UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 65 | Number 6 Article 28

8-1-1987

Houses and Wages: An Increase in Worker's Compensation Recovery

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Houses and Wages: An Increase in Workers' Compensation Recovery

The North Carolina Workers' Compensation Act[1] (the Act) provides compensation for workers who suffer disability by accident arising out of and in the course of their employment. The Act is a compromise that gives "a swift and certain remedy to an injured [employee]," while at the same time insuring "a limited and determinate liability for employers."[2] It replaces tort liability with no-fault liability.[3] Compensation under the Act is based on the victim's reasonable expenses for treatment or care, plus a fraction of the individual's average weekly wages for the period of disability.[4] The purpose of the Act is to "compel industry to take care of its own wreckage."[5] The North Carolina Supreme Court recently expanded the type of relief provided by the Act in *Derebery v. Pitt County Fire Marshall*.[6] First, the court held that in the case of a volunteer fireman, the weekly wages of the victim's two part-time jobs should be combined to calculate the average weekly wage on which compensation is to be based rather than calculating compensation based on the higher of the two wages, as the court previously had held.[7] Second, the court ruled that an employer's duty to furnish "other treatment or care" under North Carolina General Statutes section 97-29 includes a duty to furnish wheelchair-accessible housing when it is not otherwise available to the victim.[8]

This Note examines both of these issues in light of the past history of the Workers' Compensation Act in North Carolina, as well as in comparison with the positions that other states have taken on these issues. The Note concludes that the court should not limit its holding to volunteer firemen, but should allow combination of wages for all victims who hold more than one job. It also concludes, however, that the court went too far in awarding the full cost of wheel-

1. N.C. GEN. STAT. §§ 97-1 to -101 (1985). The Workers' Compensation Act is administered by the North Carolina Industrial Commission. *See id.* §§ 97-77 to -86. When an accident occurs, the employee is first required to give notice of the accident to the employer. *Id.* § 97-22. The employee then has two years in which to file a claim with the Industrial Commission. *Id.* § 97-24. If the employer and employee are unable to agree on a level of compensation, either party can apply to the Industrial Commission for a hearing. *Id.* § 97-83. The hearing is conducted either by a member of the Commission or a deputy. *Id.* § 97-84. A party who is not satisfied with the award has the right to apply for review by the full Commission. *Id.* § 97-85. Findings of fact and law made by the Commission are binding, but the parties have a right to appeal to the North Carolina Court of Appeals. *Id.* § 97-86.

2. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966).

3. Andrews v. Peters, 55 N.C. App. 124, 125, 284 S.E.2d 748, 749 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

4. N.C. GEN. STAT. §§ 97-26, -29 (1985). Section 97-26 provides for recovery of medical expenses. *Id.* § 97-26. Section 97-29 sets the rate of compensation for total incapacity at "sixty-six and two thirds percent (66 2/3%) of his average weekly wages, but not more than the amount established annually . . . nor less than $30.00 per week." *Id.* § 97-29.

5. Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

6. 318 N.C. 192, 193-94, 347 S.E.2d 814, 815 (1986).

7. *Id.* at 198, 347 S.E.2d at 818.

8. *Id.* at 205, 347 S.E.2d at 822.

chair-accessible housing instead of limiting the employer's liability to the added cost of the housing attributable to its special features.

On March 5, 1983, nineteen year-old Frank Derebery, a volunteer fireman, was injured in an accident arising out of and in the course of his employment. The accident paralyzed his legs and permanently confined him to a wheelchair.[9] Prior to the injury Derebery had worked two part-time jobs, earning average weekly wages of $74.41 and $87.40, respectively. After the injury he was permanently disabled. Derebery returned to his parents' rented home, but several of the rooms, including the bathroom, were inaccessible to him.[10] The owner of the house refused to permit modifications. With the help of rehabilitation therapy Derebery became capable of living independently and expressed a desire to do so. He requested that the Industrial Commission (the Commission) award him a mobile home, the Enabler, that was designed to accommodate a wheelchair.[11] The Commission awarded Derebery compensation based on the weekly wages of the higher paying job, refusing to combine the wages of both jobs. The Commissioner, however, did order the employer, Pitt County Fire Marshall, to provide Derebery with a wheelchair-accessible place to live.[12]

Both parties appealed. Derebery contended that the Commission erred in not allowing combination of wages from both of his jobs in computing the average weekly wage and that the award thus failed to reflect his true earning capacity.[13] Pitt County Fire Marshall contended that the Commission erred in awarding Derebery wheelchair-accessible housing, arguing that the statute did not allow such an award.[14] Relying on *Barnhardt v. Yellow Cab Co.*,[15] the North Carolina Court of Appeals upheld the determination of wages.[16] *Barnhardt*, a 1966 case, contains dicta which stated that in the case of volunteer firemen, compensation was to be based on the higher paying of the fireman's jobs.[17] The appellate court, however, reversed and vacated the order for housing, reasoning that nothing in the Act authorizes such an award.[18]

The supreme court reversed the court of appeals, holding that the victim should receive compensation based on the combined wages and that he also should be provided with wheelchair-accessible housing.[19] The court distinguished this case from *Barnhardt* on the ground that *Barnhardt* involved a cab driver whose compensation was tied to the wages of the job at which he was

9. *Id.* at 194, 347 S.E.2d at 816.

10. *Id.* at 194, 347 S.E.2d at 815-16.

11. *Id.* at 194, 347 S.E.2d at 816.

12. *Id.* at 195-96, 347 S.E.2d at 816-17.

13. *Id.* at 193, 347 S.E.2d at 815.

14. *Id.*

15. 266 N.C. 419, 146 S.E.2d 479 (1966).

16. Derebery v. Pitt County Fire Marshall, 76 N.C. App. 67, 70, 332 S.E.2d 94, 96-97, *rev'd*, 318 N.C. 192, 347 S.E.2d 814 (1985).

17. *Barnhardt*, 266 N.C. at 428, 146 S.E.2d at 485.

18. *Derebery*, 76 N.C. App. at 72, 332 S.E.2d at 97-98.

19. *Derebery*, 318 N.C. at 193-94, 347 S.E.2d at 815.

injured.[20] *Derebery* involved a volunteer fireman,[21] and the Act makes special provision for volunteer firemen, providing that their compensation is based on the wages of their principal employment, rather than their wages as volunteer firemen.[22] The court overruled the dicta in *Barnhardt* that applied to volunteer firemen.[23] In upholding the housing award, the court reasoned that the history of expansion of the statute would support such an award,[24] and also noted that other jurisdictions had allowed such awards.[25]

Chief Justice Branch and Justices Billings and Meyer concurred on the wage issue, but dissented on the housing issue.[26] The dissent argued that such an award was not intended by the general assembly and not permissible under the Act.[27] Furthermore, the dissent stated that even if such an award is permitted by the statute, it would not be appropriate here because this case is nothing more than "a young man desiring to move out of his parents' home to live independently."[28] This desire for independence, reasoned the dissent, is not the kind of unusual event that would justify a housing award.[29]

According to the North Carolina Supreme Court, "[i]t is a fundamental rule that the Workmen's Compensation Act 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation.' "[30] The court, therefore, has strictly construed the provisions of the Act that allow employers to escape liability by hiring independent contractors.[31] In *Johnson v. Asheville Hosiery Co.*[32] the supreme court refused to characterize a man hired to paint the employer's factory as an independent contractor.[33] The court also held that even though the employment was "casual," it was within the course of the employer's business, and the employer thus was liable under the Act for injuries suffered by the man hired to paint the factory.[34] Likewise, the court has been willing to reopen a case after a compensation award had been entered for the purpose of increasing the compensation, when it was shown that the injury was not partially disabling as first believed,

20. *Id.* at 198, 347 S.E.2d at 818.

21. *Id.*

22. N.C. GEN. STAT. § 97-2(5) (1985).

23. *Derebery*, 318 N.C. at 198, 347 S.E.2d at 818.

24. *Id.* at 199, 347 S.E.2d at 819.

25. *Id.* at 201-03, 347 S.E.2d at 820-21.

26. *Id.* at 205-08, 347 S.E.2d at 822-24 (Billings, J., concurring in part and dissenting in part).

27. *Id.* at 206, 347 S.E.2d at 822 (Billings, J., concurring in part and dissenting in part).

28. *Id.* at 205, 347 S.E.2d at 822 (Billings, J., concurring in part and dissenting in part).

29. *Id.*

30. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965) (quoting Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 593 (1930)).

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

32. 199 N.C. 38, 153 S.E. 591 (1930).

33. *Id.* at 40, 153 S.E. at 593 (employer directed progress of work and reserved control of employee and other painters, thus employee not an independent contractor).

34. *Id.* at 41, 153 S.E. at 593. The court held that painting is necessary to provide proper lighting and make the workplace reasonably safe in a hosiery factory. Therefore painters should be considered to be within the course of the employer's business even though not engaged in the employer's profession. *Id.*

but permanently disabling.[35] Nonetheless, the court in *Barnhardt* was unwilling to construe the statute to allow a victim who worked full-time at one job and part-time at another job to combine the two wages in calculation of his average weekly wage, reasoning that it would be unfair to the employer to base compensation on an amount greater than the wages the employer had paid the employee.[36]

Under the Act, the term "average weekly wages" includes only the wages from the employment in which the victim was working at the time of the injury.[37] The Act does provide, however, that when for "exceptional reasons" this determination would be unfair, the Commission may use "such other method of computing average weekly wages . . . as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."[38] The court in *Barnhardt* found no "exceptional reasons" and refused to combine the victim's wages.[39] According to the court, when the general assembly shifted the economic loss due to the injury from the employee to the employer, the intention was to "relate the amount of that loss to the average weekly

35. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 578, 139 S.E.2d 857, 863 (1965). Plaintiff suffered a head injury, but his doctors did not become convinced until after the first compensation hearing that the injury was permanent. The court refused to apply the rule in civil actions requiring all damages to be assessed and awarded at one trial, and upheld the Commission's discretionary power to hold a second hearing and award compensation for permanent rather than partial disability. *Id.*

36. *Barnhardt*, 266 N.C. at 427, 146 S.E.2d at 485.

37. The Act reads:

> Average Weekly Wages.- "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of injury . . . divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same locality or community.
>
> *But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*
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> . . . .
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> In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282 or senior members of the State Civil Air Patrol functioning under Article 11, Chapter 143B, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman [or other employee listed above] . . . was earning in the employment wherein he principally earned his livelihood as of the date of the injury.

N.C. GEN. STAT. § 97-2(5) (1985) (emphasis added).

38. *Id.*

39. *Barnhardt*, 266 N.C. at 427, 146 S.E.2d at 485.

wages which that employer was paying the employee."[40] It would be unfair to an employer to base liability on an average weekly wage higher than the wages the employer had paid to the employee prior to the injury, because the amount of compensation after the injury would be greater than the compensating employer paid in wages before the injury.[41] Because Barnhardt was injured while working at his part-time job, the court held that he could recover benefits based only on his wages from that job.[42] The court recognized the harshness of this rule to the employee, but stated that it was up to the general assembly, not the court, to change this result.[43]

Other states have dealt with this issue in four different ways. Some, like North Carolina, have held that the victim could recover based only on the average weekly wage in the employment in which the injury occurred.[44] Some have said that wages may be combined if earned in similar or related employment, but not if they were earned in unrelated employment.[45] Still others have held that average weekly wages should be based on a combination of all of the employee's wages regardless of whether the employments were similar or not.[46] And in one state, instead of applying the related or similar test, the court based its determination on whether the disability affects both employments.[47]

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40. *Id.*

41. *See, e.g., id.*

42. *Id.* at 429-30, 146 S.E.2d at 486.

43. *Id.* at 429, 146 S.E.2d at 486.

44. For example, in Tomarchio v. Township of Greenwich, 75 N.J. 62, 379 A.2d 848 (1977), plaintiff, whose deceased wife had held a full-time clerical position and worked one day a week at a different, but similar, position, was only allowed to recover based on the wages of the full-time job, which was the employment in which decedent was killed. *Id.* at 78-79, 379 A.2d at 855-56. The court also discussed the apparent harshness of the New Jersey rule of limiting the wage base to the employment of injury. Even in cases when the employee is injured at a part-time job, only the wages of the part-time job become part of the wage base for award computation. The court stated, however, that the New Jersey statute alleviates this unfairness by expanding part-time earnings to a full-time basis and basing the compensation on that amount. *Id.* at 79, 379 A.2d at 856. North Carolina does not expand part-time wages to create a constructive full-time weekly wage. *See also* Glazebrook v. Hazelwood School Dist., 498 S.W.2d 823, 826-27 (Mo. Ct. App. 1973) (claimant, a professional bus driver who also drove a school bus, allowed to recover based only on his part-time earnings as a school bus driver even though the employments were similar).

45. *See, e.g.*, Wesolowski v. Industrial Comm'n, 99 Ariz. 4, 7, 405 P.2d 887, 889 (1965) (en banc) (work as a water meter reader not similar to truck driving, so victim could not recover based on truck driver wages even though he was injured in a traffic accident while reading meters); St. Paul-Mercury Indem. Co. v. Idov, 88 Ga. App. 697, 698-99, 77 S.E.2d 327, 329, *cert. dismissed*, 210 Ga. 256, 78 S.E.2d 799 (1953) (victim who had held three jobs, two as a retail sales clerk at liquor stores and one as a retail sales clerk at a clothing store, allowed to recover compensation based on all three salaries because the three jobs were similarly hazardous in nature); Friddle v. Industrial Comm'n, 92 Ill. 2d 39, 46-47, 440 N.E.2d 865, 869 (1982) (full-time employment as a driving instructor unrelated to employment as a volunteer fireman, so widow of victim could recover based only on fireman's wages).

46. *See, e.g.*, Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 418-19, 156 P. 491, 496 (1916) (award to widow of night watchman shot and killed on the job based on combined salary from six different jobs he held); American Uniform & Rental Serv. v. Trainer, 262 So. 2d 193, 195-96 (Fla. 1972) (machine operator injured at part-time job allowed to recover benefits based on combined salary in part-time and full-time jobs); Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 170-71, 217 S.E.2d 214, 217 (1975) (death benefits for employee shot and killed during convenience store robbery computed based on employee's combined wages as a clerk at the convenience store and as a forklift operator, even though the employments were not "related or similar").

47. *See* Lahay v. Hastings Lodge No. 1965, 398 Mich. 467, 481, 247 N.W.2d 817, 824 (1976) (victim, injured by slipping on a piece of ice while working part-time as a bartender, not allowed to

The *Derebery* court distinguished *Barnhardt* on the basis that Derebery was a volunteer fireman.[48] The Act makes special provision for volunteer firemen,[49] basing compensation for volunteer firemen not on their income as firemen, but on income from the " 'employment wherein [they] principally earned [a] livelihood.' "[50] The employer's liability would not be related to the employee's wages from that job even if the wages were not combined, reasoned the court, so no reason exists to prohibit combination of wages from two or more jobs.[51] The court further implied that there would be no unfairness to the employer in allowing combination.[52] The *Barnhardt* court did say in dicta that in the case of a volunteer fireman, "the North Carolina Legislature did not permit a *combination* of wages, but adopted as its basis the wages of his principal employment."[53] The *Barnhardt* decision seemed to have interpreted "principal employment" to mean the higher paying of the two jobs.[54] The *Derebery* decision expressly overruled this language.[55] The court reasoned that the general assembly had intended that a volunteer fireman receive "compensation commensurate with his proven earning ability as demonstrated by the wages he receives for work done other than in his capacity as a volunteer fireman."[56] The court interpreted "principal employment" to mean the job or jobs in which the fireman " 'principally earned his livelihood.' "[57]

This decision will allow volunteer firemen to recover based on their wages in two or more part-time jobs.[58] The purpose of the average weekly wage is to provide a measure of the injured employee's earning capacity.[59] This combination of wages is more likely to reflect the employee's true earning capacity.[60] The *Derebery* decision may go beyond granting greater recovery for volunteer firemen. It may reflect the court's dissatisfaction with the *Barnhardt* decision, which has been criticized since it was first handed down.[61] One commentator noted that the general assembly had set a maximum recovery under the Workers' Compensation Act so that the unlimited liability that the court in *Barnhardt*

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recover for wages of full-time insurance adjustor job because his full-time job was not affected by the injury).

48. *Derebery*, 318 N.C. at 198, 347 S.E.2d at 818.

49. N.C. GEN. STAT. § 97-2(5) (1985). For the text of the relevant portion of the Act, see *supra* note 37.

50. *Derebery*, 318 N.C. at 196, 347 S.E.2d at 817 (quoting N.C. GEN. STAT. § 97-2(5) (1985)).

51. *See id.* at 196-98, 347 S.E.2d at 817-18.

52. *See id.* at 197-98, 347 S.E.2d at 817-18.

53. *Barnhardt*, 266 N.C. at 428, 146 S.E.2d at 485.

54. *See id.*

55. *Derebery*, 318 N.C. at 198, 347 S.E.2d at 818.

56. *Id.* at 197, 347 S.E.2d at 817.

57. *Id.* (quoting N.C. GEN. STAT. § 97-2(5) (1985)).

58. *Id.* at 198, 347 S.E.2d at 818. This holding presumably also will relate to the other enumerated employees in N.C. GEN. STAT. § 97-2(5) (1985). This Note refers to volunteer firemen only, as a matter of convenience, but "volunteer firemen" should be read to include all employees enumerated in § 97-2(5). See *supra* note 37 for text of N.C. GEN. STAT. § 97-2(5) (1985).

59. *Derebery*, 318 N.C. at 196-97, 347 S.E.2d at 817.

60. *Id.*

61. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 60.31(c), at 10-626, -627 (1986); Note, *Workmen's Compensation—Average Weekly Wage—Combination of Wages*, 44 N.C.L. REV. 1177 (1966).

seemed to fear was in fact limited by statute.[62] He called for legislative reform to allow combination of wages,[63] but the general assembly has not as yet accepted the invitation to amend the statute.[64]

Another commentator suggested that the general assembly has already provided the remedy.[65] Under the existing statute, if "exceptional reasons" lead to an unfair average weekly wage when the statutory formulas for computing the wage are applied, "such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."[66] This commentator concluded that the court should apply this statute to find the existence of such exceptional circumstances when the employee was working two jobs, and therefore should allow combination of wages.[67]

The South Carolina Supreme Court has done just that. In *Foreman v. Jackson Minit Markets, Inc.*[68] the employee, a convenience store clerk, was shot and killed during a robbery.[69] The court allowed his estate to recover based both on his wages as a clerk and on his wages as a forklift operator.[70] The court reasoned that his employment in two jobs was an "exceptional reason" under the statute and adopted a combination of wages as the method of computation that would " 'most nearly approximate the amount which the injured employee would be earning were it not for the injury.' "[71] The South Carolina statute is virtually identical to the North Carolina Act in these provisions.[72] Yet, South Carolina has applied its statute to allow injured employees to recover based on the wages earned in two jobs.[73] North Carolina should follow suit.

The *Derebery* court was correct in allowing a volunteer fireman to recover

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62. Note, *supra* note 61, at 1182. At the time of that Note, the maximum recovery was set at $37.50. Act of May 29, 1963, ch. 604, § 1(a), 1963 N.C. Sess. Laws 688, 688 (codified at N.C. GEN. STAT. § 97-29 (1965)). The Act has since been amended to provide that the maximum be established annually. Act of April 27, 1981, ch. 276, § 2, 1981 N.C. Sess. Laws 269, 269 (codified as amended at N.C. GEN. STAT. § 97-29 (1985)); *see supra* note 4.

63. Note, *supra* note 61, at 1183.

64. *See* N.C. GEN. STAT. § 97-2(5) (1985) (Act has not been amended to allow combination of wages); *see also supra* note 37 (text of relevant portion of Act).

65. 2 A. LARSON, *supra* note 61, § 60.31(c), at 10-627, -628.

66. N.C. GEN. STAT. § 97-2(5) (1985).

67. 2 A. LARSON, *supra* note 61, § 60.31(c), at 10-627, -628.

68. 265 S.C. 164, 217 S.E.2d 214 (1975).

69. *Id.* at 166, 217 S.E.2d at 214.

70. *Id.*

71. *Id.* at 167, 170, 217 S.E.2d at 215-16 (quoting S.C. CODE ANN. § 42-1-40 (Law. Co-op. 1962)).

72. The South Carolina Act in effect at the time of *Foreman* read:

> Average weekly wages - "*Average weekly wages*" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury . . . .
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> . . . .
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> But when for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. CODE ANN. § 72-4 (Law. Co-op. 1962) (current version at S.C. CODE ANN. § 42-1-40 (1985)). The North Carolina Act is virtually identical to this provision. *See supra* note 37.

73. *Foreman*, 265 S.C. at 170, 217 S.E.2d at 216-17.

based on the wages from all of his jobs. The court, however, should not limit this holding to volunteer firemen, but should extend it to all workers. As it stands now, a worker who is injured while performing a part-time job will receive only minimal recovery.[74] Although it is true that the statute should be construed to limit the employer's liability, the court should not do so to the extent that it will leave a severely injured worker destitute. Furthermore, such a construction will not expose the employer to unlimited liability because the employer's liability is limited by the Act.[75] The *Barnhardt* court correctly pointed out that there is no reason to allow combination of wages from similar jobs, and at the same time not allow combination of wages from all jobs.[76] Thus, this court should adopt the position of other states that allow combination of wages from all jobs in which the employee was working.[77] This position would more nearly comply with the purpose of the statute, which is to compensate injured employees on the basis of their earning capacity.[78]

The *Derebery* opinion not only allowed a combination of wages under the Workers' Compensation Act, but also, for the first time, allowed an employee to recover the cost of specially equipped housing under the statute.[79] The North Carolina Act provides that "[i]n cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of [sic] rehabilitative services shall be paid for by the employer during the lifetime of the injured employee."[80] In *Godwin v. Swift & Co.*[81] the North Carolina Supreme Court ruled that "[t]he statute makes provision for payment for named essential items and services, and adds '*other treatment or care.*' The provision for other treatment or *care* goes beyond and is in addition to the specifics set out in the statute."[82]

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74. The claimant in *Barnhardt* recovered only $16.14 per week (60% of $26.90). *Barnhardt*, 266 N.C. at 422, 430, 146 S.E.2d at 481, 486.

75. *See supra* note 62 and accompanying text.

76. *Barnhardt*, 266 N.C. at 424, 146 S.E.2d at 482. There are basically two different approaches used in applying the related or similar test. One is a comparison of the hazards of the two jobs to see if they are similarly hazardous. *E.g.*, St. Paul-Mercury Indem. Co. v. Idov, 88 Ga. App. 697, 698, 700-01, 77 S.E.2d 327, 329 (1953), *cert. dismissed*, 210 Ga. 256, 78 S.E.2d 799 (1953); *see supra* note 45 and accompanying text. The problem with this approach is that the wages not included in the award are usually those from a less hazardous industry. 2 A. LARSON, *supra* note 61, § 60.31(e), at 10-636.

The second approach is to compare the industries to see if the industries are related. *E.g.*, J.J. Murphy & Son, Inc. v. Gibbs, 137 So. 2d 553, 559 (Fla. 1962) (work in a school cafeteria not related or similar to work in a print shop; therefore, injured employee's award could not reflect combined wages). Florida later rejected the related or similar test. American Uniform & Rental Serv. v. Trainer, 262 So. 2d 193, 195-96 (Fla. 1972). The problem with this approach is that the industry is not bearing the cost of compensation as a whole; rather, the individual employer bears the cost. If employers in the same industry shared costs, combining wages for related and similar employment would make sense. Absent shared costs, however, refusing to combine wages for unrelated or dissimilar work is indistinguishable from combining wages for related work. 2 A. LARSON, *supra* note 61, § 60.31(f), at 10-637, -638. For an in-depth criticism of the related or similar test, see 2 A. LARSON, *supra* note 61, § 60.31.

77. *See* cases cited *supra* note 46.

78. *See supra* text accompanying note 59.

79. *Derebery*, 318 N.C. at 205, 347 S.E.2d at 822.

80. N.C. GEN. STAT. § 97-29 (1985).

81. 270 N.C. 690, 155 S.E.2d 157 (1967).

82. *Id.* at 693, 155 S.E.2d at 159-60 (emphasis in original).

The Act has not always offered such expansive recovery. When originally enacted, it made no provision for medical expenses for longer than ten weeks from the date of injury for a permanently disabled worker.[83] In 1947 the general assembly amended the Act to include "reasonable, necessary medical, nursing and hospital expenses" for the life of an employee who was paralyzed due to a brain or spinal cord injury.[84] In 1953 the Act was again amended to include "other treatment or care" for such employees.[85] And finally, in 1973 the Act was amended to provide "other treatment or care or rehabilitative services" for any employee with a permanent disability.[86] The Act clearly has undergone continued expansion since it was first enacted, but the question raised in *Derebery* was whether even these expanded benefits include wheelchair-accessible housing.

Different states have answered this question in different ways. In dealing with the same or similar issues, states have taken three different approaches. Some courts have refused to allow recovery for housing or for modifications to housing.[87] The Virginia Supreme Court refused to interpret its statute even to require the employer to pay for a wheelchair ramp for an employee who was confined to a wheelchair.[88] Nebraska likewise has refused to allow a housing award. The Nebraska Supreme Court simply rejected the request for modification of housing without comment.[89]

At least one state has attempted to make an apportionment between the added cost of specially equipped housing and other items not compensable under the statute. Plaintiff in *Pine Bluff Parks and Recreation v. Porter*[90] requested that the employer be required to pay the rent to house him in a special facility designed as a residence for paraplegics. The Arkansas Court of Appeals held

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83. Act of March 11, 1929, ch. 120, § 25, 1929 N.C. Pub. Laws 117, 127-28; *see also id.* § 29, at 129 (providing compensation for permanently disabled employees, but making no provision for medical expenses).

84. Act of April 4, 1947, ch. 823, § 1, 1947 N.C. Sess. Laws 1118, 1118-19 (codified as amended at N.C. GEN. STAT. § 97-29 (1985)).

85. Act of April 29, 1953, ch. 1135, § 1, 1953 N.C. Sess. Laws 1059, 1059 (codified as amended at N.C. GEN. STAT. § 97-29 (1985)).

86. Act of April 12, 1974, ch. 1308, § 2, 1973 N.C. Sess. Laws 609, 609 (codified as amended at N.C. GEN. STAT. § 97-29 (1985)).

87. *See, e.g.*, Spiker v. John Day Co., 201 Neb. 503, 512-13, 270 N.W.2d 300, 306 (1978); Low Splint Coal Co. v. Bolling, 224 Va. 400, 406, 297 S.E.2d 665, 668 (1982).

88. Low Splint Coal Co. v. Bolling, 224 Va. 400, 406, 297 S.E.2d 665, 668 (1982). The Virginia statute at the time provided that "[a]s long as necessary after an accident, the employer shall furnish . . . free of charge . . . a physician . . . and other necessary medical attention." VA. CODE ANN. § 65.1-88 (1980), *amended by* Act of March 27, 1983, ch. 471, 1983 Va. Acts 614, 615 (codified as amended at VA. CODE ANN. § 65.1-88 (Supp. 1986)). The court concluded that a ramp did not constitute "medical attention." *Low Splint Coal*, 224 Va. at 404, 297 S.E.2d at 667. The statute was later amended to provide that:

> In awards entered for incapacity for work . . . upon determination by the treating physician and the Commission that the same is medically necessary, the Commission may require that the employer furnish . . . modification of the claimant's principal home consisting of ramps, handrails and doorway alterations, provided that the aggregate cost of all such items and modifications . . . shall not exceed $10,000.

VA. CODE ANN. § 65.1-88 (Supp. 1986).

89. Spiker v. John Day Co., 201 Neb. 503, 512-13, 270 N.W.2d 300, 306 (1978).

90. 6 Ark. App. 154, 639 S.W.2d 363 (1982).

that an employer would be liable only for that portion of the total cost to the employee at the facility that was attributable to the services covered by its statute.[91] The employer was not liable for the portion of the cost attributable to such things as custodial care, lodging, or housekeeping.[92]

Finally, some states have allowed for completely rent-free housing.[93] In *Peace River Electric Corp. v. Choate*[94] a Florida court of appeals required an employer to furnish a wheelchair-accessible mobile home to the employee rent-free, but the title to the mobile home remained in the name of the employer's insurance carrier.[95] Similarly, in *Squeo v. Comfort Control Corp.*[96] the New Jersey Supreme Court awarded an employee the cost of adding an apartment to his parents' home.[97] The court, however, required that the parents execute a mortgage in favor of the employer so that if the house was ever sold, or the employee ever became unable to use the apartment, the employer would be compensated for the value that the apartment added to the property.[98] New Jersey decided this case under a statute similar to North Carolina's Act.[99] Both *Peace River* and *Squeo* add a cautionary clause that only in extremely unusual circumstances will an award of housing be given.[100]

Derebery represents an expansion of present North Carolina law in that, for the first time, the supreme court allowed an award of housing to a totally disabled employee.[101] The court reasoned that the statute was meant to be construed liberally and that the general assembly's history of expanding the coverage of the Act, together with the interpretation of the statute in *Godwin*,

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91. *Id.* at 160, 639 S.W.2d at 366. The court held that the Workers' Compensation Commission took an erroneous approach to determining the portion of the facility costs chargeable to the employer. *Id.* at 159, 639 S.W.2d at 366. An administrative law judge had found the employer liable for the excess of the rent at the facility over the rent paid by the injured employee at his previous dwelling. *Id.* at 158, 639 S.W.2d at 365. The court stated, however, that a comparison of the rental of the employee's former home with the cost of the facility "might have been a relevant factor" had the apparatus and other services been provided in the employee's former home. *Id.* at 160, 639 S.W.2d at 366.

92. *Id.* at 159-60, 639 S.W.2d at 366.

93. *See, e.g.*, Peace River Elec. Corp. v. Choate, 417 So. 2d 831, 832 (Fla. Dist. Ct. App. 1982), *petition dismissed*, 429 So. 2d 7 (Fla. 1983); Squeo v. Comfort Control Corp., 99 N.J. 588, 606, 494 A.2d 313, 322 (1985).

94. 417 So. 2d 831 (Fla. Dist. Ct. App. 1982), *petition dismissed*, 429 So. 2d 7 (Fla. 1983).

95. *Id.* at 831-32. The mobile home in question in this case was an Enabler mobile home, similar to the one that Derebery requested. *Id.* at 831.

96. 99 N.J. 588, 494 A.2d 313 (1985).

97. *Id.* at 592, 607, 494 A.2d at 315, 323.

98. *Id.* at 595-96, 606, 494 A.2d at 317, 323.

99. The New Jersey statute provides that "[t]he employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury." N.J. STAT. ANN. § 34:15-15 (West Supp. 1986); *see also supra* text accompanying note 80 (citing a portion of N.C. GEN. STAT. § 97-29 (1985)).

100. The New Jersey Supreme Court cautioned that "it is only the unusual case that may warrant such extraordinary relief." *Squeo*, 99 N.J. at 604, 494 A.2d at 322. The Florida court recognized "the risk that [it] might be plowing fertile grounds for litigious seed" and stated, "[t]he circumstances of this case are unique and fraught with human misery, and we caution that this opinion should not be loosely interpreted . . . ." *Peace River*, 417 So. 2d at 831. "[O]nly extreme cases of disability might warrant such extraordinary relief." *Id.* at 832.

101. *Derebery*, 318 N.C. at 205, 347 S.E.2d at 822.

supported this construction of the statute.[102] The dissent, however, argued that the extension of "other treatment or care" to include wheelchair-accessible housing is "clearly a misconstruction."[103] The amendments to the Act, argued the dissent, do not relate to "anything beyond the care, treatment or rehabilitative services related to the employee's medical condition."[104] The dissent would not extend the statute to include accessible housing.[105] Furthermore, even if the statute did warrant such an award, the dissent would not grant it in this case.[106] Justice Billings reasoned that the facts in this case were not unusual enough to justify such an award.[107]

The decision in *Derebery* will allow wheelchair-bound victims to recover accessible housing from their employers. However, the impact of this case in all likelihood will extend farther than just allowing a recovery for housing. In a later case, the court of appeals relied heavily on its decision in *Derebery* when it refused to extend "other treatment or care" to require that the employer furnish a victim with a specially-equipped van.[108] Now that the court of appeals' *Derebery* decision has been reversed by the supreme court, North Carolina courts may be willing to permit victims to recover specially-equipped vehicles and other appliances that will allow handicapped persons to lead fuller lives.

Another factor that should be considered is that neither the supreme court nor the Industrial Commission's opinion dealt with the question of title to the home.[109] Presumably, the title will remain with the employer. If it does not, however, this will represent a windfall to the employee. This type of windfall should not be allowed. The Workers' Compensation Act was intended to compensate injured employees, not to provide them with such windfalls at the employer's expense.[110]

Derebery allows a windfall to employees in another way. Before this decision, injured employees had to provide their own housing arrangements and bear the accompanying costs.[111] After *Derebery*, the employee who requires wheelchair-accessible housing does not just recover the excess cost of such housing over the cost of housing that is not equipped for wheelchairs, but gets an award

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102. *See supra* text accompanying notes 30 & 81-82.

103. *Derebery*, 318 N.C. at 206, 347 S.E.2d at 822 (Billings, J., concurring in part and dissenting in part).

104. *Id.*

105. *Id.* at 208, 347 S.E.2d at 823-24 (Billings, J., concurring in part and dissenting in part).

106. *Id.*

107. *Id.*

108. *See* McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 756-57, 336 S.E.2d 407, 409 (1985).

109. The Industrial Commission's award stated only that "[d]efendant shall furnish plaintiff with all reasonable and necessary treatment or care for the well-being of plaintiff which includes an appropriate place for plaintiff to live in view of his condition." *Derebery*, 318 N.C. at 195, 347 S.E.2d at 816. The supreme court simply stated that the Industrial Commission "may re-enter its award for wheelchair accessible housing." *Id.* at 205, 347 S.E.2d at 822.

110. *See supra* text accompanying note 2.

111. *See generally* N.C. GEN. STAT. §§ 97-1 to -101 (1985) (North Carolina Workers' Compensation Act provides for no award of housing).

that covers all housing expenses.[112] Yet, disabled employees who do not require such modified housing will still have to bear the cost of their housing expenses. This result, which provides ordinary housing expenses to some victims while denying those same expenses to others, is not within the spirit of workers' compensation.[113] As the dissent noted:

> The Workers' Compensation Act provides disability compensation as a substitute for lost wages. That substitute for wages is the employer's contribution to those things which wages ordinarily are used to purchase—food, clothing, *shelter*, etc. There is no provision in the Workers' Compensation Act for the employer, in addition to providing the statutory substitute for wages, to provide the ordinary necessities of life . . . .[114]

The Act is designed as a compromise between the employer's need for limited liability and the employee's need for quick and certain recovery.[115] The decision in *Derebery* will further that purpose in that it requires industry to pay for the special housing needs of wheelchair-bound victims whose injuries arose out of and in the course of their employment. It goes too far, however, in awarding the entire expense of such housing, because the employee, whether injured or not, would have to provide for normal housing expenses, and injured employees who do not require such housing will still have to bear the cost of their own housing. The court should have required an apportionment of the cost of the modified housing between the expense attributable to the necessary special features of the house and that which is attributable to normal living expenses.[116] The court should have then awarded the added portion of the cost to the employee, but not require the employer to pay the full cost.

The North Carolina Supreme Court has expanded the scope of the Workers' Compensation Act significantly in the *Derebery* opinion.[117] The court

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112. *Derebery*, 318 N.C. at 205, 347 S.E.2d at 822 (Billings, J., concurring in part and dissenting in part).

113. *See supra* text accompanying notes 2-5.

114. *Derebery*, 318 N.C. at 205, 347 S.E.2d at 822 (Billings, J., concurring in part and dissenting in part).

115. *See supra* text accompanying note 2.

116. The apportionment would be similar to that discussed in Pine Bluff Park & Recreation v. Porter, 6 Ark. App. 154, 160, 639 S.W.2d 363, 366 (1982); *see supra* notes 90-91 and accompanying text. As noted in *Pine Bluff*, the rent from the victim's former home might be a factor that the court should consider in making the apportionment. The court also should consider the rent of area housing that is similar in size and features, but not specially equipped. Because the employer will retain title to the house, the victim would be required to pay to the employer the portion of the rent that is attributable to ordinary housing expenses. If the victim wishes to own his own home (or mobile home as in *Derebery*), then a similar apportionment can be made between the purchase price of the home as it would be without the special features and the price of the house with the features. The employer would then be liable for the added cost of the house. The victim would get title, but would be required to execute a mortgage in favor of the employer, so that if the house were ever sold, or if the victim were to become unable to use the house, then the employer would be compensated for any value that the special features may have added to the house. This mortgage would be similar to the one used in Squeo v. Comfort Control Corp., 99 N.J. 588, 595-96, 606, 494 A.2d 313, 317, 323 (1985). *See supra* text accompanying note 98. In *Squeo* the mortgage covered the entire housing expense. *Squeo*, 99 N.J. at 595-96, 606, 494 A.2d at 317, 323. This Note recommends that it cover only the added value to the house due to the wheelchair-accessible features.

117. *Derebery*, 318 N.C. at 198, 347 S.E.2d at 818.

should continue such expansion by allowing combination of wages in all cases in the future, not merely limiting its holding to volunteer firemen.[118] Allowing combination of wages in all cases would permit injured victims to recover based on their true earning capacity rather than recovering based on their wages from only one job. The court went too far, however, in awarding the full cost of housing to the injured employee without any reduction for the employee's normal housing expenses. In the future the court should limit housing awards to the amount of the housing cost that is attributable to the special added features of the housing.[119] If the award for lost wages is thus based on the victim's true earning capacity, and the victim is then required to meet ordinary living expenses from this award, including housing expenses, an equitable result is achieved that more accurately reflects the spirit of the Workers' Compensation Act.

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118. *See supra* notes 74-78 and accompanying text.
119. *See supra* note 116 and accompanying text.