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# Workers' Compensation - You Take (45% of) My Breath Away

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# COMMENT

## WORKERS' COMPENSATION—YOU TAKE (45% OF) MY BREATH AWAY—*Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981).*



### I. INTRODUCTION

With increasing frequency, North Carolina textile workers have sought relief under the Workers' Compensation Act[1] for the

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* *See also* Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981), in which the Court remanded a claim to the Industrial Commission to determine what percentage of claimant's disability was due to occupational diseases; Walston v. Burlington Industries, _ N.C. _, 285 S.E.2d 822 (1981), *petition for reh'g granted*, _ N.C. _, _ S.E.2d _ (1982), holding that the Industrial Commisson's finding that plaintiff did not have an occupational disease was supported by competent evidence.

1. N.C. GEN. STAT. § 97-1 to 122 (1979).

disabling effects of byssinosis or "brown lung" disease.[2] Their plight has been the subject of a Congressional investigation[3] and a Pulitzer Prize winning series in the *Charlotte Observer*.[4]

In order for a claimant to recover compensation for an occupational disease under the North Carolina Workers' Compensation Act, he or she must either establish a claim based on a disease set forth in the specific schedule of diseases listed in North Carolina General Statutes § 97-53,[5] or rely on the catchall provison, subsection thirteen of that article. Subsection thirteen provides a general definition of occupational diseases:

> any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of employment.[6]

In *Morrison v. Burlington Industries*,[7] the North Carolina Supreme Court brought the "byssinosis" victim to the forefront of public attention. The Court addressed the issue of whether a workers' compensation claimant may recover compensation for total disability which results from the combined effects of a disease as defined in subsection thirteen of North Carolina General Statutes § 97-53 and a noncompensable preexisting condition or disease. (North Carolina General Statutes are hereinafter referred to as G.S.).

This comment will examine the standards the North Carolina appellate courts have developed to determine whether a workers' compensation claimant is entitled to relief for an occupational dis-

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2. *Id.* § 97-53(13) (1979). For excellent discussions of the definition of occupational disease, *see* 1B A. LARSON, WORKMEN'S COMPENSATION § 41.30 (1978); Note, *Redefinition of Occupational Disease and the Applicable Compensation Statute*, 16 WAKE FOREST L. REV. 288 (1980); Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916 (1980); Note, *Workmen's Compensation—Development of North Carolina Occupational Disease*, 7 WAKE FOREST L. REV. 341 (1971).

3. *Hearings Before the Subcommittee on Labor Standards of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st. Sess. (1979).

4. N.Y. Times, April 14, 1981, § III, at 4. (The initial article in the *Charlotte Observer* series appeared on Feb. 3, 1980, § A, at 1.).

5. N.C. GEN. STAT. § 97-53 (1979).

6. *Id.* § 97-53(13) (1979).

7. 304 N.C. 1, 282 S.E.2d 458 (1981).

ease under subsection thirteen, as well as the rules governing apportionment[8] of liability in claims arising under the Act. Finally, the *Morrison* decision will be considered in light of previous decisional law and standards adopted in the majority of jurisdictions.

## II. THE MORRISON CASE

Plaintiff worked in the spinning department of Burlington Mills from 1948 until 1975, when she was no longer able to work.[9] During the mid-sixties the plaintiff first noticed a breathing problem and, at that time, sought medical treatment from a general practitioner in her home of Erwin, N.C.[10] Between 1965 and 1975, she was hospitalized several times due to her breathing problem.[11] Plaintiff smoked between a half-pack and a pack of cigarettes per day for about twenty years.[12]

During the mid-sixties plaintiff was also treated at Duke Medical Center for phlebitis and bronchitis. In 1967, she had a vein stripping operation and subsequent tests indicated that she had diabetes.[13]

In April, 1975, plaintiff was examined by a specialist at the University of North Carolina School of Medicine. He recommended that plaintiff relocate to another area in the mill where there was less exposure to cotton dust.[14] Ms. Morrison was transferred to a different department, but had to leave after three weeks; since she was required to stand for long hours, conditions were intolerable.[15]

In August, 1976, the plaintiff filed a claim with the Industrial Commission, alleging that she had contracted an occupational disease as a result of exposure to cotton dust in her place of employment.[16] Between July, 1977 and December, 1978, hearings were

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8. *See generally* 2 A. LARSON, *supra* note 2, § 59.20; Note, *Apportionment of Disabilities Is Limited Under the North Carolina Act*, 54 N.C.L. REV. 1123 (1976); Levine, *Legal Questions Regarding the Causation of Occupational Disease*, 26 LAB. LAW J. 88 (1975).

9. Record on Appeal at *iii* a, Morrison v. Burlington Industries, 304 N.C. 1, 282 S.E.2d 458 (1981).

10. *Id.* at 2.

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 2.

14. *Id.* at 12.

15. *Id.* at 3.

16. *Id.* at *ii*.

held on plaintiff's claim.[17] The Commission heard testimony concerning the possible causes of claimant's disability from three physicians.

Dr. Henderson Mabe, a general practitioner, had treated plaintiff since 1965. He testified that plaintiff was not able to work on 24 April 1975, due to "chronic bronchitis, phlebitis of the leg and obstructive pulmonary disease."[18] Dr. H. Sieker, Professor of Medicine at Duke University and a specialist in occupational diseases, examined plaintiff in 1977. He testified that in his opinion 50-60% of her disability related to cotton dust exposure and 40-50% to other factors.[19] Dr. Battigelli, a specialist in pulmonary medicine at the University of North Carolina, examined the plaintiff in April of 1975 (while she was still employed), and diagnosed her as having "chronic obstructive lung disease, bronchitis in type, in cigarette smoker with aggravation of complaints, on dust exposure."[20]

In December, 1978, Commissioner Brown entered an award finding plaintiff "totally disabled due to exposure to cotton dust while in defendant's employment."[21] The full Commission subsequently found that the plaintiff sustained a 55% loss of wage earning capacity as a result of an occupational disease and reduced the award as provided under G.S. § 97-30 for partial disability.[22]

The Court of Appeals,[23] one judge dissenting, remanded to the Industrial Commisson, ruling: "if the workers' incapacity to work is total and if the incapacity is occasioned by a compensable injury or disease, the worker's incapacity to work cannot be apportioned to other preexisting or latent illnesses or infirmities, nor may the entitlement to compensation be diminished for such conditions."[24]

On appeal, the Supreme Court of North Carolina first ruled[25] that the medical evidence was not "sufficiently definite to permit

17. Morrison v. Burlington Industries, 47 N.C. App. 50, 266 S.E.2d 741 (1980).

18. Record at 8.

19. *Id.* at 9.

20. *Id.* at 12.

21. Morrison v. Burlington Industries, 47 N.C. App. 50, 52, 266 S.E.2d 741, 743 (1980).

22. *Id.* at 53, 266 S.E.2d at 743.

23. *Id.*

24. *Id.* at 57, 266 S.E.2d at 745.

25. Morrison v. Burlington Industries, 301 N.C. 226, 271 S.E.2d 364 (1980).

effective appellate review."[26] The Commission was instructed to take more medical evidence to determine what relationship, if any, existed between cotton dust exposure and other infirmities.[27] On remand, the Commission adduced medical evidence in accordance with the Court's order,[28] and found that although plaintiff was totally incapacitated for employment purposes, only 55% of that incapacity was caused, aggravated or accelerated by exposure to cotton dust during the course of her employment at Burlington. Again, the Commission entered an award based upon a finding of partial disability.[29]

On the second review,[30] the Supreme Court of North Carolina reinstated the award of 55% partial disability. Over the dissent of Justice Exum,[31] the Court held that the Commission had no authority to award compensation for total disability as this would have been inconsistent with the Commission's finding that 45% of the disability was due to disease not caused, aggravated or accelerated by the occupational disease.[32]

## III. BACKGROUND

### A. *North Carolina's Treatment of Occupational Disease Claims*

The General Assembly enacted occupational disease legislation within the scheme of the Workers' Compensation Act[33] in response to the decision of the North Carolina Supreme Court in *McNeely v. Carolina Asbestos Co.*,[34] in which a plaintiff suffering from as-

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26. *Id.* at 223, 271 S.E.2d at 368.

27. *Id.*

28. *Id.* The Court formulated three questions: (1) what percentage, if any, of plaintiff's disablement, that is, incapacity to earn wages, results from an occupational disease; (2) what percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease; and (3) what percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were not accelerated or aggravated by plaintiff's occupational disease.

29. 304 N.C. 1, 3, 282 S.E.2d 458, 463. Note that although the commission entered an award for partial disability, Mrs. Morrison was found totally incapacitated.

30. *Id.*

31. *Id.* at 19, 282 S.E.2d at 470 (Exum, J., dissenting).

32. *Id.*

33. 1935 N.C. Sess. Laws, Ch. 123.

34. 206 N.C. 568, 174 S.E. 509 (1934). McNeely contracted pulmonary asbestosis due to inhalation of asbestos dust at his place of employment. McNeely

bestosis was denied compensation.[35] As stated by a principal draftsman, the Act was a legislative recognition that any burden should not fall upon the worker, but upon the industry which cut off the worker's natural life of usefulness.[36]

When the occupational disease section was first adopted, North Carolina, like many other jurisdictions, provided coverage for specified occupational diseases. Subsection thirteen,[37] as amended in 1971, includes a catchall provision which makes compensable "any diseases due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the public is equally exposed outside of the employment."[38]

In the leading case of *Booker v. Duke Medical Center*,[39] the Supreme Court of North Carolina redefined the meaning of occupational disease,[40] and examined the elements necessary to come

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brought an action for damages in common law negligence, but the trial court sustained defendant's motion for nonsuit. On appeal, the North Carolina Supreme Court affirmed, saying the claimant's remedy lay exclusively under the Workers' Compensation Act rather than in a tort action. *Id.* at 572, 174 S.E. at 511-12. For a short discussion of this case, *see* Note, *Occupational Disease*, 4 FORDHAM L. REV. 147 (1935).

35. *Id.*

36. McMullen, *Occupational Disease Compensation*, POPULAR GOVERNMENT 4 (May-June 1935).

37. N.C. GEN. STAT. § 97-53(13) (1979). Subsection thirteen has gone through several changes. Prior to the 1963 amendments, the provision afforded the right to compensation for: "Infection or inflammation of the skin, eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." The 1963 amendments inserted "or any other internal or external organ or organs of the body" between " . . . nasal cavities" and "due to irritating. . . ." 1963 N.C. Sess. Laws, Ch. 965. The effect of the amendment was to broaden the scope of coverage of subsection thirteen. In 1971, subsection thirteen was amended to its present format as follows:

> (13) Any disease, other than hearing loss covered in another subsection of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

1977 N.C. Sess. Laws, Ch. 547.

38. N.C. GEN. STAT. § 97-53(13) (1979).

39. 297 N.C. 458, 256 S.E.2d 189 (1979).

40. Note, *Redefinition of Occupational Disease and the Applicable Compensation Statute*, 16 WAKE FOREST L. REV. 288 (1980).

within the scope of subsection thirteen.[41] The *Booker* Court found the occurrence of serum hepatitis in a lab technician to be due to causes and conditions characteristic of employment; there was a "recognizable link" between the nature of the decedent's job and the increased risk of contracting the disease.[42] The Court concluded there was a "distinctive relation"[43] between decedent's employment and the disease serum hepatitis.[44]

The *Booker* court rejected the employer's contention that serum hepatitis was an "ordinary disease" of life and, thus, not compensable under the Act.[45] The Court emphasized that the statute does not preclude all ordinary diseases of life, only those to which the "general public is *equally* exposed outside of employment."[46]

Proof of a causal relationship between the occupational disease and employment is necessarily based on circumstantial evidence and the *Booker* Court held that the following factors may be considered by the fact finder:

> (1) the extent of exposure to the disease or disease causing agents during employment,
> (2) the extent of exposure outside of employment, and
> (3) absence of the disease prior to the work related exposure as shown by the employee's medical history.[47]

Applying the foregoing principles, the *Booker* Court agreed with the Commission's finding that the claimant's decedent had contracted a compensable occupational disease.

Shortly after *Booker, Wood v. J.P. Stevens*[48] addressed the

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41. N.C. GEN. STAT. § 97-53(13) (1979).
42. 297 N.C. 458, 472, 256 S.E.2d 189, 198 (1979).
43. *Id.* at 474, 256 S.E.2d at 199.
44. *Id.*
45. *Id.* at 475, 256 S.E.2d at 200.
46. *Id.* at 468, 256 S.E.2d at 196.
47. *Id.* at 476, 256 S.E.2d at 201.
48. 297 N.C. 636, 256 S.E.2d 692 (1979). *Wood* was the first case in which the North Carolina Supreme Court recognized that byssinosis could be compensable as an occupational disease. The Court held that the Industrial Commission erred in taking judicial notice of the noncompensability of byssinosis under G.S. § 97-53(13). In addition to *Morrison*, the Court has addressed claims based on byssinosis in Taylor v. J.P. Stevens, 300 N.C. 94, 265 S.E.2d 144 (1980) (discussing notice provisions as applied to a claim based on byssinoisis); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981) (remanding to the Industrial Commisson as the evidence was not sufficiently definite to permit effective appellate review); Walston v. Burlington Industries, _ N.C. _, 285 S.E.2d 822 (1982) (denying compensation to claimant suffering from byssinosis when claimant also suf-

problem of which of the several amended versions of G.S. § 97-53(13) should apply to a given claim. The Court held that because disablement which results from occupational disease is treated as injury by accident, it follows that the employee's rights to compensation are governed by the law in effect at the time of disablement.[49] Applying longstanding principles and following the dictates of the Act,[50] the Court held legal disability equates with an incapacity to earn wages rather than physical infirmity.[51]

While the decisions in *Wood* and *Booker* clarified and liberalized[52] the law of occupational disease in North Carolina, neither addressed the question of whether an employee may recover benefits for total disability if his or her incapacity to earn wages results from the *combined* effects of an occupational disease and a preexisting noncompensable disease or condition. Before examining the impact of *Morrison,* it is necessary to review the North Carolina law of apportionment[53] of damages in workers' compensation cases.

### *B. Apportionment of Damages in North Carolina Workers' Compensation Law*

In the field of workers' compensation law, apportionment refers to prorating of liability between the employer and an employee himself, when a prior personal disability contributes to the final disabling result. In addition, apportionment refers to the prorating of liability between successive employers[54] or between an employer and a Second Injury Fund.[55]

Several states allow apportionment of liability where an employee has both a noncompensable prior disability and a subsequent accidental injury or occupational disease. Under most stat-

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fered from ordinary disease of life and history of smoking was, according to medical testimony, the primary etiologic agent contributing to her condition).

49. *Id.* at 644, 256 S.E.2d at 698 (1979).

50. N.C. GEN. STAT. § 97-2(9) (1979) defines disability as the incapacity, because of injury, to earn wages which the employee was receiving at the time of injury in the same or any other employment.

51. 297 N.C. at 651, 256 S.E.2d at 701 (1979), *citing,* Anderson v. Northwestern Motor Co. 233 N.C. 372, 64 S.E.2d 265 (1951) and Hall v. Thomason Chevrolet, 263 N.C. 569, 139 S.E.2d 857 (1965).

52. *See* Note, *supra* note 40.

53. *See supra* text accompanying note 8.

54. 2 A. LARSON, *supra* note 2, § 59.20.

55. *Id. See also* N.C. GEN. STAT. § 97-35 (1979) and N.C. GEN. STAT. § 97-40.1 (1979).

utes, the employee is entitled to that which he or she would have been entitled had the earlier accident or occupational disease been considered alone.[56] Since its enactment in 1929,[57] the North Carolina Act has included an apportionment provision.

> § 97-33. *Prorating in Event of Earlier Disability or Injury.*—If any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in G.S. 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.[58]

*Schrum v. Catawba Upholstering Co.*[59] discussed the application of the apportionment provisions of the North Carolina Act. The claimant was blinded in one eye as a result of an accidental injury arising out of employment. The Industrial Commission awarded compensation for a 60% loss of vision, because the employee had previously suffered astigmatism causing a 40% loss of vision. The Supreme Court of North Carolina held that apportionment was improper and ruled tht the claimant was entitled to compensation for total loss of vision in the eye. In so holding, the Court noted that the apportionment statute was designed "to provide for deduction of prior *compensable* injuries and thus to prevent double compensation."[60]

Subsequent to *Schrum*, the appellate courts of North Carolina have consistently rejected apportionment in cases in which the statute does not specifically apply. These decisions have been based on either the aggravation principle or the "odd lot"[61] doctrine.

### *1. The Aggravation Principle*

In *Anderson v. Northwestern Motor Co.*,[62] the Supreme Court of North Carolina first applied the aggravation principle. As set

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56. 2 A. LARSON, *supra* note 2, § 59.30.
57. 1929 N.C. Sess. Laws, Ch. 120.
58. N.C. GEN. STAT. § 97-33 (1979).
59. 214 N.C. 353, 199 S.E. 385 (1938).
60. *Id.* at 355, 199 S.E. at 387 (emphasis added).
61. *See infra* text accompanying note 74.
62. 233 N.C. 372, 64 S.E.2d 265 (1951).

forth by Justice Ervin, the principle is as follows:

> when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person.[63]

The claimaint in *Anderson* sustained a back injury while he was employed by the defendant. He was diagnosed as permanently physically disabled as a result of "either his injury . . . or by an injury that predated employment."[64] The Industrial Commission denied compensation, finding that the employee's disability resulted from a congenital condition rather than from the industrial accident. In affirming the decision of the Commission, the Court held that the Commission properly determined that the accident "did not either of itself or in combination with a preexisting infirmity, cause the disability."[65]

Since *Anderson*, the courts have had little opportunity to develop the aggravation principle. In *Kennedy v. Martin Marietta Chemicals*,[66] the Court of Appeals upheld an award of death benefits,[67] finding that "diminished oxygen supply combined with decedent's arteriosclerotic heart disease caused the fatal heart attack"[68] claimant suffered while at work. Likewise, in *Pruitt v. Knight Publishing Co.*,[69] the Court of Appeals ruled that the Industrial Commission erred in reducing a claimant's disability from 35% to 10% since 25% was attributable to a preexisting back condition. Apportionment was held to be improper where the preexisting condition was acted upon by a subsequent injury which precipitated the

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63. *Id.* at 374, 64 S.E.2d at 267. *See generally* Levine, *supra* note 8; 1A A. LARSON, *supra* note 2, § 1220.

64. 233 N.C. 372, 373, 64 S.E.2d 265, 266 (1951).

65. *Id.* at 375, 64 S.E.2d at 267.

66. 34 N.C. App. 177, 237 S.E.2d 542 (1977).

67. N.C. GEN. STAT. § 97-38 provides for payment of death benefits.

68. 34 N.C. App. 177, 182, 237 S.E.2d 542, 545 (1977). In *Kennedy*, the court affirmed the Commisson's finding that a sudden deprivation of oxygen accelerated or aggravated claimant's preexisting heart condition, thereby triggering the heart attack which resulted in his death. The court in so holding applied the aggravation principle without actually noting the *Anderson* decision.

69. 27 N.C. App. 254, 218 S.E.2d 876 (1975), *rev'd on other grounds*, 289 N.C. 254, 221 S.E.2d 466 (1979).

disability.[70]

The aggravation principle has also been applied by the Court of Appeals in the context of an occupational disease claim. In *Self v. Starr Davis*,[71] the Court of Appeals found asbestosis accelerated and contributed to death from a brain tumor. Relying on an earlier decision of the Supreme Court,[72] the Court of Appeals held that while the tumor itself was not aggravated or accelerated by asbestosis, the claimant's decedent's *death* was. While asbestosis was not the sole cause of death, the Court awarded benefits because it accelerated or contributed to the death of the employee.

In summary, prior to *Morrison*, the courts applied the aggravation principle to determine whether a preexisting physical condition combined with an injury by accident or occupational disease to produce disability. Under the pre-*Morrison* standard, it was not necessary that the industrial accident or occupational disease be medically related to, or that it medically aggravate, the claimant's preexisting physical condition. So long as the occupational disease or injury by accident combined with the preexisting physical condition to produce disability, apportionment was improper.

### 2. *The "Odd Lot" Doctrine*

In addition to the aggravation principle applied in *Anderson*, the Courts have adopted the "odd lot" doctrine as a basis of awarding total disability benefits to the claimant who is unable to earn wages due to the effects of an industrial accident or occupational disease combined with factors of age and education. Application of the odd lot doctrine permits a finding of total disability in a situation where a claimant is not altogether incapacitated for any kind of work, but is nonetheless so handicapped that he will be unable to obtain regular employment in any well-known branch of the competitive labor market.[73] The rationale underlying the application of the doctrine is that the employer takes the employee as he is.[74]

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70. *Id.* at 258, 218 S.E.2d at 879.

71. 13 N.C. App. 694, 187 S.E.2d 466 (1971).

72. *Id.* at 699, 187 S.E.2d at 469, relying on Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

73. 2 A. LARSON, *supra* note 2, § 57.51; House v. State Accident Insurance Fund, 20 Or. App. 150, 157, 530 P.2d 872, 875 (1975).

74. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 256, 189 S.E.2d 804, 807 (1972).

The odd lot doctrine, while not specifically recognized by that name, was applied by the Supreme Court of North Carolina in the recent case of *Little v. Anson County Schools Food Services.*[75] In *Little,* a school janitor was injured when she fell over a mop bucket. Because of her limited educational background and advanced age, she was determined by the Commission to be unqualified to obtain gainful employment. The Court ruled that the Commission should have considered the factors of age and education in determining whether to grant benefits for total disability, indicating that benefits should not be apportioned between incapacity due to the job-related injury and incapacity due to age and education.[76] The *Little* decision is consistent with the earlier Court of Appeals holding in *Mabe v. North Carolina Granite Corp.,*[77] which upheld an award of total disability to a claimant whose 40% incapacity due to silicosis combined with factors of age and lack of education. The "odd lot" doctrine, therefore, is in accord with the legal definition of disability, the plaintiff's incapacity to earn wages.

Against the background of a developed case law in the area of apportionment, and a redefinition of occupational disease as enunciated in *Booker,* the Supreme Court in *Morrison* addressed the question of whether apportionment is proper in the context of an occupational disease claim.

## IV. THE IMPACT OF MORRISON

*Morrison* is significant because it is the first case in which the Supreme Court of North Carolina considered the application of apportionment to occupational disease claims arising under G.S. § 97-53(13). Before considering the significant questions addressed by the Court, it is important to note that 55% of the claimant's inability to work was found by the Industrial Commisson to have been caused in part by "chronic obstructive lung disease"[78] and in part by other physical infirmities "not caused, aggravated or accel-

75. 295 N.C. 527, 246 S.E.2d 743 (1978); *see* Note, *Using Age, Education and Work Experience to Determine Disability,* 15 WAKE FOREST L. REV. 570 (1979).

76. 295 N.C. at 532-33, 246 S.E.2d at 746-47.

77. 15 N.C. App. 253, 189 S.E.2d 804 (1972).

78. 304 N.C. 1, 4, 282 S.E.2d 458, 462 (1981). As noted by Justice Exum in Hansel v. Sherman Textiles, 304 N.C. 44, 62, 283 S.E.2d 101, 111 (1981), "chronic obstructive lung disease" is a disease which ultimately causes a worker to be incapable of work. The disease in its ultimate disabling form may have many components, including bronchitis, asthma, emphysema, and byssinosis.

erated by an occupational disease."[79] The Commission found these other infirmities "disabling in and of themselves"[80] and the Court deferred to this finding.[81]

In response to the plaintiff's contention that the Act permits no apportionment when an occupational disease combines with a preexisting noncompensable condition or disease to produce total disability, the Court held apportionment was proper and sought to reconcile prior case law with its holding. The Court's discussion of principles applicable in occupational disease cases, however, raises as many questions as it resolves.

### *A. What Must the Claimant Prove in Order to Receive Compensation for Total Disability?*

*Morrison* outlines the elements a plaintiff must establish in order to recover under G.S. § 97-53(13). First, the claimant must meet the requirements of the statute, as explained in *Booker*,[82] by demonstrating that she has a disablement resulting from an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed.[83]

Secondly, *Morrison* commands that the claimant show "the extent of disablement *resulting from* said occupational disease, *i.e.*, whether she is partially disabled as a *result of the disease*."[84] The Court relies on the case of *Hall v. Thompson Chevrolet*[85] as authority for the proposition that the claimant must carry the burden of proof to show "not only . . . disability, but also its degree."[86]

The *Morrison* Court appears to be breaking new ground, in fact, because the question in *Hall* was whether the claimant's disablement was permanent partial or temporary total. The claimant failed to offer sufficient evidence to prove that he could no longer

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79. 304 N.C. 1, 7, 282 S.E.2d 458, 463 (1981).

80. *Id.* at 9, 282 S.E.2d at 464.

81. *Id.* at 9, 282 S.E.2d at 463.

82. 297 N.C. 458, 256 S.E.2d 189 (1979). *See supra* text accompanying notes 37-40 for a discussion of *Booker*.

83. 304 N.C. 1, 12, 282 S.E.2d 458, 467 (1981).

84. *Id.* at 12, 282 S.E.2d at 467.

85. 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965).

86. 304 N.C. 1, 13, 282 S.E.2d 458, 467 (1981).

perform work he had done before the accident.[87] In *Morrison*, there was no question but that the plaintiff sustained a total loss of wage earning capacity.[88]

By requiring the occupational disease claimant to show the percentage of disability which is due to the occupational disease, the Court adopts the defendant employer's argument that the "resulting from" language of G.S. § 97-29 and § 97-30 should be read as "resulting exclusively from."[89]

Thus, the *Morrison* Court creates a distinction between the occupational disease claimant and the employee who sustains an injury by accident. An accident need not be the sole cause of disability if the employment reasonably contributes to the disability,[90] whereas in occupational disease claims, the occupational disease must be the exclusive cause of disability.

With respect to Brown Lung victims, questions of causation are at best difficult to resolve.[91] It seems unclear why the plaintiff who has satisfactorily shown total disability and a long history of exposure to dust should also be required to come forward and establish that his disability is not in any way due to causes and conditions outside of employment. In effect, this test requires the plaintiff to prove a negative. If the employer is the one to benefit from the apportionment rule, should he not carry the burden of showing that a substantial part of claimant's disability was the result of factors other than those existing in the workplace?[92]

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87. 263 N.C. 569, 139 S.E.2d 857 (1965).

88. 304 N.C. 1, 5, 282 S.E.2d 458, 465 (1981).

89. Appellant's Brief at 15, Morrison v. Burlington Industries, 304 N.C. 1, 282 S.E.2d 458 (1981).

90. Vause v. Vause Equipment Co., 233 N.C. 88, 63 S.E.2d 173 (1951). *See* Hansel v. Sherman Textiles, 304 N.C. 44, 53, 283 S.E.2d 101, 106 (1981), where, in following *Morrison*, the court notes that in cases of injury by accident, the employment need not be the sole causative force to render an injury compensable. This rule of causation is not applied in occupational disease cases.

91. Martin & Higgins, *Byssinosis and Other Respiratory Ailments*, 18 J. OF OCCUPATIONAL MEDICINE 455 (1976); Imbus & Suh, *Byssinosis—A Study of 10,133 Textile Workers*, 26 ARCH. OF ENV. HEALTH 183 (1973); Bouhuys, *et al.*, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, 154 LUNG 167 (1977); Schrag & Gullett, *Byssinosis in Cotton Textile Mills*, 101 AM. REV. OF RESPIRATORY DISEASE 497 (1971). *See also*, 4A ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 205E.100, (R. Gray 3d ed. 1981).

92. This is the reasoning of the California Supreme Court in Pullman-Kellog v. Workers' Compensation Board, 26 Cal. 3d 450, 605 P.2d 422 (1981) which applied the California apportionment statute discussed at note 102 *infra*.

In Kentucky, the apportionment act provides:

### B. *The Aggravation Principle*

As noted by the Supreme Court of North Carolina in *Anderson v. Northwestern Motor Co.*,[93] the aggravation principle disallows apportionment when the effects of an industrial accident and preexisting physical condition combine to produce death or disability.[94] The *Morrison* majority seeks to reconcile *Anderson* by referring to the Industrial Commission's finding that the plaintiff's occupation "did not cause, aggravate or accelerate" her other diseases and infirmities which caused a forty-five percent incapacity to work and earn wages.[95] The court views aggravation in terms of aggravation of an infirmity;[96] that is, determining whether the occupational disease acted directly upon a preexisting condition. Yet, an examination of *Anderson* and the law then and now indicates that the aggravation principle to which Justice Ervin referred was more likely aggravation of *disability* rather than aggravation of an infirmity. As stated in *Anderson*,

> While there seems to be no case on the specific point in this state,

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> In case of disability or death from silicosis, coal workers' pneumoconiosis, or any other compensable pneumoconiosis, complicated with tuberculosis of the lungs, pulmonary emphysema or other pulmonary dysfunction and there has been employment exposures to harmful dust or industrial hazards reasonably competent to produce such accompanying disease or dysfunction, there is a rebuttable legal presumption that all resultant disability therefrom is work related and compensble, and compensation shall be payable as for the uncomplicated disease, Provided, however, That the disease or dysfunction was an essential factor in causing such disability or death.

KY. REV. STAT. § 342.316(7) (1977).

As has been noted, where there has been exposure to harmful dust sufficient to produce pulmonary dysfunctions, and they were associated with an industrial disease, then it is presumed that all of the disability is work related and compensable. The defendant is not prevented from presenting proof, where the facts warrant, that the attendant pulmonary dysfunction was not work related. *See* Note, *Kentucky's Answer to the "Coal Black Shame"—A Critical Analysis of Kentucky Workmen's Compensation Coverage of Black Lung Disease*, 59 KY. L.J. 467, 476 (1970).

93. 233 N.C. 372, 64 S.E.2d 265 (1951).

94. 1 A. LARSON, *supra* note 2, § 12.20.

95. 304 N.C. 1, 15, 282 S.E.2d 458, 469 (1981).

96. The test formulated in *Morrison* refers to percentages of disablement resulting from disease or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease and percentage of plaintiff's disablement due to diseases unrelated to occupation which were not aggravated or accelerated by occupational disease.

> courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a preexisting disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury *materially* accelerates or aggravates the preexisting disease or infirmity and thus proximately *contributes* to the death or disability of the employee, the injury is compensable even though it would not have caused death or disability to a normal person.[97]

As authority for this principle, the *Anderson* court did not cite case law; instead, it relied on encyclopediae and a treatise on the law of Workmen's Compensation.[98] An examination of these sources indicates that the better rule disallows apportionment to pathology. Indeed, Professor Larson refers to the "exceptional statute" whereby compensation is payable only for the percentage of disability attributable to the accident.[99]

The rule of apportionment enunciated in *Morrison* is difficult to administer and may lead to protracted litigation as experts attempt to assign percentages of causation to nonindustrial factors.[100] Nevertheless, if the Court insists on apportionment, adoption of tests used pursuant to state statutes[101] is preferable to the *Morrison* formula. Under the California apportionment statute,[102] for example, the crucial test is whether the nonindustrial diseases would have caused any disability absent exposure to harmful sub-

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97. 233 N.C. 372, 374, 64 S.E.2d 265, 267 (1951) (emphasis added).

98. The Court cited: 6 W. SCHNEIDER, WORKMEN'S COMPENSATION § 1543(1) (1957); 58 AM. JUR., *Workmens Compensation* § 247 (1948); and 71 C.J., *Workmens Compensation Acts* § 358 (1935).

99. 1 A. LARSON, *supra* note 2, § 12.20.

100. *See supra* note 91. For an excellent discussion of the problems in the diagnosis of byssinosis from the medical as well as legal viewpoint, *see Examination of The Scope of The Industrial Disease Problem Which Confronts Our Society: Hearings Before The Subcommittee on Labor of the Committee on Human Resources, United States Senate*, 95th Cong., 1st Sess. 162 (1977); R. Roblee, Medico Legal Aspects of the Coverage of Occupational Disease Under Workers Compensation: Changing Concepts of Causation and the Case of Byssinosis (May, 1977) (unpublished paper submitted to Professor Rombauer at the University of Washington School of Law). *See also* Hyatt v. Waverly Mills, _ N.C. App. _, 286 S.E.2d 837 (1982), in which medical expert would not assign percentages in determination of causation.

101. *See* 2 A. LARSON, *supra* note 2, § 59.21.

102. CAL. LAB. CODE § 4663 (West 1971) reads: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury."

stances.[103] If so, apportionment is proper. This "but for" test is a workable solution for determining apportionment.

Likewise, under the Florida statute,[104] apportionment is not allowed where there is no evidence of any percentage of disability due to preexisting disease or condition.[105] In contrast, the *Morrison* court not only allowed apportionment, but ordered the Commission to find percentages in determining plaintiff's disability.

### C. *Is Apportionment a Legislative or Judicial Function?*

Another question *Morrison* raises is whether apportionment is properly a judicial or legislative matter. As stated near the end of the majority opinion, the Court is not "philosophically opposed" to the result sought by the claimant, but the "expansion of the law to permit such recovery is the legislature's prerogative . . . ."[106] If other systems provide any basis of comparison, the opposite is true. As stated Professor Larson, "*except in states having special statutes on aggravation of diseases,* no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death."[107]

In states having statutes applicable to *Morrison*-type claims, an employee with a prior disability receives for a subsequent injury only what he would have been entitled to had the subsequent (compensable) injury been considered alone.[108] Of course, application of apportionment statutes to occupational disease claims presents problems of proof not encountered in accidental injury situations.

The North Carolina General Assembly enacted the apportionment provision within the scheme of the Workers' Compensation Act.[109] Arguably, the General Assembly did not intend that the apportionment provisions apply in occupational disease cases. When G.S. § 97-33 was first enacted, occupational disease legislation had not yet been incorporated into the Act. Yet, in 1975, when the apportionment provision was amended,[110] no provision was made for

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103. Pullman-Kellogg v. Workers' Compensation Appeals Board, 26 Cal. 3d 450, 161 Cal. Rptr. 783 (1980).

104. FLA. STAT. ANN. § 440.02(19) (West 1981).

105. Cover v. TG&Y Store # 1331, 405 So. 2d 985 (Fla. Dist. Ct. App. 1981).

106. 304 N.C. 1, 19, 282 S.E.2d 458, 470 (1981).

107. 2 A. LARSON, *supra* note 2, § 59.22 (1978) (emphasis added).

108. *Id.* at § 59.21.

109. *See supra* note 57.

110. The 1975 Session Laws added "is an epileptic" after employee in the

apportionment in occupational disease cases. Applying principles of statutory construction, when an act is amended, that which is not included in the amended version is deemed to have been considered and rejected by the legislature.[111] It is noteworthy that *Mabe v. North Carolina Granite Corp.*[112] was decided prior to the 1975 amendment and there the Court of Appeals rejected apportionment.

As noted in *Schrum,*[113] the General Assembly's purpose in enacting this provision was to prevent double compensation. The *Morrison*-type claimant receives no other payments under the act and, in fact, the defendant made no argument based on G.S. § 97-33.[114]

Regardless of whether the General Assembly considered the question of apportionment in occupational disease cases in 1975, the present inquiry should be what that body may do to offset the harsh result of the *Morrison* decision. The problems could be attacked through the enactment of legislation disallowing apportionment in G.S. § 97-53(13) cases, or adopting a "but for" rule of apportionment, similar to that enacted in California.

### *D. Can the "Odd Lot" Doctrine Coexist With the Rules Enunciated in Morrison?*

As previously noted, *Little v. Anson County Schools Food Services*[115] firmly mandated that the Industrial Commission consider factors of age and education in determining whether an employee is totally disabled and entitled to compensation under G.S. § 97-29. The *Morrison* Court, in summarizing the law, stated that when a preexisting, nondisabling, non-job related *condition*[116] is aggravated by an occupational disease, the employer must compensate the employee even though a normal person would not have been disabled under the circumstances.

The *Morrison* majority seeks to distinguish *Little* because it dealt not with occupational *diseases,* but rather socio-economic

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second line. 1975 Sess. Laws, Ch. 832.

111. 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (D. Sands 4th ed. 1973).

112. 15 N.C. App. 253, 189 S.E.2d 804 (1972).

113. Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938).

114. 304 N.C. 1, 282 S.E.2d 458 (1981).

115. 245 N.C. 527, 246 S.E.2d 743 (1978).

116. 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981).

*conditions*.[117] With the *Morrison* rule, a disability resulting from the combination of preexisting conditions (age and education) and an occupational disease is compensable, whereas the combination of a preexisting disease and an occupational disease triggers an apportionment rule. No sound reason is given for this distinction.

By adopting the dual standard for the application of apportionment, the Court implicitly encourages the employer to favor the Morrisons (diseased employees) over the Littles (those with socio-economic handicaps).[118] This result is at odds with the liberal principles underlying the Workers' Compensation Act. Query whether the *Morrison* claimant may recover an award for total disability by alleging inability to obtain gainful employment due to factors of age and education?

## V. CONCLUSION

*Morrison* is the first case in which the North Carolina Supreme Court has considered the question of whether apportionment is proper in the context of an occupational disease claim. In allowing apportionment, the majority reversed a progressive trend in the field of workers' compensation law.

The *Morrison* decision adds to the burden of proof required of an occupational disease claimant, departs from the prior application of the aggravation principle in this state, and creates an artificial distinction between claimants suffering from preexisting diseases and those whose disability is in part caused by advanced age or lack of skill. Finally, the Court usurps the legislative function in ordering apportionment.

At its first opportunity, the Court should reconsider the *Morrison* rule of apportionment and reestablish North Carolina's progressive tradition in the field of workers' compensation law. As stated by Justice Sharp in *Booker*,[119] the clear intent of the General Assembly in enacting subsection thirteen was to bring North Carolina in line with the vast majority of states by providing com-

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117. *Id.*

118. *See* Judge Clark's dissent in Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 260, 218 S.E.2d 876, *rev'd on other grounds*, 289 N.C. 254, 221 S.E.2d 355 (1975), in which he states that the apportionment rule could lead to discrimination against the handicapped. Under similar reasoning, the application of apportionment against those with a disease but not those with a lack of education could lead to discrimination against the latter group.

119. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189, 196 (1979).

prehensive coverage of occupational diseases.

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