2d 382 (1940). The facts in *Buchanan* were unusual. Claimant had "turned sick and blind" as he was performing his usual job. *Id.* at 174, 7 S.E.2d at 382. The court held that claimant had not met any of the three requirements of the compensation formula ("injury by accident," "arising out of," or "in the course of") and denied recovery. *Id.* at 175, 7 S.E.2d at 383. Although the court cited *Slade* and *Neely* and distinguished *Moore* to support its conclusion, it did not discuss the injury by accident question.

Since *Buchanan* was decided before *Smith* it is of little value in determining the intentions of the *Smith* court. *Buchanan*'s relevance is further limited because the court did not discuss the injury by accident issue and because of its unusual facts.

122. 227 N.C. 184, 41 S.E.2d 592 (1947). *See* text accompanying notes 100-06 *supra*.

123. 246 N.C. at 280, 98 S.E.2d at 294.

124. *Id.* at 279, 98 S.E.2d at 293. The court stated that "[f]actually the case came within the rule announced by the Court in Moore v. Sales Co. and hence outside of the rule laid down in the *Slade* and *Neely* cases. This was frankly recognized by Justice Seawell, who wrote the opinion." *Id.*

125. The *Smith* court did state that its award could have been sustained under the unusual conditions rule. The court, however, expressly stated that it was adopting a new liberal rule and that it was not applying the unusual conditions exception. *See* text accompanying notes 78-83 *supra*.

126. *See* text accompanying notes 107-11 *supra*.

127. The court acknowledged that it was adopting the minority position, which it attempted to justify on two grounds: 1) the restrictive interpretation had been so consistently given to the statute that the court had no right to change it; and 2) the negative statutory definition of the word "accident," (N.C. GEN. STAT. § 97-52 (1979)), as including only unusual events supported the minority view. 246 N.C. at 280-81, 98 S.E.2d at 294. For further discussion of the first justification, see text accompanying notes 149-59 *infra*. For the text of the statutory definition, see note 38 *supra*. The statutory definition does not support the minority interpretation because the required unusual event could be interpreted as either an unexpected cause or an unexpected result.

128. Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962).

129. *Id.*

130. *See, e.g.*, Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Searcy v. Branson, 253 N.C. 64, 116 S.E.2d 175 (1960); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947).

131. *See, e.g.*, Davis v. Summitt, 259 N.C. 57, 129 S.E.2d 588 (1963); Faires v. McDevitt & St.

working at a new task[134] have been found to constitute unusual conditions. Working in hot weather,[135] working in a hurry[136] and working at a slightly unusual task[137] may contribute to a finding of unusual conditions, but generally will not support that finding by themselves. Often the court simply makes the conclusory finding that no unusual conditions existed.[138]

The unusual conditions rule thus creates the need to make close factual distinctions and as a result the decisions are difficult to reconcile. Unusual conditions have been found to exist in situations that appear to be quite typical for the work environment and have found lacking in other cases that present similar fact situations.[139] This inconsistency raises the basic question whether the court's disposition of unusual condition cases truly is based upon findings of particular unusual conditions like those mentioned above. Although decisions purport to rely on the process of ascertaining unusual conditions, opinions are likely influenced to some extent by underlying judgments about the essential work-relatedness of the injury[140] and the situation of the parties

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Co., 251 N.C. 194, 110 S.E.2d 898 (1959); Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947).

132. *See, e.g.*, Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959); Dunton v. Daniel Constr. Co., 19 N.C. App. 51, 198 S.E.2d 8 (1973); Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971).

133. *See, e.g.*, Davis v. Summit, 259 N.C. 57, 129 S.E.2d 588 (1963); Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959); Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

134. *See, e.g.*, Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959); Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977).

135. *See, e.g.*, West v. N.C. Dept. of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948) (compensation denied).

136. *See, e.g.*, Southards v. Byrd Motor Lines, Inc., 11 N.C. App. 583, 181 S.E.2d 811 (1971) (compensation denied).

137. *See, e.g.*, Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964) (compensation denied); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962) (compensation denied); Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938) (compensation awarded).

138. *See, e.g.*, Rhinehart v. Roberts Super Market, Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Holt v. Cannon Mills Co., 249 N.C. 215, 105 S.E.2d 614 (1958).

139. *See* text accompanying notes 92-97 *infra*.

140. The presence of a pre-existing medical condition and other factors may raise a serious question whether work was a real cause of the injury. In the following cases the possibility that the injury was not work related may have influenced the finding of a lack of unusual conditions and, thus, an injury by accident: Jackson v. N.C. State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968) (prior heart attack); Rhinehart v. Roberts Super Market, Inc., 271 N.C. 586, 157 S.E.2d 1 (1967) (congenital condition); Andrews v. County of Pitt, 269 N.C. 577, 153 S.E.2d 67 (1967) (heart condition); Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964) (prior heart condition); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962) (prior arteriosclorosis); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954) (high blood pressure); West v. N.C. Dept. of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948) (prior heart condition).

But see the following cases in which sufficient unusual conditions to create an injury by accident were found despite the presence of pre-existing medical conditions: Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959) (prior hernia); McMahan v. Hickey's Supermarket, 24 N.C. App. 113, 210 S.E.2d 214 (1974) (prior hernia); Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971) (disc deterioration); Soles v. Stephens Farm Equip. Co., 8 N.C. App. 658, 175 S.E.2d 339 (1970) (prior disc problems).

before the court.[141] It is extremely difficult, however, to determine how much weight is given to these considerations because most opinions do not contain the detailed facts from which such determinations could be made and the court does not express when or how much these underlying considerations play a part in its decisions.

Since *Hensley*, judicial decisions denying awards when the injury by accident question was seriously at issue have outnumbered decisions granting awards by almost two to one.[142] Although only one Commission decision denying an award on the basis of lack of unusual conditions has been reversed,[143] the courts have frequently overturned decisions granting awards

141. In Bigelow v. Tires Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971), the court found unusual conditions in a close case. The court mentioned that claimant had worked 20 years for the employer and that he had a third grade education.

142. Awards have been denied because of lack of unusual conditions in the following cases: Jackson v. N.C. State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968); Rhinehart v. Roberts Super Market, Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Andrews v. County of Pitt, 269 N.C. 577, 153 S.E.2d 67 (1967); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964); O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Turner v. Burke Hosiery Mill, 251 N.C. 325, 111 S.E.2d 185 (1959); Holt v. Cannon Mills Co., 249 N.C. 215, 105 S.E.2d 614 (1958); Artis v. North Carolina Baptist Hosps., Inc., 44 N.C. App. 64, 259 S.E.2d 784 (1979); Curtis v. Carolina Mechanical Systems, Inc., 36 N.C. App. 621, 244 S.E.2d 690 (1978); Smith v. Burlington Indus., 35 N.C. App. 105, 239 S.E.2d 845 (1978); Pulley v. Migrant & Seasonal Farmworkers Ass'n, 30 N.C. App. 94, 226 S.E.2d 227 (1976); Hewett v. Constructor's Supply Co., 29 N.C. App. 395, 224 S.E.2d 297, *cert. denied*, 290 N.C. 550, 226 S.E.2d 510 (1976); Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975); Vassor v. Albemarle Paper Co., 18 N.C. App. 570, 197 S.E.2d 260 (1973); Russell v. Pharr Yarns, Inc., 18 N.C. App. 249, 196 S.E.2d 571 (1973); Garmon v. Tridair Indus., 14 N.C. App. 574, 188 S.E.2d 523 (1972); Southards v. Byrd Motor Lines, Inc., 11 N.C. App. 583, 181 S.E.2d 811 (1971); Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

Awards based upon a finding of unusual conditions have been granted in the following cases: Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Davis v. Summitt, 259 N.C. 57, 129 S.E.2d 588 (1963); Searcy v. Branson, 253 N.C. 64, 116 S.E.2d 175 (1960); Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959); King v. Forsyth County, 45 N.C. App. 467, 263 S.E.2d 283 (1980); Searcey v. Alexander Constr. Co., 35 N.C. App. 78, 239 S.E.2d 847, *cert. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978); Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977); McMahan v. Hickey's Supermarket, 24 N.C. App. 113, 210 S.E.2d 214 (1974); Dunton v. Daniel Constr. Co., 19 N.C. App. 51, 198 S.E.2d 8 (1973); Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971); Soles v. Stephens Farm Equip. Co., 8 N.C. App. 658, 175 S.E.2d 339 (1970). Unusual conditions were found, but an award was denied on other grounds in Lutes v. Export Leaf Tobacco Co., 19 N.C. App. 380, 198 S.E.2d 746 (1973).

143. King v. Forsyth County, 45 N.C. App. 467, 263 S.E.2d 283 (1980). The *King* decision is very interesting because it may be an indication that the court is moving toward reform of the traditional injury by accident rule. In *King* claimant, a deputy sheriff, suffered a heart attack immediately after he engaged in an "extremely vigorous" foot chase of a suspect. *Id.* at 470, 263 S.E.2d at 285. There was medical testimony that claimant's exertion caused the injury. Although the Commission denied an award on the basis of lack of unusual conditions, the court of appeals reversed. *Id.* at 471, 263 S.E.2d at 285. The court stated that claimant's pursuit of the suspect amounted to "overexertion," and that the existence of the overexertion was sufficient to make the injury compensable. *Id.* If the court had stopped there, its holding and approach would have fit comfortably within the traditional unusual conditions framework, as overexertion had long been recognized as an unusual condition. *See* note 131 and accompanying text *supra*. In its holding, however, the court specifically noted that, when an injury is caused by overexertion, it is compensable whether or not the nature of the activity engaged in was usual or unusual. 45 N.C. App. at 471, 263 S.E.2d at 285. Although the holding does not overrule any prior decisions, both the language of the holding de-emphasizing the nature of the activity and the result itself indicate that the court may be taking a more liberal approach to the injury by accident issue.

after determining that nothing unusual surrounded the injury.[144] The supreme court, however, has acknowledged complaints about its interpretation and has noted that North Carolina is in the minority in its construction of the injury by accident requirement.[145] Furthermore, it has invited the General Assembly to amend the statute.[146] In one post-*Hensley* case the court even stated that, while compensation would be awarded under any rule if a laborer was injured while dropping a rock, the view that compensation should be denied if a laborer was injured while lifting and heaving a rock did "not commend itself as either very sound reasoning or very good law."[147] Such comments are rare, however, and in most cases the court has simply stated and applied the rule, usually to the detriment of the claimant.

III. JUSTIFICATIONS FOR NORTH CAROLINA'S INJURY BY ACCIDENT INTERPRETATION

The North Carolina Supreme Court has advanced only two justifications, one expressly and one by implication, for its construction of the "injury by accident" requirement. The court's only express justification for its position has been that the court does not have the power to change its consistently conservative interpretation of the statute. The implied justification is rooted in the court's fear that improper application of the Workers' Compensation Act could result in limitless employer liability. The court repeatedly has asserted that only work-related injuries are compensable and that the system is not a general accident and health insurance program.[148] Although the court has never expressly justified its interpretation in this manner, its construction arguably could be justified because it serves as a necessary additional requirement of causal connection between employment and injury that helps ensure that only work-related injuries are compensated.

On several occasions the court has stated that it will not change its con-

144. Rhinehart v. Roberts Super Market, Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Lawrence v. Hatch Mills, 265 N.C. 329, 144 S.E.2d 3 (1965); Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Pulley v. Migrant & Seasonal Farmworkers Ass'n, 30 N.C. App. 94, 226 S.E.2d 227 (1976).

145. O'Mary v. Land Clearing Corp., 261 N.C. 508, 510-11, 135 S.E.2d 193, 195 (1964); Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 280, 98 S.E.2d 289, 293 (1957).

146. O'Mary v. Land Clearing Corp., 261 N.C. 508, 511, 135 S.E.2d 193, 195 (1964); Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962); Holt v. Cannon Mills, 249 N.C. 215, 216, 105 S.E.2d 614, 615 (1958); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 281, 98 S.E.2d 289, 294 (1957).

147. Keller v. Electric Wiring Co., 259 N.C. 222, 225, 130 S.E.2d 342, 344 (1963).

148. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966); Duncan v. City of Charlotte, 234 N.C. 86, 90-91, 66 S.E.2d 22, 25 (1951); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951). In *Duncan* the court said that the "rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the Act within the limits of its intended scope—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." 234 N.C. at 91, 66 S.E.2d at 25 (1951).

struction of the statute because it feels bound by its current interpretation.[149] This justification for the current construction was first advanced in *Hensley*. In that case the court stated that the conservative *Slade* interpretation had been "so consistently given to the statute" that it had acquired the status of a written statute.[150] The court protested that, although its interpretation was in the minority,[151] the court had "no right to change or ignore it."[152] Thus, the court stated, legislative action would be required to effect a change in the interpretation.[153]

There are two effective criticisms of this justification for continuing the current interpretation. First, as illustrated in Section II above, the court's pre-*Hensley* interpretation of the statutory requirement was anything but consistent. Prior to *Hensley* a liberal construction, holding the unexpected injury itself compensable, was the rule for as many years as the current conservative one had been.[154] The liberal *Smith* holding was not formally overturned until *Hensley*, the very case that purported to find a consistent, long-standing conservative interpretation.[155] There has been a consistent construction since *Hensley*, but the authority for that construction has been *Hensley* itself. A justification that stands on such bootstrapping is unpersuasive.[156] Second, when changing circumstances have warranted it, the supreme court has overruled outmoded holdings,[157] including long-standing interpretations of stat-

149. Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962); Holt v. Cannon Mills, 249 N.C. 215, 216, 105 S.E.2d 614, 615 (1958).

150. 246 N.C. 274, 281, 98 S.E.2d 289, 294 (1957).

151. *Id.* at 280, 98 S.E.2d at 293.

152. *Id.* at 281, 98 S.E.2d at 294.

153. *Id. See also* Harding v. Thomas & Howard Co., 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962); Holt v. Cannon Mills, 249 N.C. 215, 216, 105 S.E.2d 614, 615 (1958).

154. The court followed a liberal interpretation for a total of 14 years, consisting of the seven years between passage of the Act in 1929 and the decision in *Slade* in 1936 and the seven years between the *Smith* decision in 1940 and that of *Edwards* in 1947. There was also a total of 14 conservative years consisting of the four years between the *Slade* decision in 1936 and the *Smith* opinion in 1940 and the 10 years between the court's holding in *Edwards* in 1947 and its decision in *Hensley* in 1957.

155. Although *Smith* was not formally overturned until *Hensley*, in the years after *Edwards* and before *Hensley*, the court effectively overruled *Smith* by simply ignoring its holding.

156. The justification also violates the rule that stare decisis does not apply when there are conflicting decisions. 21 C.J.S. *Courts* § 192 (1940). This rule has been recognized in North Carolina. *See* State v. Mobley, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954); Patterson v. McCormick, 177 N.C. 448, 457, 99 S.E. 401, 405 (1919).

157. *See, e.g.*, Bulova Watch Co. v. Brand Distribs., 285 N.C. 467, 481, 206 S.E.2d 141, 151 (1974) (overruling Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1930), on the constitutionality of Fair Trade Act); Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 21, 152 S.E.2d 485, 499 (1967) (overruling Williams v. Randolph Hosp. Inc., 237 N.C. 387, 75 S.E.2d 303 (1953), and Williams v. Union County Hosp. Ass'n, 234 N.C. 536, 67 S.E.2d 662 (1951), on the tort immunity of charitable hospitals); State v. Mobley, 240 N.C. 476, 486, 83 S.E.2d 100, 107 (1954) (overruling State v. Freeman, 86 N.C. 683 (1882), on the issue of arrest without warrant when no breach of peace). The *Rabon* court recognized that in previous decisions it had been declared that changing the rule was properly a matter solely for the legislature but, nevertheless, changed the rule. 269 N.C. 1, 13-14, 152 S.E.2d 485, 493-94.

Overruling of the injury by accident requirement would not disrupt vested property rights, a concern that supports the policy of stare decisis. The court has stated that "a decision of this Court, subsequently concluded to have been erroneous, may properly be overruled when such action will not disturb property rights previously vested in reliance upon the earlier decision." Bulova Watch Co. v. Brand Distribs., 285 N.C. at 473, 206 S.E.2d at 145.

utes.[158] In discussing situations in which application of stare decisis is not appropriate, Justice Ervin stated that it should "not be applied in any event to preserve and perpetuate error and grievious wrong . . . 'There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.' "[159] The stare decisis objection should therefore not be an impassable obstacle to a court convinced that the current injury by accident interpretation is erroneous.

The second, implied justification supporting the court's interpretation of the injury by accident requirement—that the interpretation serves as an extra causal requirement necessary to keep liability within proper bounds—is at least superficially more persuasive. Workers' compensation is only intended to provide compensation for injuries that are causally related to the work.[160] Determining the cause of some injuries, however, especially heart, hernia, and back injuries that may have resulted at least in part from degenerative processes, can be very difficult.[161] Often medical knowledge simply can not tell how much any one of many possible causes contributed to an injury. In

158. *See, e.g.*, State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963) (overruling State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925) and State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936), on interpretation of punishment statute).

159. State v. Ballance, 229 N.C. 764, 767, 51 S.E.2d 731, 737 (1949) (quoting Spitzer & Co. v. Commissioners of Franklin County, 188 N.C. 30, 123 S.E. 636 (1924)).

160. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951).

161. *See* E. CHEIT, *supra* note 19, at 324-33. *See also* M. BERKOWITZ, WORKMEN'S COMPENSATION 248-60 (1960); Cohen & Klein, *A Proposed Solution to the Legal Problems of Workmen's Compensation Heart Cases*, in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 199 (M. Berkowitz ed. 1973); Mitchell, *Some Medical Issues in Workmen's Compensation*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 355 (M. Berkowitz ed. 1973).

Heart injuries pose the most serious problem because of the prevalence of heart disease in society and because there is widespread disagreement in the medical community regarding the interrelation between them and job effort. *See* Cohen & Klein, *supra*. Although use of the term "heart attack" is, from a medical standpoint, imprecise, it is used in the case law. Most heart attacks are medically known as myocardial infarcations. They occur when blood vessels become so blocked that the blood flow is insufficient to meet the demands of the heart. *See* McLaughlin, *The Compensability of Heart Injuries Under the Pennsylvania Workmen's Compensation Act*, 21 U. PITT. L. REV. 445, 446-54 (1960); Mitchell, *supra*. The extent of disagreement about the medical cause of heart injuries was illustrated in one survey of five cardiologists. The doctors reviewed 319 compensation cases in an attempt to answer questions pertaining to causation. Complete agreement was reached in only 47 cases. In 90 cases four doctors agreed. In 48 cases only two physicians agreed, and the panel was unable to arrive at a majority opinion. Furthermore, when the cases were reviewed later by the doctors without knowing the cases had been seen previously, in 30% of the opinions the physicians reversed themselves. *See* Goshkin, *Legislative Action, The Only Reasonable Solution to the Problems of Workmen's Compensation Heart Cases*, 5 THE FORUM 329, 335 n.17 (1969-70) (citing *Heart Claims Under the California Workmen's Compensation Act*, 13 CIRCULATION 448 (1956)). While the great preponderance of medical thought does agree that some form of heart disease must pre-exist a heart injury, see 1B LARSON, *supra* note 23, § 38.83, at 7-247, medical science readily admits that it cannot, with any degree of certainty, determine the initiating cause of a heart attack. *See* Goshkin, *supra*, at 335. The results of several studies into the relationship between heart attacks and unusual physical exertion are inclusive. *See* Mitchell, *supra*.

Although the medical cause of the most common form of occupational hernia, iguinal hernia, is understood, the relationship of hernia occurrence to job activity is less well known. *Id.* at 356. A hernia occurs when the contents of the abdomen protrude from their normal position through a weakness in the lower abdominal wall. The question whether occupational stress caused a particular protrusion is a matter of judgment about which physicians may disagree. While job activity can cause a hernia, significant medical opinion does hold to the view that ordinary muscular effort

this vacuum the courts have shown suspicion toward injuries that might have both employment and nonemployment causes. They have demonstrated a proper reluctance to award compensation for injuries that may be connected with work to the extent that they occur within the time and space limits of employment, but may be more truly caused by degenerative processes inherent in the wear and tear of life.[162] Although the statutory formula contains two explicit causation tests, the "arising out of" test[163] and the "in the course of" test,[164] it was surely fear that these two traditional tests could not screen out non-job-related claims that motivated the court to press the injury by accident component into service as a third causation test.[165]

This third causation requirement that tests for an external cause or unusual conditions is, unfortunately, unduly harsh and arbitrary.[166] Underlying the requirement is the assumption that the presence of some type of unusual circumstances in the work environment—either an external cause or unusual conditions—is a reliable indication of whether the injury was causally related to the work. The external cause requirement arguably helps ensure work-relatedness because, if there was such a cause, it is possible that it, and not natural degeneration, was the cause of the injury. The unusual conditions requirement also arguably adds assurance of work relatedness in the same way, although less reliably, because the presence of such conditions indicates that there was some irregular element in the work environment that could have accounted for the injury. The injury by accident causation requirement is unduly harsh, however, because it operates to deny compensation for any injury that does not have an external cause or unusual conditions, even if the injury was in fact work related. Furthermore, because it acts as an irrebuttable presumption based upon the merely arguable theory that an injury that is not surrounded by unusual circumstances of some kind is not job related, the injury by accident causation requirement is highly arbitrary. Although the requirement applies to every injury, it usually becomes crucial only in claims for injuries that may have involved natural degeneration, such as hernias and rup-

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has only a "minor contributory influence on the development of the ordinary forms of hernia." *Id.* (citing L. NYHUS & H. HARKINS, HERNIA (1964)).

Any force that causes extension, rotation or compression of the back is capable of producing spinal injury. 1B R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 14.04 (1968). There are many different types of injuries associated with the lower back. Many involve fracture or dislocation of the intervertebral disc. The medical cause of lower back injury and the relationship between it and job exertion is better understood than that of heart attacks but less understood than that of hernia. Mitchell, *supra*.

162. *See* 1B LARSON, *supra* note 23, § 38.81.

163. This component is a general test of the causal connection between work and injury. An injury must be a "natural and probable consequence" of the work to pass this requirement. *See, e.g.*, Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

164. This component specifically tests the time, place and circumstances under which the accident occurred. An injury is in the course of employment if it occurs during the hours of and at the place of employment while the claimant was actually performing job duties. *See, e.g.*, Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

165. *See* 1B LARSON, *supra* note 23, § 38.81.

166. *See id.*

tured discs, because these types of injuries typically occur in the absence of an external cause and unusual conditions.

IV. CRITICISMS OF NORTH CAROLINA'S INJURY BY ACCIDENT REQUIREMENT

A. Irrelevance to Question of Causation

The fundamental criticism of the injury by accident requirement is that it is neither a rational nor a well-fitted test of causation.[167] The presence or absence of an external cause or unusual conditions has only a slight rational bearing on the question whether an injury is job related. Existence of an external cause may be an indication that an injury is work related, although it might not be, as, for example, when the external cause is a tornado.[168] Existence of unusual conditions is an even more unreliable indication of work-relatedness because the unusual nature of circumstances surrounding an injury has little logical bearing on whether job activity caused the injury. More importantly, the *absence* of an external cause or unusual conditions provides no rational basis for the arbitrary conclusion that an injury is not job related.[169] Absence of these conditions indicates only that the circumstances surrounding the occurrence of the injury were ordinary, and ordinariness of circumstances is a poor indication of the job relatedness of an injury. Indeed, because factors foreign to the job environment have not been introduced, the absence of an external cause or unusual conditions is arguably an indication that an injury is job related. Yet, under the current interpretation of the statute, lack of an external cause or unusual conditions automatically precludes issuing an award. Thus, the court may reach a decision without ever squarely addressing the crucial issue of causation.

The following example illustrates the irrelevance of the external cause and unusual conditions tests to the question of causation. Suppose that two workers, a clerk and a laborer, have hearts in similar condition. The clerk suffers a heart attack when he undertakes the unusual job of carrying file folders. The laborer suffers a heart attack when performing his usual task of lifting heavy cement bags. Because neither injury had an external cause, the court would apply the unusual conditions test. The laborer would probably fail the test and be automatically disqualified from benefits, but the clerk's claim would probably pass.[170] It would seem, however, that the laborer's injury was more probably caused by his heavy work than the clerk's injury was

167. For similar criticisms, see Edwards v. Piedmont Publishing Co., 227 N.C. 184, 190-92, 41 S.E.2d 592, 596-97 (1947) (Seawell, J., concurring); 1B LARSON, *supra* note 23, § 38.81.

168. *See* Walker v. J.D. Wilkins, Inc., 212 N.C. 627, 194 S.E. 89 (1937).

169. 1B LARSON, *supra* note 23, § 38.81. Job-related injuries can occur in the absence of external causes and unusual conditions.

170. After passing the injury by accident test, the clerk's claim would be measured under the other two requirements in the compensation formula. General causal connection would be tested under the "arising out of" component. *See* note 163 *supra*. The time, place, and circumstances under which the accident occurred would be examined under the "in the course of" requirement. *See* note 164 *supra*.

caused by his light work. The important question in both cases is whether there was a causal connection in fact between the work and the injury. Comparison of usual work conditions with work conditions at the time of the injury is simply irrelevant to this inquiry.

The same problem can be illustrated by comparing two North Carolina cases. In *Byrd v. Farmers Federation Cooperative*,[171] claimant, the manager of a farmers co-op store, ruptured a disc while lifting a 100 pound fertilizer bag. His job duties included lifting fertilizer bags and there was no evidence that he was not healthy at the time of the injury. Benefits were denied on the ground that there were no unusual conditions.[172] In *Soles v. Stephens Farm Equipment Co.*,[173] claimant ruptured his disc attempting, while in an awkward position, to lift a tire. His job duties as manager of a farm equipment store did not involve lifting tires. Claimant had ruptured a disc on a prior occasion.[174] Finding that the unusual and awkward lifting of the tire constituted an unusual condition, the court awarded compensation.[175] Neither case involved an external cause, and the *Byrd* claim was defeated by an application of the unusual conditions test while the *Soles* claim passed. Yet the existence of the unusual conditions in *Soles* did not add any rational assurance that the injury suffered by claimant in *Soles* was more job related than that suffered by claimant in *Byrd*. In fact, because the *Soles* claimant had a pre-existing injury, it would seem plausible that the *Byrd* injury was more truly work related.

While the examples presented to this point have involved close questions, it is apparent that the external cause and unusual conditions requirements have been employed to defeat claims for injuries that are unquestionably job related. For example, claimant in *Johnson v. Erwin Cotton Mills Co.* [176] was a seamstress whose usual job duties included reaching for and drawing sheets from left to right. At the time of her injury she stretched "real hard," felt something slip, and felt pain in her arm and shoulder.[177] The injury was diagnosed as myositis—inflammation and strain of the shoulder muscle. Although it is difficult to imagine a more job-related injury, benefits were denied because of lack of an external cause or unusual conditions.[178] In *O'Mary v. Land Clearing Corp.*,[179] claimant was employed to supervise the cleaning up of rough, rugged land recently cleared by bulldozer. His job involved walking over the land, and one day he noticed a broken blister on his toe. The toe became infected and had to be amputated. Compensation was denied because

171. 260 N.C. 215, 132 S.E.2d 348 (1963).

172. *Id.* at 216, 132 S.E.2d at 349.

173. 8 N.C. App. 658, 175 S.E.2d 339 (1970).

174. The injury occurred seven years prior to the injury for which compensation was claimed. Claimant had undergone corrective surgery and claimant's doctor stated that treatment relating to the old injury had not been given for one or two years. *Id.* at 659-60, 175 S.E.2d at 340-41.

175. *Id.* at 661, 175 S.E.2d at 342.

176. 232 N.C. 321, 59 S.E.2d 828 (1950).

177. *Id.*

178. *Id.* at 322, 59 S.E.2d at 829.

179. 261 N.C. 508, 135 S.E.2d 193 (1964).

of lack of an external cause or unusual conditions[180] even though the injury seems to have been clearly job related.

The cases and examples discussed above illustrate that the external cause and unusual conditions tests are very poor methods for determining the job relatedness of an injury. There is a strong probability that unusual conditions can be present when the injury is not work related[181] and that unusual conditions can be absent when the injury is work related. Application of the third causation test actually hinders consideration of relevant causation questions and arbitrarily defeats seemingly meritorious claims before they can be put to a true causation test.

B. Unwarranted Statutory Construction

North Carolina's interpretation is unwarranted as a matter of statutory construction, especially in light of the remedial nature of the Act.[182] The meaning of the phrase "injury by accident" is somewhat ambiguous. While the word "injury" denotes only a result, the word "accident" can mean either an unexpected cause or an unexpected result. It has been argued that, because the statute uses both words and connects them with the word "by," the word "accident" must be interpreted as denoting a cause.[183] Thus, before there can be an "injury by accident," an external cause must produce the injury. On the other hand, the statute was construed as an entirely different manner in *Fenton v. J. Thorley & Co.*[184] The House of Lords reasoned there that the words "by accident" appeared in the statute merely to exclude injuries that were not unexpected, such as those that were intentional and that the phrase did not impose an external cause requirement. Thus, the sustaining of an unexpected injury was an "injury by accident."

The most reasonable statutory interpretation consistent with the policy of the Act is the *Fenton* construction. This construction is more consistent with the popular meaning of the word "accident" and would seem to be more in keeping with legislative intent and understanding of the effect of the phrase. It is a construction that gives legitimate effect and force to all parts of the statute. The latter interpretation was the one adopted by the House of Lords at a time almost contemporaneous with passage of the first workers' compensation act,

180. *Id.* at 511, 135 S.E.2d at 195.

181. In this situation the employer has a legitimate complaint. An injury that is not work related will pass the injury by accident requirement if there are unusual conditions. If, for some reason, the claim also passes the more traditional causation test of the "arising out of" component, the employer will be held liable for a non-work-related injury. Because the unusual conditions test is such a poor guarantee of work-relatedness and because a claim might not receive close scrutiny under the "arising out of" test if it passes the "injury by accident" test, the potential exists for unfair allocation of liability to the employer.

182. For similar criticisms, see Edwards v. Piedmont Publishing Co., 227 N.C. 184, 189-93, 41 S.E.2d 592, 596-98 (1947) (Seawell, J., concurring); 1B LARSON, *supra* note 23, § 38.61.

183. *See* Purity Biscuit Co. v. Industrial Comm'n, 115 Utah 1, 25-30, 201 P.2d 961, 973-75 (1949) (Latimer, J., dissenting). *But see* Redman Warehousing Corp. v. Industrial Commission, 22 Utah 2d 398, 454 P.2d 283 (1969); Mellen v. Industrial Commission, 19 Utah 2d 373, 431 P.2d 798 (1967).

184. [1903] A.C. 443. *See* note 30 *supra*.

and it is the construction in the overwhelming majority of American jurisdictions.[185] On the other hand, the former, more conservative interpretation of the statute is the type of "technical, narrow and strict interpretation"[186] that the North Carolina courts have declared improper in construing the Act.[187]

C. *Inconsistent and Seemingly Capricious Results*

Another fundamental criticism of North Carolina's interpretation of the injury by accident requirement is that it cannot be rationally applied.[188] Perhaps the best criticism of the interpretation is the widely divergent results of the cases in which the unusual conditions rule has been applied. Decisions in cases with similar facts are frequently so different that application of the rule seems capricious.[189] The unusual conditions rule is unworkable in practice because it is premised on the incorrect assumption that there is an objectively measurable quantum of usual conditions that surround job performance.[190] Yet job duties naturally and unavoidably vary constantly within the same job from more to less usual depending upon a multitude of factors. Because the assumption that there is a quantum of usual work conditions is simply not supported in actual experience, decision-making under the unusual conditions rule requires the court to grasp at and magnify questionable distinctions in the minutiae of job performance. Inconsequential considerations, such as slight differences in weight lifted or exertion required, are frequently the unusual conditions upon which ultimate decisions of compensability rest.[191] Because

185. *See* text accompanying notes 205-08 *infra*.

186. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E.2d 591, 593 (1930).

187. The language of North Carolina's special statute governing compensability of hernias arguably provides a somewhat more legitimate basis for judicial interpretation of the "injury by accident" language as an external cause requirement. A hernia is not compensable under the special statute unless it "immediately followed an accident." N.C. GEN. STAT. § 97-2(18)(d) (1979). It is arguable that this language more clearly separates the "injury" requirement from the "accident" requirement and is thus a clearer indication that the "accident" must be an external cause. Even this argument, however, can be criticized. First, the supreme court has never stated that the special statute imposes a higher or different "accident" requirement than the "accident" requirement in the general statute. Second, the language of the statute, liberally construed, does comport with medical understanding of how a hernia is sustained. Because a hernia is the condition that immediately follows a rupture of the stomach wall, a hernia does immediately follow an event (the unexpected rupture) that could be described as an accident. *See* Mitchell, *supra* note 161. Thus, if the court were to hold that an unexpected internal result could be an accident, the hernia statute would not prevent compensation. Third, hernia statutes similar to North Carolina's have been construed in other jurisdictions to permit compensation of the unexpected hernia alone. *See* Gulf States Creosoting Co. v. Walker, 224 Ala. 104, 106, 139 So. 261, 262 (1932); Hardware Mut. Cas. Co. v. Sprayberry, 195 Ga. 393, 394-95, 24 S.E.2d 315, 316-17 (1943).

188. For similar criticisms, see Edwards v. Piedmont Publishing Co., 227 N.C. 184, 190-91, 41 S.E.2d 592, 596-97 (1947) (Seawell, J., concurring); 1B LARSON, *supra* note 23, § 38.63.

189. *See* text accompanying notes 192-97 *supra*.

190. Every job involves work under different conditions because there is always, for example, fast work and slow work, and hard work as well as easy work. It is impossible to tell whether a stock boy's lifting of the heaviest case of groceries that he will lift that year is work under usual or unusual conditions. Larson states that "a surprising number of cases" hold that the injury by accident requirement is satisfied when the worker was simply performing the heaviest part of his usual work. 1B LARSON, *supra* note 23, § 38.63.

191. Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938), and Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947), are examples of cases in which the court elevated trivial circumstances into conditions unusual enough to support awards.

decisions depend upon subjective judgments about what usual duties were and upon hair-splitting distinctions concerning conditions at the time of the injury, application of the unusual conditions rule results in confusion and irreconcilable results.

A comparison of three cases—*Beamon v. Stop and Shop Grocery*,[192] *Rhinehart v. Roberts Super Market, Inc.*,[193] and *McMahan v. Hickey's Supermarket*[194]—serves to illustrate the problems encountered in applying the unusual conditions rule. In *Beamon*, claimant was a grocery store checkout clerk whose regular job duties included bagging groceries. She suffered a back injury when she picked up a twenty pound bag of charcoal from the bottom of a grocery cart. Although she did not ordinarily handle charcoal bags, there was nothing unusual about the manner in which she lifted the bag. Compensation was denied because of lack of unusual conditions.[195] In *Rhinehart*, claimant was a grocery store stock boy who sustained a back injury while lifting, turning, and tossing a forty-eight pound case of soup cans to another worker. His regular job duties included lifting cases of groceries, although he usually handled cases alone. The Commission awarded compensation but the court reversed, concluding that claimant's twisting motion and toss to another worker did not constitute sufficient unusual conditions.[196] In *McMahan*, claimant was a grocery store clerk and bag boy whose regular duties included lifting and loading cases of groceries. After lifting a fifty-five pound case of dog food from the floor and carrying it to a customer's two-door hardtop car, he suffered a hernia while placing it in the cramped back seat. Compensation was awarded, the unusual condition being that this was the first time claimant had loaded a case in the back seat of such a car in a cramped position.[197]

The results of these cases cannot be rationally harmonized. Although all injuries were sustained while the claimants were performing essentially ordinary job duties, all cases involved some unusual conditions. It is difficult to understand, and the cases do not explain, why lifting and placing an object in a cramped position is more unusual than lifting an object not usually lifted or lifting and twisting with an object. Certainly no difference is apparent that could reasonably account for the differing outcomes. In fact, all activities seem equally as inherently usual or unusual. Thus, the cases illustrate that there is no objective measure of unusual conditions, that decisions rest upon insignificant distinctions and that the standard cannot be rationally applied.

192. 27 N.C. App. 553, 219 S.E.2d 508 (1975).
193. 271 N.C. 586, 157 S.E.2d 1 (1967).
194. 24 N.C. App. 113, 210 S.E.2d 214 (1974).
195. 27 N.C. App. at 555, 219 S.E.2d at 509.
196. 271 N.C. at 588, 157 S.E.2d at 3. Although claimant's injury involved a congenital condition, the medical testimony was that work could have "precipitated" the injury. *Id.* at 587, 157 S.E.2d at 2. Although the court did not discuss whether the existence of the pre-existing condition was significant, this factor may have influenced the decision to deny compensation.
197. 24 N.C. App. at 116, 210 S.E.2d at 215.

D. *Conflict with the Policy Underlying Workers' Compensation*

The injury by accident requirement is unjustified because it is contrary to the basic principles of workers' compensation. The policy determination underlying enactment of workers' compensation was that industry, and ultimately consumers, should bear the cost of work-related injuries.[198] Workers, who before workers' compensation often suffered great hardship when they sustained injury, gave up their right to sue for damages in return for the promise of certain, if limited, compensation for work-related injuries.[199] The earliest rule in North Carolina, as well as most other jurisdictions, was that the remedial acts should be liberally construed in favor of claimants.[200] The court's current construction of the injury by accident requirement arbitrarily and unfairly denies compensation for some injuries that are unquestionably work related as well as for other injuries that may not be work related. Requiring workers to bear the cost of work-related injuries, however, violates the fundamental principle upon which workers' compensation systems were enacted. Even in situations in which work connection is a close question and perhaps ultimately unanswerable with medical certainty, as in some degenerative injury cases, the rule of liberal construction should prevail and compensation should be granted. The effect of the injury by accident construction is to reallocate the risk of injuries previously allocated by the legislature and to shift the burden of these injuries from society to the individual worker.[201]

Some workers' compensation acts received early interpretations.[202] This was natural in view of the systems' then radical concept and the desire to avoid placing potentially vast liability on employers. As the courts and society came to accept workers' compensation as a fair system necessary to modern industrial life, however, these strict constructions were overruled and modified.[203] Early constructions of the "injury by accident" component similar to North Carolina's have been expressly overruled in many states on public policy grounds.[204] Currently, although twenty-six jurisdictions have statutes similar to North Carolina's,[205] only one other state applies a rule similar to North

198. *See* text accompanying notes 19-20 *supra*. For a full discussion of the policies of workers' compensation, see COMPENDIUM, *supra* note 18, at 21-26.

199. *See* Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 725-26, 153 S.E. 226, 268 (1930) (quoting Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 590, 158 P. 256, 258 (1916)).

200. *See* text accompanying note 39 *supra*.

201. The current interpretation of the requirement is reminiscent of the common-law defense of assumption of risk because, under it, benefits are denied when injury is sustained while performing typical or normal work.

202. Larson, *Basic Concepts and Objectives of Workmen's Compensation*, in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 33 (M. Berkowitz ed. 1973).

203. S. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION 472-77 (1947).

204. *See, e.g.*, Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957); Ciuba v. Irvington Varnish & Insulator Co., 27 N.J. 127, 141 A.2d 761 (1958); Stout v. N.D. Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D. Sup. Ct. 1975). In *Stout*, the court stated that the arbitrary requirement that had been interpreted to arise under the "injury by accident" component was "historically incorrect, logically unsound, and impractical in operation." *Id.* at 894.

205. 1B LARSON, *supra* note 23, § 37.10. The statutes are similar in that they all contain the phrase injury "by accident." Nine other states use the phrase "accidental injury." *Id.*

Carolina's injury by accident requirement to all types of injuries.[206] Only approximately nine other states require some type of unusual circumstances in cases involving heart injuries.[207] In the vast majority of states the unexpected sustaining of any type of injury satisfies the injury requirement.[208]

E. Conclusion

Continued use of the external cause and unusual conditions tests to determine whether there has been an injury by accident cannot be justified. The tests are not supported by the language of the statute, their application produces inconsistent results, and they conflict with the remedial policy of workers' compensation. Most importantly, the tests are not rational or well-fitted tests of causation. Although the requirements have been employed to defeat claims in which work connection was questionable,[209] in many of these cases the claim could have been as easily defeated by application of a more sensible causation test. Indeed, in a few cases the North Carolina Supreme Court itself has held that there was a lack of *both* injury by accident and true causation,[210] demonstrating that a more rational causation test can dispose of questionable claims.

The one situation in which there may be some justification for using an arbitrary test is where the medical cause of the injury is truly unknown. Employers should not be liable for injuries for which the cause is truly unknown simply because they occur during working hours. If an arbitrary test is used in these situations it should assign responsibility to the most probable source of the injury. Even if the necessity of an arbitrary test is admitted, however, North Carolina's external cause and unusual conditions rules can be criticized on two grounds. First, the tests can and have been applied to a wide variety of injuries, including those for which true medical causation can be deter-

206. That state is Missouri. *See id.* §§ 38.20, .30.

207. *See id.* § 38.71. The figure is only approximate because decisions are often imprecise and contradictory. *Id.* Larson states that the number of jurisdictions that hold the unexpected injury itself compensable is three to one over the number that do not. *Id.* § 38.30.

208. *See id.* § 38.71. This majority is made up of states that have a statutory "accident" requirement but hold that it is satisfied by the unexpected sustaining of an injury and of states that do not have such a statutory requirement, so that the injury by accident issue does not even arise. *See id.* §§ 38.30, .71.

209. *See, e.g.*, cases cited at note 140 *supra*.

210. *See* Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951). In other cases the court has supported its conclusion that there was not an injury by accident by extensive discussion of medical testimony and the question of actual medical causation, so that it appears that lack of causation was the real basis of the decision. *See* Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962).

The case of Lutes v. Export Leaf Tobacco Co., 19 N.C. App. 380, 198 S.E.2d 746 (1973), illustrates that claims can be properly disposed of by using a traditional causation test exclusively. In *Lutes* the court concluded that claimant had sustained an injury by accident but denied the claim because there was no causal connection between the injury and his work. *Id.* at 383, 198 S.E.2d at 748. In Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934), a case decided before the modern injury by accident requirements were developed, a claim for heart attack was denied on the single ground of lack of causation. *Id.* at 713, 175 S.E. at 97.

mined.[211] Second, the tests do a poor job of determining even the probable source of an injury.

V. PROPOSALS FOR REFORM

There are several alternatives to North Carolina's current method for handling the important causation problems raised in the administration of workers' compensation. All the alternatives examined below deal forthrightly with the causation problem presented by degenerative injuries, something the North Carolina approach does not do. Although these alternative causation tests vary from conservative to liberal, all are more successful in discriminating among claims than the current "injury by accident" interpretation. Finally, the alternatives are not mutually exclusive; different approaches could be applied in the same jurisdiction depending upon the particular kind of injury involved.

A. Applying the Injury By Accident Requirement Only to Heart Attacks and Injuries That Do Not Involve Sudden Rupture

North Carolina could apply its interpretation of the injury by accident requirement only in cases involving heart attacks and injuries that do not involve sudden rupture;[212] injuries involving sudden ruptures,[213] such as hernias and ruptured discs, would not have to pass the extra causation test. Approximately eight states make this distinction in applying a type of unusual conditions test.[214] The jurisdictions that do not apply an extra causation test in cases involving sudden ruptures do so on the theory that proving causation for sudden ruptures is less difficult than for heart attacks and nonsudden injuries.[215] Both common sense and medical knowledge provide some support for

211. *See* text accompanying notes 176-80 *supra*.

212. The category of heart attack cases includes all the cases that involve damage to the heart. Injuries that do not involve sudden rupture are injuries such as back sprain, bursitis, muscle strain, and spasm, and aggravation of pre-existing conditions. Larson categorizes these injuries as arising from "generalized conditions." *See* 1B LARSON, *supra* note 23, § 38.30.

213. Injuries that involve sudden rupture include hernia, ruptured discs, and cerebral hemorrhage. These injuries are associated with actual "breaking" of the body and sudden structural change. Larson categorizes them as "breakage" injuries. *See* 1B LARSON, *supra* note 23, § 38.20.

214. The states are Colorado, Florida, Indiana, Kansas, South Carolina, South Dakota, Washington, and Wyoming. *See* states listed at 1B LARSON, *supra* note 23, § 38.20 at 7-17 n.20, 7-29 n.21, 7-43 n.28, & 7-44 nn.34, 35, 36.1 & 37; states listed at 1B LARSON, *supra* note 23, § 38.30 at 7-77 to -99 n.52. Such a breakdown can only be approximate because opinions are not precise and decisions are sometimes inconsistent.

215. *See, e.g.*, Boeing v. Fine, 65 Wash. 2d 169, 171-73, 396 P.2d 145, 147 (1964), in which the court stated:

> The fundamental differences between heart attacks and back injuries are such as to render the 'unusual exertion test irrelevant when transplanted into the area of the law dealing with injuries to the skeletal structure of the body. . . . A heart attack . . . is largely related to long-term disease, and may be unrelated to the particular employment hazard to which the worker may be subjected. . . . Contrast this to injuries of the back. It is quite possible that a slight or usual strain applied at an unusually different angle could . . . overpower and injure a normal back. . . . An unthinking or automatic application of the heart rule to the mechanical structures of the body would be unreasonable, illogical, and unwise.

this proposition.[216] In jurisdictions that make this distinction,[217] the unexpected occurrence of the injury—the accidental result itself—satisfies the injury by accident requirement for sudden ruptures.[218] The only causation test for sudden injuries is the test of strict medical causation—the question whether the injury was actually caused by the work. The test's source is the "arising out of" component of the statute. Although this alternative is only a slight reform, dropping use of the arbitrary standard and employment of a true causation test in the case of sudden ruptures would permit compensation of job-related injuries of this type even if they were sustained without an external cause or unusual conditions.

B. Adoption of New York's "Wear and Tear" Rule

North Carolina could adopt New York's "wear and tear" rule.[219] Under the New York rule, as under North Carolina's unusual conditions rule, an extra, arbitrary causation test is imposed in all cases in which the injury does not have an obvious external cause. An injury is not compensable unless it has an external cause or meets the extra causation test.[220] Of course in New York, as in North Carolina, medical causation in fact must also be established.[221]

A claim will pass the wear and tear test only if the exertion used to perform the job activity that resulted in injury was greater than exertion experienced in the wear and tear of ordinary nonemployment life.[222] Unlike the

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See also 1B LARSON, *supra* note 23, §§ 38.71-.73, .81.

216. The distinction seems to be based at least in part on definiteness of the injury produced. Because a sudden injury, such as a hernia, produces a definite and immediate change, it is easier to attribute causation to the immediate environment. Furthermore, the etiology, or medical cause, of hernia and lower back injuries is somewhat easier to establish than that of heart attacks. *See* Mitchell, *supra* note 161, at 355.

217. The distinction between heart cases and nonsudden injuries and injuries involving sudden rupture for purposes of imposing an extra causation test has been criticized. *See* 1B LARSON, *supra* note 23, § 38.73. It is argued that the elements that have sometimes been said to give some assurance of causation—definiteness and immediacy—are just as present in the heart attack situation as in the sudden injury situation. This criticism fails to recognize that the distinction may be justified simply because it is easier to determine the medical cause of such injuries as hernias and ruptured discs.

218. 1B LARSON, *supra* note 23, § 38.20.

219. The evolution and content of the New York rule is examined in great detail in 1B LARSON, *supra* note 23, § 38.64(a). The rule is apparently traceable to the case of Burris v. Lewis, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957).

220. In New York, the extra arbitrary causation test can be met in any one of three ways. One way is by satisfying the wear and tear standard. The two other ways to meet the test are to establish that work at the time of injury required greater exertion than the worker's own usual work or greater exertion than the usual work of other employees. *See* 1B LARSON, *supra* note 23, § 38.64(a).

221. *See* Burris v. Lewis, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957), in which an award was reversed for lack of causal connection between work and injury regardless of the nature of external conditions.

222. For a typical application of the standard, see Lerner v. Terrycab Co., 20 A.D.2d 615, 616-17, 245 N.Y.S.2d 565, 566-67 (1963). Job exertion is compared with the typical nonemployment exertion encountered in any hypothetical person's life. Whether job exertion was greater than this rather vague, arbitrary standard is a question of fact, *id.* at 567, that is to be determined from the "common-sense viewpoint of the average man." Masse v. James H. Robinson Co., 301 N.Y. 34, 37, 92 N.E.2d 56, 57 (1950).

North Carolina claimant, the New York claimant who is injured while performing usual work under usual conditions may still recover if his job exertion was greater than the ordinary wear and tear of life.[223] The wear and tear rule and the unusual conditions rule serve the same function because they both arbitrarily deny compensation when external conditions reveal that the work-relatedness of an injury may be suspect. The New York standard is superior to the North Carolina standard, however, because it compares factors that have a more rational bearing on the work-relatedness of the injury.[224] If an injury occurs during work exertion that is not greater than the exertion of ordinary life, there are some reasonable grounds for the general presumption that the injury is not job related. If work exertion is greater than ordinary wear and tear, there is some rational basis for concluding that the injury may be work related. Although application of New York's arbitrary rule undoubtedly leads to denial of some work-related claims, the wear and tear rule is preferable if it is felt that a bright-line standard is necessary to keep an ultimate check on causation.

C. *Adoption of Professor Larson's Two-Step Approach to Proof of Causation*

North Carolina could adopt the two-step approach to proof of causation proposed by Professor Larson, a leading authority on workers' compensation law.[225] Under this alternative the "injury by accident" component is not regarded as a causation requirement. It is satisfied by the unexpected sustaining of an injury.[226] Causation is measured under two different tests, one for legal and one for medical causation, that are derived from the "arising out of" component of the statute. To satisfy the legal causation test, the claimant who had a pre-existing condition must show that job exertion at the time of injury was greater than that of nonemployment life;[227] the claimant without a pre-existing condition need only show that job activity was the medical cause of his

223. *See, e.g.*, Dodson v. Frank Vanecek & Son, 24 A.D.2d 787, 263 N.Y.S.2d 774 (1965), in which benefits were claimed for the death of a mason's helper who suffered a ruptured aneurysm while shoveling sand. Although the worker was performing his usual work under usual conditions at the time of injury, compensation was awarded because the work itself was more strenuous than the ordinary wear and tear of life.

224. Under the unusual conditions rule, usual job conditions are compared to conditions at the time of injury; under the wear and tear rule, exertion of ordinary life is compared with job exertion at the time of injury. Comparing job conditions at the time of injury with usual job conditions reveals little about the qualities of the work that might have been capable of actually causing injury. *See* text accompanying notes 160-65 *supra*. Comparison of job exertion at the time of injury with ordinary nonemployment exertion provides a standard by which to judge whether job exertion was strenuous or extreme. The information revealed by the wear and tear test, therefore, does have a rational relationship to the question whether an injury was job related.

225. *See* 1B LARSON, *supra* note 23, § 38.83.

226. Larson argues that this proposal "can hardly be considered revolutionary" because this was the original meaning given to the "injury by accident" component in England. *Id.* Under this interpretation, the number of denials for lack of injury by accident would be small because few workers would continue at their tasks if they genuinely expected to sustain an injury. *Id.*

227. *Id.* This arbitrary standard employed for cases involving pre-existing conditions is the same as New York's wear and tear rule. For a discussion of the wear and tear rule, see text accompanying notes 219-24 *supra*.

injury.[228] To satisfy the test of medical causation, all claimants must show, as a matter of medical fact, that job activity "contributed causally"[229] to the injury.[230] This alternative thus applies a strict medical causation test for all injuries and an additional arbitrary legal test only in those cases in which suspicion about work-relatedness is highest—those involving a pre-existing condition.[231]

D. Abandonment of Proof of Medical Causation and Adoption of an Arbitrary Legal Causation Standard

North Carolina could reject the need to prove actual medical causation for some types of injuries and award compensation whenever work conditions satisfy an arbitrary legal causation standard.[232] Under this alternative the familiar principle that an injury must be causally connected to the work before it is compensable is frankly abandoned. This radical approach is based upon the recognition that it is extremely difficult, under current medical knowledge, to determine the true medical cause of some injuries, particularly those involving the heart.[233] Reasonable medical views may be diametrically opposed on the question whether work actually caused or even contributed to the cause of a particular injury.[234] It is contended that, in such situations, attempting to make principled disposition of injury claims on the basis of whether they were medically related to the job is impossible.[235] Thus, application of the medical test only leads to confusion and unpredictable decisions. Elimination of the medical causation test and adoption of a legal standard as the sole causation test, the argument proceeds, would make decision-making more predictable

228. 1B LARSON, *supra* note 23, § 38.83.

229. *Id.* § 38.83, at 7-237.

230. 1B LARSON, *supra* note 23, § 38.83. The same test, strict medical causation, is both the legal and medical test in cases in which the claimant did not have a pre-existing condition.

231. This scheme is justified by analogy to the distinction between neutral risk situations and personal risk situations that is usually associated with analysis of problems relating to the "arising out of" component of the statute. *Id.* It is argued that if the worker contributes a personal risk of injury in the form of a pre-existing condition, it is appropriate to require him to prove that employment contributed an even greater risk in the form of exertion greater than that of nonemployment life. If the worker did not contribute a personal risk, it is appropriate to charge the work environment with the injury because, by simply placing the worker at the location of injury, the work was more responsible than the worker for creating the injury. *Id.*

232. This proposal has been suggested by Cohen & Klein, *supra* note 161.

233. *See* note 161 *supra*.

234. Cohen and Klein assert that at least four factors help create situations involving greatly conflicting testimony about causal connection. The problem of "purchased loyalty" is an obvious factor, but the cause of medical disagreement is much deeper. The most important factor is the genuine lack of medical agreement about the medical cause of heart attacks. Another factor is that existing law compels litigants to adopt extreme medical opinions because testimony that there were mixed personal and job causes does the employer no good. The employer must usually pay full compensation if there is any significant work-related cause, even if the worker had a pre-existing condition. The fourth factor is that, because of the different legal and medical concepts of causation, medical testimony may not be addressed to the legal question at issue. Cohen & Klein, *supra* note 161, at 181. Cohen and Klein note that it is never difficult for a party to choose as an expert witness a physician whose views coincide with his legal position and that almost every contested claim involves conflicting medical testimony. *Id.* They express the fear that the success of claims hinge on the persuasive ability of the parties' physicians.

235. *Id.*

and consistent[236] and no less arbitrary than it already is.[237] Under this alternative awards would be granted merely upon proof that the external conditions surrounding the injury met a clearly defined standard.[238] Any arbitrary standard, such as the unusual conditions rule, could be adopted. The wear and tear rule, however, is preferable because it is a better measure of job relatedness.[239] This alternative should be applied, of course, only when the cause of an injury is very difficult to determine.[240]

E. Application of a Pure Medical Causation Test Alone

North Carolina could refuse to employ an arbitrary causation test and instead apply the test of pure medical causation as the only causation requirement for all injuries. Compensability would simply depend upon whether the injury was in fact caused by the work. The injury by accident requirement would be satisfied upon the occurrence of an unexpected injury, regardless of external conditions. The source of the causation test would be the "arising out of" component of the statute. This alternative has been adopted in the great majority of states,[241] and it has been recommended by both the National

236. Cohen and Klein claim that decision-making under an arbitrary legal standard such as "wear and tear of life" or "unusual conditions" "should present little difficulty." *Id.* at 185. This assertion is suspect in light of, for example, the problems North Carolina has encountered in giving definition to the concept of unusual conditions. The proposed alternative, however, examines only external conditions and claims are measured under only one test. On balance, decision-making might be somewhat more predictable.

237. This alternative is based solely upon application of an arbitrary standard. Cohen and Klein assert, however, that decision-making under the medical cause in fact test is also arbitrary because answering that test for some types of injuries is beyond the expertise of medical science. *Id.* at 182.

238. *Id.* at 183. Admitting that their alternative does not purport to determine actual causation, Cohen and Klein state that the test would simply "represent a policy statement by the legislature as to which claims should be charged to the system and which should be charged to other sources, thereby providing a greater degree of predictability and consistency." *Id.* at 186. The authors suggest that states employ the wear and tear rule as the arbitrary standard. It is contended that use of this standard to dispose of claims is responsible and fair because the standard is fairly successful at distinguishing between purely personal injuries and injuries that are at least partly job related. *Id.*

As an example of how this alternative would function if the arbitrary standard were the wear and tear rule, suppose that we have two employees, one a laborer who usually lifted heavy steel blocks and the other an office worker. If the laborer had a heart attack while performing usual work, he would receive compensation because he was undergoing obviously great exertion. If the office worker had a heart attack while moving a six pound table, however, he would not receive compensation because he was not undergoing exertion greater than ordinary life. Actual causation is not relevant in either case. The awards would not be altered even if the office worker could prove his injury was job related and the laborer's employer could establish that the laborer's injury was not job related.

The sustaining of an unexpected injury would satisfy the "injury by accident" component under this alternative. The causation test would be imposed under the "arising out of" component. *Id.* at 184.

239. *Id.*

240. Only heart disease is discussed in Cohen and Klein's proposal. The extremely difficult causation question and the magnitude of the problem distinguish cardiac cases from other injuries. The authors do state, however, that their proposal "could certainly be applied to other pre-existing diseases, especially those such as cancer, in which the causative factors are highly unknown." *Id.* at 186.

241. *See* 1B LARSON, *supra* note 23, § 38.71. Only five states employ an arbitrary causation test for injuries such as cerebral hemorrhages; only 10 states employ an arbitrary test for heart

Commission on State Workmen's Compensation Laws[242] and the Council of State Governments.[243] Although the various medical causation tests differ in their wording of the degree of required causal connection between the injury and work—employing such phrases as "significant cause,"[244] "contributed in some material degree,"[245] and "contributed causally"[246]—the purpose and effect of the tests are essentially the same.[247] In all states that employ the medical test as the sole test of causation, the only important determination is the sometimes difficult question whether the injury was in fact so causally related to the work that it is fair to attribute the cause to the employment environment and require the employer to pay compensation.

This alternative has been criticized on the ground that it does not adequately screen out non-work-related claims.[248] The criticisms are based upon the recognized difficulty of establishing true medical causation for some injuries, especially degenerative injuries, and the fear that medical science can almost always establish at least some medical connection between work and injury.[249] This "floodgates" argument raises the spectre that adoption of the pure medical causation alternative would effectively destroy the causal connection requirement and turn workers' compensation into a general accident insurance system.[250]

There is convincing evidence, however, that use of the medical causation test as the sole causation test does not open the "floodgates" and permit improper awards.[251] First, the medical cause of some degenerative injuries such as hernias and ruptured discs can be established with enough precision to permit rational determination of whether the injury was job related.[252] Although the medical cause of heart attacks cannot be so precisely determined,[253] expert medical opinion is helpful, and judgments about medical causation can be

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injuries. *Id.* The general causation requirement of the "arising out of" component must be satisfied in all states.

242. The NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 49-52 (1972) [hereinafter cited as COMMISSION REPORT].

243. THE COUNCIL OF STATE GOVERNMENTS, WORKMEN'S COMPENSATION AND REHABILITATION LAW § 2(a) (2d ed. 1973). The Council proposes that the injury by accident component be deleted. *Id.* at 83-84.

244. COMMISSION REPORT, *supra* note 242, at 51.

245. Dwyer v. Ford Motor Co., 36 N.J. 487, 493, 178 A.2d 161, 164 (1962).

246. *See* text accompanying note 229 *supra*.

247. COMPENDIUM, *supra* note 18, at 183-84.

248. *See* Purity Biscuit Co. v. Industrial Comm'n, 115 Utah 1, 30, 201 P.2d 961, 975 (1949) (Latimer, J., dissenting); Cohen & Klein, *supra* note 161. The difficulty of proving causation for heart injuries has led the American Heart Association to suggest that all heart cases be removed from the worker's compensation system. *Id.* at 183.

249. *See* Cohen & Klein, *supra* note 161, at 183.

250. Purity Biscuit Co. v. Industrial Comm'n, 115 Utah 1, 29-30, 201 P.2d 961, 975 (1949) (Latimer, J., dissenting).

251. E. CHEIT, *supra* note 19, at 324-32; 1B LARSON, *supra* note 23, § 38.83; COMMISSION REPORT, *supra* note 242, at 35-36.

252. *See* note 161 *supra*. The medical cause of hernia and back injuries can be established with some precision. *See* Mitchell, *supra* note 161. Only three states employ an arbitrary causation test for these injuries. 1B LARSON, *supra* note 23, § 38.20.

253. *See* note 161 *supra*.

made on the basis of "human experience."[254] Second, although it is theoretically possible to determine the medical cause of many types of injuries, it is often not easy for claimants to establish that their particular injuries were in fact job related and thus compensable.[255] The burden of proof of establishing the causal relationship is always on the claimant. The medical causation tests require a showing of much more than de minimus causal connection before compensation is permitted.[256] Claims can fail the medical test because of adverse direct physical evidence from autopsies, contrary expert medical opinion evidence and simple failure to sustain the initial burden.[257] The causation requirements imposed by the "in the course of" component provide added assurance of work relatedness. Third, experience in the vast majority of states that employ the medical causation test exclusively is evidence that the "floodgates" fears are exaggerated.[258] Despite the unquestioned difficulty in some cases of determining medical causation, most state compensation schemes function fairly and effectively with the test of pure medical causation.[259] Studies in some of these states show that the number of borderline cases in which there exists a true causation dispute and in which a causation decision under the liberal test could result in an arguably improper award is relatively low.[260]

If North Carolina adopted the strict medical test as the sole causation test and held that the injury by accident component did not impose a causation requirement, job-relatedness of all injuries would be measured under the "arising out of" component of the statute. In North Carolina, the general degree of causal connection required by the arising out of component is met when work was a "contributing proximate cause"[261] of the injury or the injury was a "natural and probable consequence"[262] of the work. These generally worded tests apply in all situations in which there is a causation question, including those involving the special causation problems of degenerative injuries. The court has more specifically addressed the question of the requisite

254. Hoffman v. National Sur. Corp., 91 Ga. App. 414, 417, 85 S.E.2d 784, 786 (1955). Evidence of the strenuous nature of the work involved, expert medical opinion evidence and natural inferences can all aid in determining causation. *See* LARSON, *supra* note 23, § 38.83.

255. *See* E. CHEIT, *supra* note 19, at 329-30 (citing D. Russell & R. Beard, Heart Disease and Workmen's Compensation, What are the Costs to the Insurance Carrier? (California Heart Association mimeograph)); 1B LARSON, *supra* note 23, § 38.83.

256. *See* text accompanying notes 244-47 *supra*. If injury occurs while a claimant is performing easy or nonstrenuous work it will be difficult to establish that the employment environment contributed to the cause of the injury. An injury is not causally related to employment if it was caused by a pre-existing degenerative condition whose natural progress simply brought it to climax during working hours.

257. *See* 1B LARSON, *supra* note 23, § 38.83. Larson states that simple failure to prove sufficient medical causation is probably the most common reason for denial of claims. *Id.*

258. See E. CHEIT, *supra* note 19, at 329-32; 1B LARSON, *supra* note 23, § 38.83. Some of the factors that work to reduce the number of arguably nonemployment related claims that are brought are the availability of assistance from nonoccupational programs such as social security and private insurance plans and increasing safety standards in the work place.

259. COMMISSION REPORT, *supra* note 242, at 36.

260. E. CHEIT, *supra* note 19, at 329-32. Studies in New York and California indicate that the number of disputed heart cases amounts to only a very small number of the total claims actually filed and benefit awards determined. *Id.*

261. Cole v. Guilford County, 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963).

262. Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963).

degree of causation in cases that involve pre-existing conditions. The court has made it clear that, while work did not have to be the sole cause, it had to "contribute in some reasonable degree" to the injury.[263] In order to "arise out of" employment, the injury had to have a "definite discernable relation" to job activity.[264] The basic causation test in North Carolina is thus similar to the medical causation tests of other jurisdictions, and there is no reason why it could not adequately serve as the sole test of causation for all injuries.

VI. CONCLUSION

Workers' compensation, the nation's first and oldest form of social insurance,[265] has been much criticized in recent years,[266] with the most fundamental criticism being simply that the various state-administered programs have failed to provide fair compensation. Many critics have concluded that the current workers' compensation system is a failure, and several far-reaching alternatives have been suggested for dealing with the problem of employment-related injuries.[267] In 1971 Congress created a National Commission on State Workmen's Compensation Laws to investigate the charges aimed at workers' compensation.[268] The Commission's report was critical of most state laws, finding them generally "neither adequate nor equitable."[269] Alternatives to the present system were examined, but the Commission concluded that the most feasible alternative was to retain and reform the present system.[270] One of the Commission's reform proposals was that "the 'accident' requirement be dropped as a test for compensability."[271] The Commission noted that interpretations of the injury by accident requirement such as North Carolina's had served as arbitrary bars to compensation for work-related injuries and that elimination of such constructions would help realize the Commission's goal that there "should be no legal impediments to full coverage of all injuries which are work-related."[272]

It is time to change North Carolina's construction of the injury by acci-

263. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951).

264. *Id.* (quoting Cox v. Kansas City Refining Co., 108 Kan. 320, 195 P. 863 (1921)).

265. Larson, *Compensation Reform in the United States*, in OCCUPATIONAL DISABILITY AND PUBLIC POLICY 14 (E. Cheit & M. Gordon eds. 1963).

266. For a collection of criticisms, see Berkowitz, *Aspects of the Economics of Workmen's Compensation*, in REPORT OF THE NATIONAL WORKSHOP ON REHABILITATION AND WORKMEN'S COMPENSATION 13-14 (1971).

267. Possible alternatives include integrating workers' compensation with other social programs, *see* COMPENDIUM, *supra* note 18, at 299-305; giving injured workers an option to recover under both the compensation system and a negligence based alternative, *see* Marcus, *Advocating the Rights of the Injured*, in OCCUPATIONAL DISABILITY AND PUBLIC POLICY 77 (E. Cheit & M. Gordon eds. 1963); abandoning workers' compensation and returning to a system of liability based on fault, *see* COMMISSION REPORT, *supra* note 242, at 119-20, and creating a federal workers compensation system.

268. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 27, 84 Stat. 1616.

269. COMMISSION REPORT, *supra* note 242, at 25.

270. *Id.* at 119-21. The Commission recommended that the federal government enact legislation to guarantee state compliance. *Id.* at 127.

271. *Id.* at 49.

272. *Id.*

dent requirement. The unquestioned difficulty of determining the precise medical cause of some degenerative injuries is not a sufficient justification for maintaining the current across-the-board rule. Continued use of the arbitrary presumption against the work-relatedness of injuries sustained under usual circumstances is also not justified in light of the many better alternative methods for determining causation. All the alternatives discussed in Section V are based on more reasonable public policy positions and more sensible interpretations of the language of the statute than the current construction. The liberal, medical cause in fact test is a fair and just alternative method of determining causation that would not open the floodgates to unjustified claims. If it is believed that an arbitrary scheme is necessary to keep an ultimate check on causation, however, more rational arbitrary alternatives are available. Under whatever alternative selected, the sustaining of an unexpected injury—the accidental result—should alone satisfy the injury by accident requirement. Necessary causation tests should be imposed under the "arising out of" component of the statute. The policy favoring liberal construction should dictate that, if any error is to be made in the selection of the general causation test to be used, it should be error in favor of the injured worker.

Either judicial or legislative action could bring about the necessary change. Any of the alternatives listed above could be adopted by the court without the need for legislative action. The opinions indicate, however, that the North Carolina courts would appreciate new legislative direction.[273] The legislature could act by adopting the alternative contained in The Council of State Government's Model Workmen's Compensation Law,[274] which omits the phrase "by accident" from the compensation formula.[275] As another alternative, the words "or result" could be added directly after the phrase "injury by accident." Under either of these alternatives, the sustaining of an injury alone would satisfy the "injury" component of the statute. Causation would be tested only under other components of the statute.

In surveying the current injury by accident rule, Justice Ervin's admonition about persisting in error should be remembered.[276] The claims of injured workers such as Thomas Pulley should not be denied because of harsh, narrow requirements that have little relationship to causation. The rationale of the case for compensation has never been presented better than in Justice Seawell's quotation in *Edwards v. Piedmont Publishing Co.* from the opinion of the House of Lords in the seminal workers' compensation case, *Fenton v. Thorley*:

> "It does seem to be extraordinary that anybody should suppose that . . . Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as 'accidents' which be-

273. *See, e.g.*, text accompanying note 153 *supra*.

274. THE COUNCIL OF STATE GOVERNMENTS, WORKMEN'S COMPENSATION AND REHABILITATION LAW (2d ed. 1973).

275. *Id.* § 2(a).

276. *See* text accompanying note 159 *supra*.

yond all others merit favorable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident. . . . A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that this is right."[277]

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277. Edwards v. Piedmont Publishing Co., 227 N.C. 184, 191-92, 41 S.E.2d 592, 597 (1947) (Seawell, J., concurring) (quoting Fenton v. J. Thorley & Co. [1903] A.C. 443).