

CHAPTER SIX

OCCUPATIONAL DISEASE CLAIMS UNDER THE NORTH CAROLINA WORKERS' COMPENSATION ACT

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I. INTRODUCTION AND HISTORY

The Workers' Compensation Act (called Workmen's until amended in 1979) was passed in 1929. The original Act covered workplace accidents but specifically excluded occupational diseases from coverage. The occupational disease provisions were enacted in 1935 and included N.C. Gen. Stat. §§ 97-52 through 97-76. The 1935 amendments, which provided compensation for occupational diseases, were motivated by the filing of multiple civil cases alleging negligence by the employer for exposing employees to asbestos and silica, causing asbestosis and silicosis. See *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934); *Swink v. Carolina Asbestos Co.*, 210 N.C. 303, 186 S.E. 258 (1936).

In *McNeely*, the North Carolina Supreme Court stretched the definition of accident to find that the employee's inhalation of asbestos dust over five months in a plant, which had failed to install a dust suction system commonplace in other asbestos plants, constituted a compensable injury by accident under the Act. Plaintiff's civil claim for negligence was dismissed. *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934). Two years later, but after the passage of the 1935 amendments providing compensation for occupational diseases, the same court looking at almost identical facts from the same employer, found the inhalation of asbestos dust was an occupational disease and not an injury by accident. *Swink v. Carolina Asbestos Co.*, 210 N.C. 303, 186 S.E. 258 (1936). The plaintiff in *Swink* received no compensation because he acquired his occupational disease prior to the passage of the 1935 amendments.

The 1935 amendments only covered specifically identified occupational diseases, including asbestosis and silicosis. The North Carolina Act was similar to the workers' compensation acts of many other states, covering only the specific diseases enumerated in the statute. For the list of covered diseases, see N.C. Gen. Stat. § 97-53(1)-(12), (14)-(27). For 35 years, between 1935 and 1970, there were few appellate court decisions interpreting the occupational disease statutes.

In 1971, North Carolina followed a national trend to expand the definition of occupational disease to provide more comprehensive coverage and to include occupationally related diseases not specifically set out in the statute. The Act was amended to include the "catch all" provision which provides compensation for unlisted occupational diseases. The amendment, found at N.C. Gen. Stat. § 97-53 (13), states that a compensable occupational disease is:

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 the employment.

Since the passage of this amendment, there has been a substantial increase in the number of occupational disease appellate decisions. The passage of this amendment, plus improved medical knowledge, increased public awareness of the effects of workplace exposure, and the expansion of industry in this state, resulted in a substantial increase in the kind and number of occupational disease claims filed in the past twenty-five years. The increases are particularly apparent in cases related to toxic exposures, repetitive motion disorders, and psychological conditions.

II. OCCUPATIONAL DISEASE TEST

Whether an occupational disease claim is compensable generally depends upon what type of disease is being alleged. Potentially compensable diseases fall into four categories, each of which has its own set of proof requirements. The four categories are: (a) listed diseases, N.C. Gen. Stat. § 97-53(1)-(12), (14)-(23), (26)(27); (b) “catch-all” diseases, N.C. Gen. Stat. § 97-53(13); (c) asbestosis and silicosis, N.C. Gen. Stat. § 97-53(24)(25); and (d) hearing loss, N.C. Gen. Stat. § 97-53(28). In all four categories, the claimant must prove exposure and disease, but the burden of the specific requirements vary between categories.

A. Listed Diseases under N.C. Gen. Stat. § 97-53

N.C. Gen. Stat. § 97-53 lists the diseases which are covered under the Act. Most of the list, sub-sections (1) through (12) and (14) through (23),(26) and (27), consists of an enumeration of specific diseases, from anthrax to zinc poisoning and many in between. In order to establish compensability of most of these conditions, a claimant must simply prove exposure to the offending agent and that claimant has contracted the condition. For example, N.C. Gen. Stat. § 97-53 includes as listed compensable occupational diseases the following subsections: (2) Arsenic poisoning; (3) Brass poisoning; (4) Zinc poisoning; (5) Manganese poisoning; (7) Mercury poisoning; and (8) Phosphorus poisoning. The only elements that need to be shown

are claimant's work exposure to the listed substance and that claimant suffers from the resulting disease.

In *Henry v. A.C. Lawrence Leather Co.*, 234 N.C. 126, 66 S.E.2d 693 (1951), the court found plaintiff's tenosynovitis to be a compensable occupational disease based solely on evidence that the plaintiff's work exposed him to a constant, repeated strain or stress on the extensor tendons of his arms, which resulted in the condition tenosynovitis. There are very few litigated cases regarding the compensability of the listed diseases.

B. Asbestosis and Silicosis Cases

Asbestosis and silicosis claims, which initiated the passage of the occupational disease section of the Act, were singled out and treated differently than the other listed diseases. See N.C. Gen. Stat. §§ 97-57, 97-58, 97-60 through 97-68. A perusal of these sections of the Act will introduce the reader to the many different ways these claims are treated from other occupational disease claims. The complexity of these claims is beyond the scope of this paper. The prudent attorney handling her first asbestosis or silicosis claim will associate a firm with experience in this area.

One place where asbestosis and silicosis claims are differentiated from other occupational diseases is N.C. Gen. Stat. § 97-63, which provides that no compensation shall be paid for these diseases unless the employee was exposed to silica or asbestos in North Carolina for at least two years inside of the ten years immediately preceding the last injurious exposure. This provision was found to be an unconstitutional violation of the equal protection clause. *Walters v. Blair*, 120 N.C.App. 398, 462 S.E.2d 232 (1995), *aff'd per curiam*, 344 N.C. 628, 476 S.E.2d 105 (1996), *cert. denied*, 117 S.Ct. 1551, 520 U.S. 1196 (1997).

The *Walters* court held that the state had a legitimate interest in preventing forum shopping and in protecting against claims for which the employer was not responsible. *Walters* at 401, 462 S.E.2d at 234. The *Walters* court then held that while those interests were legitimate, the statute was grossly under inclusive in that it did not include all who were similarly situated. The *Walters* court found that, without justification, the statute imposed upon claimants suffering from asbestosis or silicosis an additional burden for recovery not so imposed on claimants with other occupational diseases. *Walters* at 401, 462 S.E.2d at 234.

The provision of N.C. Gen. Stat. § 97-61.5 which provides that employees diagnosed with asbestosis or silicosis are to be removed from the hazardous occupation and paid 104 weeks (two years) of benefits has received considerable attention from the appellate courts in the last three years. In *Jones v. Weyerhaeuser Company* the defendant brought a constitutional challenge. The defendant contended that the statute denied it equal protection of the law under both the North Carolina Constitution and the United States Constitution because the statute treats employers with employees who are exposed to asbestos and silica differently than employers with employees who are not exposed to asbestos and silica. The Court of Appeals held that N.C. Gen. Stat. § 97-61.5 “was enacted as an added benefit to employees suffering from asbestosis or silicosis, and its purpose was to account for the incurable, latent, and unique nature of asbestosis and silicosis, factors not apparent in other occupational diseases.” *Jones v. Weyerhaeuser Company*, 141 N.C. App. 482, 488, 539 S.E.2d 380, 384 (2000). The court applying the rational basis test held that § 97-61.5 was not unconstitutional because it did not, without justification, impose an additional burden. *Id.*

In *Austin v. Continental General Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001) the North Carolina Supreme Court in a *per curiam* decision adopted the dissenting opinion of Judge Greene. Judge Greene dissented from a majority opinion that allowed a worker that retired from employment for reasons unrelated to asbestosis exposure to receive 104 weeks of benefits pursuant to N.C. Gen. Stat. § 97-61.5. Judge Greene reasoned that: “The unambiguous language of section 97-61.5(b) requires an employee to be ‘removed’ from his employment as a prerequisite to receiving the 104 weeks of compensation provided for in the statute.” Thus, based on the language of the Judge Greene’s dissenting opinion the holding of the North Carolina Supreme Court is that an “employee who is no longer employed at the time he is diagnosed with asbestosis, therefore, may not, under the plain language of section 97-61.5(b), proceed with a workers’ compensation claim under this statute.” *Austin v. Continental General Tire*, , 141 N.C. App. 397, 415, 540 S.E.2d 824, 835 (2000)(Greene dissent).

In *Abernathy v. Sandoz Chemical/Clariant Corp.*, the Court of Appeals followed the decision in *Austin v. Continental General Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001), but then addressed how to calculate average weekly wage and the compensation rate of an employee who has retired prior to being diagnosed with asbestosis. *Abernathy v. Sandoz Chemical/Clariant Corp.*, 151 N.C. App. 252, 565

S.E.2d 218 (2002). The Court stated:

In the present case, it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income. . . . Because plaintiff contracted asbestosis by working around asbestos for 25 years at defendant employer, the only fair method for determining his average weekly wage is using his latest full year of employment with defendant company Accordingly, in remanding this case to the Industrial Commission for a determination of plaintiff's entitlement to compensation pursuant to G.S. § 97-64, we also instruct the Commission, if it determines plaintiff is entitled to compensation, to calculate plaintiff's average weekly wage in accordance with the method prescribed by the second full paragraph of G.S. § 97-2(5).

Abernathy at 258-59, 565 S.E.2d at 222.

C. Hearing Loss Cases

The elements of a hearing loss claim are set out at N.C. Gen. Stat. § 97-53(28). This section, which runs for several pages, is among the most technical and difficult in the Act. Hearing loss must be present in both ears, as tested at specified frequencies. The exposure must be to "harmful noise," defined as 90 decibels or more as measured in the workplace, without reduction for the effect of hearing protection devices. *Clark v. Burlington Industries.*, 78 N.C.App. 695, 338 S.E.2d 553 (1986). It is the plaintiff's burden to prove bilateral hearing loss due to noise to which the plaintiff was exposed for at least 90 days. Inadequate noise exposure is an affirmative defense. *McCuiston v. Adressograph-Multigraph Corp.*, 308 N.C. 665, 303 S.E.2d 795 (1983). Compensation is barred if an employee exposed after October 1, 1971, failed to use employer-provided hearing protection devices.

D. The "Catch-all" Provision of N.C. Gen. Stat. § 97-53

Subsection (13) is known as the "catch-all" provision. It allows for the compensability of:

Any disease...which is proven to be due to causes and conditions which

are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53. It is under this provision that the great majority of occupational disease cases are currently litigated, including chemical exposure cases, repetitive motion injury cases, and psychological injury from workplace stress cases.

Until the decision in *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979), it was widely argued that “characteristic of and peculiar to” meant a condition was compensable if it was caused only by the particular employment. The *Booker* decision written by Chief Justice Sharp provides a wonderful history of the handling of occupational disease claims, as well as setting forth the two-pronged test of compensability that today is the cornerstone of occupational disease law.

In *Booker*, the plaintiff, a lab technician, contracted serum hepatitis due to his exposure to infected blood samples. The injury to Booker was not treated as an accident because no specific incident could be identified which led to his contracting serum hepatitis. *Booker* at 465, 256 S.E.2d at 194. The Court of Appeals denied compensation for an occupational disease because serum hepatitis does not develop gradually through prolonged exposure, but instead is caused by a single exposure to the virus. *Booker* at 470, 256 S.E.2d at 197.

Justice Sharp found that: “The clear intent of the General Assembly in enacting the current version of G. S. 97-53(13) was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases.” *Booker* at 469, 256 S.E.2d at 196. The *Booker* court then analyzed the tortured history of occupational disease claims and articulated a new test for occupational disease cases. *Booker* at 472-476, 256 S.E.2d 198-200.

Because serum hepatitis is not a disease which develops gradually through prolonged exposure to harmful conditions but instead is an illness caused by a single exposure to a virus, the Court of Appeals concluded that it was not compensable as an occupational disease. For the reasons which follow we disagree.

We begin by noting Professor Larson's admonition that "(d)efinitions of

'occupational disease' should always be checked against the purpose for which they were uttered." 1B A. Larson, *Workmen's Compensation Law* s 41.31 (1978). Because the first workmen's compensation acts usually provided coverage for accidental injuries while denying or limiting it for victims of occupational disease, the tendency in early court decisions construing these acts was to expansively define the term "accident" while narrowly construing the term "occupational disease." As jurisdictions amended their laws to provide coverage for all occupationally related illnesses, these older definitions became less viable:

"The present problem of definition is: Under general definitions of occupational disease in statutes granting compensation for such disease, how much is affirmatively included? The important boundary becomes now, not that separating occupational disease from accident, since compensability lies on both sides of that boundary, but the boundary separating occupational disease from diseases that are neither accidental nor occupational, but common to mankind and not distinctively associated with the employment. For this purpose a new set of standards must be used. It is of little value, and, indeed, may be quite misleading, to quote indiscriminately from old definitions whose only purpose was distinguishing accident." 1B A. Larson, *Workmen's Compensation Law* s 41.32 (1978) (Emphasis added.)

Booker at 470, 256 S.E.2d 197.

The Court then stated a new test for occupational disease that focused on "separating occupational disease from diseases that are neither accidental nor occupational, but common to mankind and not distinctively associated with the employment" In order for a disease to be compensable as an occupational disease under the Workers' Compensation Act: (1) it must be characteristic of persons engaged in claimant's particular trade or occupation; (2) it must not be an ordinary disease of life to which the public generally is equally exposed; and (3) there must be a causal connection between the employment and the disease. *Booker* at 475, 256 S.E.2d at 200. In defining whether an employee's job exposes him to a greater risk of contracting the disease than members of the public generally, the Court held that the disease need not originate exclusively from the employment, but only that the employment must result in a hazard which distinguishes it from employment generally. *Booker* at 473-476, 256 S.E.2d 198-200.

"The phrase, 'peculiar to the occupation,' is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations (see Oxford Dictionary; Funk & Wagnalls Dictionary). . . . To come within the definition, an occupational disease must be a disease which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. *Glodenis v. American Brass Co.*, 118 Conn. 29, 40, 170 A. 146, 150."

Booker at 473, 256 S.E.2d 199.

The final requirement in establishing a compensable claim under subsection (13) is proof of causation. It is this limitation which protects our Workmen's Compensation Act from being converted into a general health and insurance benefit act. *Bryan v. Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966). In *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951) we held that the addition of G.S. 97-53 to the Act "in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment. And nonetheless, since the adoption of the amendment, may an award for an occupational disease be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged."

Booker at 475, 256 S.E.2d 200.

Elements one and two of the test are satisfied if plaintiff's occupation exposed plaintiff to a greater risk of contracting the disease than members of the public generally. Element three of the test is satisfied if the work environment significantly contributed or was a significant causal factor in the disease's development. Thus, a disease is a compensable occupational disease if: (1) the employee's job exposed him to a greater risk of contracting the disease than members of the public generally; and (2) his exposure significantly contributed to, or was a causal factor in, the disease's development. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70

(1983); *Keel v. H & V Inc.*, 107 N.C.App. 536, 421 S.E.2d 362, 365 (1992).

In *Pressley v. Southwestern Freight Lines*, 144 N.C. App. 342, 551 S.E.2d 118 (2001) the court defined what was meant by the term "general public" as that term is used in determining whether an employee suffers from an occupational disease. The claimant contracted coccidioidomycosis. Coccidioidomycosis is caused by exposure to a fungus organism which lives in the southwestern United States, including Arizona, New Mexico, and southern California. It does not grow in North Carolina or in any state east of the Mississippi River. The fungus organism can become airborne and if inhaled can lead to infection in humans. *Pressley* at 344, 551 S.E.2d at 119. Claimant alleged he contracted coccidioidomycosis in October 1991 while carrying goods for defendant Southwestern Freight Lines between Los Angeles and Bakersfield, California. Defendants denied liability on the grounds plaintiff "does not suffer from a compensable occupational disease." *Pressley* at 343, 551 S.E.2d at 119.

The critical issue in the case is how to define the term "general public" or "public generally" when determining whether the employee's job exposed him to a greater risk of contracting the disease than members of the public generally. It was not disputed that claimant's employment did not expose him to a greater risk of contracting coccidioidomycosis than that of the general public living or traveling in the southwestern United States. It was also not disputed that his risk of contracting coccidioidomycosis was greater than that of the general public of North Carolina, because the fungus spores are not present east of the Mississippi River.

The *Pressley* court concluded that the claimant did suffer from an occupational disease because it interpreted the term "general public" as pertaining to the general public of North Carolina.

[W]e interpret the term "general public" as pertaining to the general public of North Carolina. This interpretation employs a liberal construction in favor of the employee, and is consistent with the determination made by the Industrial Commission which we view as persuasive. Moreover, this interpretation does not enlarge the ordinary meaning of this term. The American Heritage College Dictionary defines "general" as "concerned with, applicable to, or affecting the whole or every member of a class or category." *The American Heritage College Dictionary* 566 (3rd ed.1997). It defines "public" as "[o]f, concerning, or affecting the community or the people." *Id.* at 1106. In

this case, we are simply defining the scope of the class, category or community as that of the general public of North Carolina. In light of this interpretation, the Commission's finding of fact that plaintiff's work as a truck driver placed him at an increased risk of contracting the disease when compared to the general public not so employed is supported by the evidence showing that coccidioidomycosis is not generally contracted in North Carolina.

Pressley at 348, 551 S.E.2d at 122.

In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), the court struggled with what benefits, if any, to pay to a worker disabled from chronic obstructive lung disease caused in part by her on-the-job exposure to cotton dust and in part by cigarette smoke. The *Rutledge* plaintiff was in her mid-forties, had a tenth grade education and worked in textile mills for 25 years. She smoked one pack of cigarettes per day from age fifteen until February 1979 (30years).

She worked for four textile mills: (1) United Merchants in Buffalo, South Carolina, from 1953 until 1971 as a weaver; (2) Milliken at Union, South Carolina, from 1971 to 1973 as a "dry cleaner"; (3) Aleo Manufacturing, Rockingham, North Carolina, from 1975 to 1976 as a weaver; and (4) for defendant from 25 October 1976 until 12 January 1979 as a winder and then as a spinner. She was absent "for bronchitis" from 28 January 1977 until 13 May 1977. She "retired" on 12 January 1979.

All the plants where plaintiff worked "had a lot of cotton dust and lint" but defendant's premises, both in the weaving and spinning areas, were "relatively clean." Defendant's mill processed essentially 50 percent cotton blend materials and occasionally blends made of even a smaller percentage of cotton. "Although there was respirable cotton dust in [defendant's] weave room, there was much less than ... in other premises." Plaintiff began developing a cough at work in 1969 or 1970. "[H]er cough was associated with her presence at work. Her shortness of breath became severe in December of 1976 and she has had various bouts with it since that time having to be out of work.... Plaintiff suffers from chronic obstructive pulmonary disease [with elements] of pulmonary emphysema and chronic bronchitis.... Plaintiff is disabled,

because of her pulmonary impairment from all but sedentary ... work which must be in a clean environment because of her reaction to cotton dust and other such irritants."

Rutledge at 87, 301 S.E.2d 361-62.

The *Rutledge* court stated the occupational disease elements as follows:

For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979). To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.

Rutledge at 93, 301 S.E.2d at 365 (emphasis added).

The *Rutledge* court elaborated later in the decision:

"The hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. But in such case 'the employment must have some definite, discernible relation to the accident.'"

Rutledge at 102, 301 S.E.2d at 370 (quoting *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 92-93, 63 S.E.2d 173, 176 (1951)).

In defining the issue before it the *Rutledge* court stated: "The question now clearly before us for the first time is whether a textile worker's *chronic obstructive lung disease* may be an occupational disease under G.S. 97-53(13) when it is caused in part by the worker's on-the-job exposure to cotton dust and in part by exposure to other substances, such as cigarette smoke, and when the disease has other components like bronchitis and emphysema which in their incipience at least are not work-related." *Rutledge* at 100-01, 301 S.E.2d 369.

Our answer to the question posed is that chronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Significant means "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." Webster's Third New International Dictionary (1971). *Significant* is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or *of little moment*. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Rutledge at 101, 301 S.E.2d at 369-70.

Thus, in *Rutledge* the North Carolina Supreme Court adopted the significant contribution principle to determine if a claimant's disease is compensable under the Workers' Compensation Act. The Court then set out the burden of proof standards.

[T]he significant contribution principle which we adopt puts upon the claimant in these lung disease cases a somewhat heavier burden than our

sister states seem to require or that we require in industrial accident cases. Our purpose in adopting this principle is to strike a fair balance between the worker and the employer in the administration of our Workers' Compensation Act as it is applied to the difficult lung disease cases. To hold that the inhalation of cotton dust must be the sole cause of chronic obstructive lung disease before this disease can be considered occupational establishes too harsh a principle from the standpoint of the worker and the purposes and policies of our Workers' Compensation Act.

This Act "should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). On the other hand, to hold the causation requirement is satisfied if cotton dust exposure contributes to the slightest extent, however miniscule or insignificant, to the etiology of chronic obstructive lung disease, places too heavy a burden on industry. This holding would compromise the valid principle that our Workers' Compensation Act should not be transformed into a general accident and health insurance law.

Rutledge at 104-05, 301 S.E.2d at 371-72.

"Circumstantial evidence of the causal connection between the occupation and the disease is sufficient." *Keel* at 540, 421 S.E.2d at 366; *Booker v. Duke Medical Center*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979). Circumstances which may be considered include: (1) the extent of the exposure to the disease-causing agent during employment; (2) the extent of exposure to the disease-causing agent outside of employment; and (3) the absence of the disease prior to the work related exposure. *Booker* at 476, 256 S.E.2d at 200; *Keel* at 539, 421 S.E.2d at 365. These circumstances mirror the factual circumstances stated in *Rutledge*, where the significant causation standard was established:

In determining whether a claimant's exposure to cotton dust has significantly contributed to, or been a significant causative factor in, chronic obstructive lung disease, the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony. It may consider other factual circumstances in the case, among which are (1) the extent of the worker's exposure to cotton dust during employment, (2) the extent of other non-work-related, but

contributing, exposures and components; and (3) the manner in which the disease developed with reference to the claimant's work history. See *Booker v. Duke Medical Center*, *supra*, 297 N.C. at 476, 256 S.E.2d at 200.

Rutledge at 105, 301 S.E.2d at 372.

The best evidence of increased risk often involves medical testimony regarding epidemiological studies, or treatises establishing an increased risk of the particular disease in the particular employment. However, such evidence is not always necessary. Medical opinions on causation do not require absolute medical certainty. Medical opinions as to causation may be based on personal knowledge or observation, or on information supplied by others, including the patient. *Booker* at 479, 256 S.E.2d at 202; *Keel* at 540, 421 S.E.2d at 366.

The North Carolina Supreme Court “rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment.” *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983); *see also Keel* at 540, 421 S.E.2d at 366; *Gay v. J. P. Stevens & Co. Inc.*, 79 N.C.App. 324, 333-34, 339 S.E.2d 490, 495-96 (1986). Such quantification is often impossible for the employee to do, since sophisticated measuring devices are not readily available or the conditions have changed from when the employee was exposed. “Workplace exposure is a significant factor if without the exposure ‘the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work’.” *Keel* at 539, 421 S.E.2d at 365 (1992) (*quoting Gay v. J. P. Stevens & Co. Inc.*, 79 N.C.App. 324, 330, 339 S.E.2d 490, 494 (1986)). If the occupational exposure augments the disease process to any degree, however slight, the employer is liable. *Keel* at 539, 421 S.E.2d at 365 (*citing Gay v. J. P. Stevens & Co. Inc.*, 79 N.C.App. 324, 330, 339 S.E.2d 490, 494 (1986) and *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983)). The substance to which an employee is injuriously exposed need not be a substance known to cause a disease. *Caulder v. Waverly Mills*, 314 N.C. 70, 74, 331 S.E.2d 646, 649-50 (1985); *Keel* at 539, 421 S.E.2d at 365; *Gay v. J. P. Stevens & Co. Inc.*, 79 N.C.App. 324, 330-31, 339 S.E.2d 490, 494 (1986).

In *Poole v. Tammy Lynn Center*, 151 N.C. App. 668, 566 S.E.2d 839 (2002) the court addressed the second element of the occupational disease test - whether there was a causal connection between plaintiff's employment and the disease. In *Poole*,

plaintiff worked in a residential facility serving persons with severe and profound developmental disabilities and mental retardation. As part of her duties plaintiff assisted residents with personal hygiene and cleaned residents when they soiled themselves due to vomiting, menstruation or bowel movements. *Poole* at 670, 566 S.E.2d at 840. Plaintiff contracted hepatitis C and as a result became permanently and totally disabled. *Poole* at 671, 566 S.E.2d at 841.

Plaintiff identified 15 individuals to whose blood she was exposed as a result of her job duties. Defendant was able to voluntarily test 10 of those individuals. None of the 10 individuals tested were positive for the hepatitis virus. Five individuals were not tested. Of those five, three refused to consent to the test, one died without an autopsy and the other individual could not be located. A review of the medical records of the five individuals who were not tested failed to indicate the presence of the hepatitis C virus. Additionally, plaintiff was unable to offer evidence of any direct blood to blood contact with any of the five individuals not tested. *Poole* at 840, 566 S.E.2d at 670.

The court agreed with a Full Commission's finding that plaintiff's employment exposed her to a greater risk of contracting hepatitis C than members of the public not so employed. However, the court held that plaintiff failed to meet her burden of proof that there was a causal connection between her employment and her contraction of hepatitis C. *Poole* at 842-43, 566 S.E.2d at 673-74.

[P]laintiff in the present case presented no evidence that she was exposed to the hepatitis C virus while employed at the Center; she relies on her alleged blood-to-blood exposure with residents at the Center as sufficient proof of causation. However, exposure to blood, standing alone, is not sufficient evidence of exposure to the hepatitis C virus; the holding in *Booker* requires proof of exposure "to the disease or disease-causing agents during employment." *Booker v. Duke Medical Center*, 297 N.C. at 476, 256 S.E.2d at 200. Uninfected blood cannot be characterized as a disease-causing agent. Rather, the disease-causing agent is the hepatitis C virus, which can be found in blood *infected with the virus*.

Poole at 843, 566 S.E.2d at 674. See also *Nix v. Collins & Aikman, Co.*, 151 N.C. App. 438, 566 S.E.2d 176 (2002)(issue of increased risk v. idiopathic hyper sensitivity). It is the plaintiff's burden to show increased risk, exposure to the disease causing agent and the causal connection between the exposure and the disease.

In *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 534 S.E.2d 259, cert. denied 353 N.C. 378, 547 S.E.2d 15 (2001) the court addressed two proof issues: (1) proof of causation involving complicated medical issues; and (2) proof of increased risk. The *Norris* court referred to North Carolina Supreme Court precedent to hold that in proving medical causation:

"where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). It has also stated that when " 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' " *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (quote omitted). Therefore, findings regarding the nature of a disease--its characteristics, symptoms, and manifestations--must ordinarily be based upon expert medical testimony. *See Wood*, 297 N.C. at 640, 256 S.E.2d at 695.

Norris at 622-23, 534 S.E.2d at 262.

In reference to proof of increased risk the court found that "none of the medical witnesses expressed an opinion as to whether plaintiff's employment or occupation subjected her to a greater risk of contracting the disease." Therefore, the court affirmed the Commission's conclusion that her fibromyalgia was not due to causes or conditions that were characteristic of and peculiar to her employment with defendant and, therefore, was not an occupational disease.

Norris at 622-23, 534 S.E.2d at 261-62.

On May 2, 2003, the North Carolina Supreme Court affirmed a split decision of the North Carolina Court of Appeals which held that even if the claimant only alleges that his occupation only contributed to or aggravated the disease, the claimant must nevertheless satisfy the two initial prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk of contracting the occupational disease than

were members of the public generally. *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 566 S.E.2d 181, *affirmed per curiam* 357 N.C. 158, 579 S.E.2d 269 (2003).

Judge Greene dissented from the majority opinion at the Court of Appeals. Judge Greene's reasoning, which was rejected by the North Carolina Supreme Court, was that in a case in which the plaintiff alleges that his disease was aggravated by his employment but not caused by his appointment the basic *Rutledge* test needs to be modified.

The burden rests on the claimant to show that: (1) " 'a causal connection between the disease and the [claimant's] employment' " exists and (2) "the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (citations omitted). Although the second prong of the test outlined in *Rutledge* uses the words "contracting the disease," this language evolved in the context of workers' compensation claims based on diseases that were brought about by the plaintiffs' employment conditions. *See, e.g., id.* at 90, 301 S.E.2d at 363; *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 472-74, 256 S.E.2d 189, 198-200 (1979). The analysis, however, must necessarily change when the focus shifts from causation as it relates to the initial development of a disease to the aggravation of an existing condition, because a plaintiff whose disease was aggravated by his employment does not claim to have contracted the disease at work.

Futrell at 462, 566 S.E.2d at 185 (Greene dissenting).

As this Court has not yet considered the proper formulation of the "increased risk" factor in an aggravation case, I would hold that, in the context of an aggravation case, the analysis must rest on whether the plaintiff's job exposed him to a greater risk of having his carpal tunnel syndrome aggravated than the general population suffering from the disease. *See Goodman v. Cone Mills Corp.*, 75 N.C.App. 493, 497, 331 S.E.2d 261, 264 (1985) (a disease is compensable when it "is aggravated or accelerated by causes and conditions characteristic of and peculiar to [the] claimant's employment") (citing *Walston v. Burlington Indus.*, 304 N.C. 670, 679-80, 285 S.E.2d 822, 828 (1982)).

Futrell at 463, 566 S.E.2d at 185-86 (Greene dissenting).

The North Carolina Supreme Court's refusal to adopt the reasoning of Judge Greene requires that a plaintiff who alleges an occupational disease based on an aggravation of an underlying condition must still meet her burden of proving that the employment placed her at a greater risk of contracting (not simply accelerating or aggravating) the occupational disease than were members of the public generally. *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 566 S.E.2d 181, *affirmed per curiam* 357 N.C. 158, 579 S.E.2d 269 (2003).

In cases arising under N.C. Gen. Stat. § 97-53(13), both plaintiffs' attorneys and defense attorneys develop facts, with the common ultimate objective to present the facts to a medical expert and ask some variation of the following two questions:

1. Do you have an opinion, satisfactory to yourself and to a reasonable degree of medical certainty, whether the job as performed by plaintiff exposed plaintiff to a greater risk of contracting [name the disease] than members of the public are generally exposed?

2. Do you have an opinion, satisfactory to yourself and to a reasonable degree of medical certainty, whether the job as performed by plaintiff significantly contributed to, or was a significant causal factor in the disease's development?

III. LAST INJURIOUS EXPOSURE

A. The Theory of Last Injurious Exposure

Section 97-57 of the Worker's Compensation Act was part of the original set of occupational disease provisions, and is the key to the determination of which employer is responsible for payment of benefits in an occupational disease claim. This first paragraph of this section provides as follows:

In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable...

N.C. Gen. Stat. § 97-57. The last paragraph contains special provisions which apply only to asbestosis and silicosis cases.

The theory behind the last injurious exposure method of assigning liability runs counter to the reasoning behind traditional accident cases. The result is often confusing. In an accident case, the employer is liable based on having been the employer at the time of the accident, which was the disabling event. It is relatively easy to pin-point, since it depends on proof of a specific event. The General Assembly recognized that it is practically impossible to identify with certainty the point of origin of a disease that develops over time, and that assigning liability in an occupational disease claim must follow a different analysis.

In an occupational disease case, it is the ending of the train of events that is critical, whether or not it caused the illness or disability. It is not always an easy concept to explain to a disabled worker or a relatively blameless employer, who wonders why the claim is against the ABC Company, where the worker was only exposed to cotton dust for six months, when the same worker was previously employed by the XYZ Company and exposed to cotton dust for thirty years. The policy, as explained by the North Carolina Supreme Court, is as follows:

This section ... [97-57] has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs - with the last injurious exposure.

Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942). More recently, the Court elaborated further in response to arguments by some that this scheme is unfair at times:

The rule under this section ... serves to eliminate the need for complex and expensive litigation on the issue of relative contribution by each of several employments to a plaintiff's occupational disease. The possibility that some employers may bear a disproportionate share of the total liability for occupational disease is a problem for the legislature, not the courts, to consider.

Fraday v. Groves Thread, 56 N.C.App. 61, 286 S.E.2d 844 (1982), aff'd, 312 N.C.316,

321 S.E.2d 835 (1984). As a practical matter, the liability for employers should even out over time, with an employer occasionally being liable for a very short-time employee, and sometimes escaping liability for a very long-term one.

B. Last Injurious Exposure in Practice

Since the enactment of N.C. Gen. Stat. § 97-57 in 1935, there have been fewer than forty decisions interpreting it by the appellate courts. All but ten of those decisions have been decided since 1980.

The case most often cited as defining the modern application of last injurious exposure is *Rutledge v. Tultex Corp. /Kings Yarns*, 308 N.C. 85, 301 S.E.2d (1983). In *Rutledge*, which was a cotton dust exposure lung disease (brown lung) case, the North Carolina Supreme Court restated the last injurious exposure principle. The term “last injurious exposure” means an exposure which proximately augmented the disease process to any extent, however slight. *Rutledge* at 89, 301 S.E.2d 362-63 (citing *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942).

In subsequent decisions, the Court has explained that “hazards of the disease,” referred to in N.C. Gen. Stat. § 97-57, does not mean that the workplace exposure must be capable of causing the disease in question. In a case in which the employee had contracted obstructive lung disease from exposure to cotton dust, the Court affirmed the assignment of liability to the plaintiff’s last textile employment, even though there was no cotton dust (only synthetic dust) in the plant. *Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985). As mentioned in the previous section, the Court of Appeals has held that the last injurious exposure need not be to a substance known to cause the disease at all. *Gay v. J.P. Stevens & Co.*, 79 N.C.App. 324, 339 S.E.2d 490 (1986).

Although it is clearly not required that the last employment cause the disease, cases are still occasionally denied by the Commission on that basis, and remanded on appeal. In *Cain v. Guyton*, 79 N.C.App. 696, 340 S.E.2d 501, *aff’d*, 318 N.C. 410, 348 S.E.2d 595 (1986), the Court specifically held that the N.C. Gen. Stat. § 97-57, “does not require an independent showing of significant contribution to the occupational disease.”

C. Particular Provisions

There are a number of specific provisions in the Workers' Compensation Act regarding the substance and the procedure in claims for asbestosis and silicosis. Among these is the second paragraph of N.C. Gen. Stat. § 97-57, which provides as follows:

...when an employee has been exposed to the hazards of asbestosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious;...

The Court of Appeals has held that this section creates an irrebuttable presumption of injurious exposure, upon proof of work around asbestos for the requisite period. *Barber v. Babcock & Wilcox Construction Co.*, 101 N.C.App. 564, 400 S.E.2d 735 (1991). In *Barber*, the court held that this presumption applied even though the plaintiff's work was near an area where dust measurements showed that the asbestos levels were "negligible."

IV. TIMELY FILING OF THE CLAIM

The time limits for providing notice to the employer and filing a claim for an occupational disease are found at N.C. Gen. Stat. § 97-58(b)&(c) which read:

(b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in cases of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. Provided, however, that the right to compensation for radiation injury, disability or death shall be barred unless a claim is filed within two years after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment.

An employee does not become disabled from an occupational disease until the

employee is both informed by competent medical authority that she suffers from an occupational disease, and the occupational disease renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity. *Dowdy v. Fieldcrest Mills*, 59 N.C. App. 696, 298 S.E.2d 82 (1982), *rehearing denied*, 308 N.C. 701, 304 S.E.2d 215 (1983); *Rutledge v. Stroh Companies*, 105 N.C. App. 307, 412 S.E.2d 901 (1992).

The Court of Appeals gave a generous interpretation to determining when incapacity to earn wages begins. The court stated that the two-year period within which an occupational disease claim had to be filed by claimant who suffered from carpal tunnel syndrome did not commence on the date claimant took leave of absence for six days after being informed by her doctor of her disease, because a six day leave-of-absence was not compensable under the Act as a period of disability. The two year period started on a subsequent date when claimant was unable to earn wages for four weeks. *Howard v. Square-D Co.*, 128 N.C. App. 303, 494 S.E.2d 606, *review allowed* 348 N.C. 72, 505 S.E.2d 872, *review improvidently allowed* 349 N.C. 224, 504 S.E.2d 785 (1998).

The statute of limitations in asbestosis and silicosis claims begins to run on the date the employee is informed by competent medical authority of the disease and its work related nature. Because an employee can obtain initial compensation benefits for asbestosis or silicosis prior to showing a disablement, the diagnosis of asbestosis or silicosis itself being sufficient to obtain benefits, the statute begins to run upon receipt of the diagnosis. N.C. Gen. Stat. § 97-61.5

V. DETERMINING EXTENT OF DISABILITY

Disability under the Workers' Compensation Act is the same for occupational disease cases as it is for injury by accident cases. Disability is defined as "incapacity because of injury to earn the same wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

A claimant has the initial burden of proving that her wage earning capacity has been impaired by injury or occupational disease. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982); *Kennedy v. Duke University Medical Center*, 101 N.C. App. 24, 398 S.E.2d 667, 682 (1990). To support a conclusion of impairment of wage earning capacity or disability, the Commission must find:

- 1) incapacity to earn pre-injury wages in the same employment;
- 2) incapacity to earn pre-injury wages in other employment; and
- 3) the injury caused the incapacity to earn the same wages.

Hilliard, 305 N.C. at 595, 290 S.E.2d at 683.

In order to prove disability due to a reduction in earning capacity, an employee must prove incapacity to earn pre-injury wages in the same or any other employment. *Hilliard v Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). Testimony of vocational rehabilitation specialists and medical experts is competent evidence in determining wage earning incapacity. *Kennedy v Duke Medical Center*; 101 N.C. App. 24, 33, 398 S.E.2d 677, 682, (1990); *Niple v. Seawell Realty and Industrial Co.*, 88 N.C. App. 136,139, 362 S.E.2d 572, 574 (1987); *Fleming v. K-Mart Corp.*, 312 N.C. 538, 544, 324 S.E.2d 214 (1985).

Evidence of post injury employment, a claimant's work experience, education, physical limitations and training and employment skills are relevant in proving wage earning incapacity. *Thomas v. Hanes Printables*, 91 N.C. App. 45, 370 S.E.2d 419 (1988)(comparable earnings, work experience, training and skill are relevant factors in determining capacity to earn same wages in different employment).

For partial disability benefits, the plaintiff has the burden of proving the extent of wage loss in order to obtain N.C. Gen. Stat. § 97-30 benefits. *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965). The extent of wage loss can be determined by computing the difference between pre-injury earnings and the wages an injured worker is able to earn post injury. *Branham v. Panel Co.*, 223 N.C. App. 237, 25 S.E.2d 865, 868 (1943). If an injured worker has obtained employment at a wage less than that earned prior to his injury, he has proven the existence and extent of his wage loss. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). However, five years prior to *Russell* the *Thomas* court stated: "Although the practice of comparing earnings before and after an injury is not the proper method to exhibit diminished earning capacity, *Hill v. Dubose*, 234 N.C. 446, 67 S.E.2d 371 (1951), this Court has indicated that this is a valid factor which deserves consideration. *Donnell v. Cone Mills Corp.*, 60 N.C.App. 338, 299 S.E.2d 436, *disc. rev. denied*, 308 N.C. 190, 302 S.E.2d 243

(1983).” *Thomas v. Hanes Printables*, 91 N.C. App. 45, 48, 370 S.E.2d 419, 421 (1988).

An employee can also meet the burden of proving disability by producing evidence that claimant made a reasonable but unsuccessful effort to find work, based on his education, work experience, skills, physical abilities, age and aptitude. *Kennedy*, 101 N.C. App. at 32. The proper focus in determining diminished wage earning capacity is on the claimant’s particular earning capacity:

If preexisting conditions such as the employee’s age, education, and work experience are such that an injury causes a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not from the degree of disability which would be suffered by someone younger or who possesses superior education or work experience.

Thomas at 48, 370 S.E.2d at 421 (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. App. 179, 188, 345 S.E.2d 374, 380 (1986)).

Finally, disability is measured by an employee’s present ability to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement. *Heffner v. Cone Mills*, 83 N.C. App. 84, 349 S.E.2d 70 (1986) (disability may not be denied because the claimant retired where there is evidence of a diminished earning capacity caused by an occupational disease). So long as an occupational disease has in some way diminished the employee’s ability to earn wages, the employee may recover disability compensation. *Thomas* at 48, 370 S.E.2d at 421.

VI. MENTAL STRESS CLAIMS

A. Introduction

In an occupational disease mental stress case, the underlying compensable illness must meet the standards for an occupational disease pursuant to N.C. Gen. Stat. § 97-53 (13). These standards are met if “the employment exposed the worker to a greater risk of contracting the disease than the public generally” and “the employment significantly contributed to, or was a significant causal factor in, the disease’s

development". *Baker v. City of Sanford*, 120 N.C. App. 783, 463 S.E.2d 559 (1995); *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 409 S.E.2d 103 (1991); *Harvey v. Raleigh Police Department*, 96 N.C. App. 28, 384 S.E.2d 549 (1989).

In mental stress occupational disease cases issues of exposure away from work to the disease causing agent (emotional stress) arise more frequently. Remember that circumstances which may be considered in determining injurious exposure include: (1) the extent of the exposure to the disease-causing agent during employment; (2) the extent of exposure to the disease-causing agent outside of employment; and (3) the absence of the disease prior to the work related exposure. *Booker* at 476, 256 S.E.2d at 200; *Keel* at 539, 421 S.E.2d at 365. Exposure to the disease-causing agent outside of employment come into play in these cases at both stages: (1) in proving the underlying occupational disease; and (2) in proving the causal link between the underlying occupational disease and the disabling mental or emotional condition.

B. Appellate Decisions

In *Woody v. Thomasville Upholstery Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002), the Supreme Court reversed *per curiam* the decision of the Court of Appeals which held that plaintiff's depression and fibromyalgia were compensable occupational diseases caused by employment related stress. The Supreme Court adopted the dissent of Judge Martin which stated in part:

Notwithstanding the fact that plaintiff's job-related stress caused her depression and aggravated her fibromyalgia, such facts cannot support the conclusion that plaintiff's mental and physical conditions were occupational diseases as defined by the statute. The findings indicate merely that plaintiff suffered from depression and fibromyalgia after being placed in the unfortunate position of working for an abusive supervisor, which can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace. Therefore, I do not believe plaintiff's conditions can be construed as

"characteristic of and peculiar to" her particular employment; they are ordinary diseases, to which the general public is equally exposed outside the workplace in everyday life.

Woody v. Thomasville Upholstery Inc., 146 N.C. App. 187, 201-202, 552 S.E.2d 202, 211-212 (2001) (Martin, dissenting).

The facts in *Woody* were that Plaintiff, a fifty year old female, began working for defendant in 1988 as a Customer Service Manager. In October 1993, plaintiff was transferred to the position of Marketing Assistant, where she demonstrated strong administrative skills and won several awards. In the spring of 1993, defendant hired Ms. Sharon Bosworth as General Manager of Marketing and Design. The new designs that Ms. Bosworth produced for defendant resulted in a substantial increase in defendant's income. Defendant assigned plaintiff as Ms. Bosworth's assistant to perform administrative duties. Initially plaintiff and Ms. Bosworth worked well together, and plaintiff had no difficulties in obtaining the information she needed from Ms. Bosworth. Subsequently, for reasons unknown to plaintiff, Ms. Bosworth stopped providing her with the information concerning the new designs. Plaintiff unsuccessfully sought to obtain the needed information by leaving memos and telephone messages with Ms. Bosworth. As time progressed, the relationship between Ms. Bosworth and plaintiff deteriorated. In her dealings with plaintiff, Ms. Bosworth's tone was short and harsh. Ms. Bosworth cursed at plaintiff and berated her by calling plaintiff "dumb" and "stupid." Additionally, Ms. Bosworth instructed the employees supposedly supervised by plaintiff to report to her (Ms. Bosworth) rather than to plaintiff because plaintiff did not know what she was doing. Due to Ms. Bosworth's behavior, plaintiff grew frustrated and worried over the inability to adequately perform the requirements of her job. Plaintiff's job became more stressful and her repeated attempts to resolve the problems with Ms. Bosworth were not successful. In contrast, plaintiff had managed the stress associated with her former position with defendant and was able to resolve prior problems.

Ms. Jan Comer, defendant's human resources manager, corroborated that Ms. Bosworth cursed at plaintiff, had called her a "bitch," and that Ms. Bosworth was insulting in her tone. Ms. Comer was of the opinion that Ms. Bosworth was emotionally unstable. Management's discussions with Ms. Bosworth regarding

plaintiff's concerns only worsened the situation, resulting in increased pressure and stress on plaintiff. Ms. Bosworth was promoted to vice-president and Ms. Comer was fired after expressing her views concerning Ms. Bosworth's conduct. *Woody* at 188-190, 552 S.E.2d at 204-05.

Thus, it appears that working for one bad supervisor will not be sufficient to meet the "characteristic of and peculiar to" prong of the occupational disease test. Rather, in order to show "the employment exposed the worker to a greater risk of contracting the disease than the public generally" a claimant will need to show that the extraordinary stress was created by the requirements of the job or changes that occurred in the workplace.

In *Harvey v. Raleigh Police Department*, the court found that the suicide of a police officer was not an occupational disease because plaintiff failed to meet both prongs of the test. *Harvey v. Raleigh Police Department*, 96 N.C.App. 28, 384 S.E.2d 549 (1989). The court upheld the Industrial Commission's Opinion that the police officer's employment did not place him at an increased risk of developing depression, and secondly, that his employment did not significantly contribute to or become a significant factor in the development of his depression. *Harvey* at 33-34, 384 S.E.2d at 552-53. The facts developed in *Harvey* showed several other causes for the police officer's depression, including: (a) he was having domestic problems; (b) he had been named in a lawsuit alleging false arrest while working part-time for K-Mart; and (c) he had been accused of stealing a candy bar, and was being investigated by internal affairs. *Harvey* at 30, 384 S.E.2d 550.

The issue of whether the job was a significant factor in the development of plaintiff's stress disorder was the critical factor in denying plaintiff's mental\mental claim in *Cross v. Blue Cross/Blue Shield*, 104 N.C.App. 284, 409 S.E.2d 103 (1991). Ms. Cross was a medical review examiner for Blue Cross/Blue Shield. She was responsible for receiving and processing requests for medical procedures. She had difficulty performing her duties and received at least three warnings. *Cross* at 286, 409 S.E.2d at 104. The psychiatrist who testified on behalf of the plaintiff acknowledged that plaintiff's job was stressful. However, he also indicated that plaintiff was experiencing several other stressors in her life. *Cross* at 288, 409 S.E.2d at 105-06. In finding that the Industrial Commission could reasonably have concluded that plaintiff's job was not the cause of her stress-related emotional problems, the Court of Appeals referred to several other stressors in plaintiff's life: (a) her sister had

died two years previously; (b) her brother had died one year previously; (c) she had recently undergone an abortion; and (d) she had ended her relationship with her boyfriend. *Cross* at 288, 409 S.E.2d at 106. In dicta, the court acknowledged its agreement with defendants' argument that stress caused by the inability to properly perform one's job is different from the stress caused by one's job duties. *Id.*

In *Baker v. City of Sanford*, 120 N.C.App. 783, 463 S.E.2d 559 (1996), the Court of Appeals reversed an Industrial Commission decision denying benefits and remanded to the Commission for a determination of whether the plaintiff's occupation was a significant causal factor in the development of his disabling depression. In *Baker*, plaintiff was a police detective with responsibility for investigating all major crimes including homicides. In 1989, one homicide case which he investigated and then testified in caused him anxiety, fear and stress. He told his family doctor that he spent most of his time at work and at home in locked rooms with the lights out. *Baker* at 784, 463 S.E.2d at 560. Plaintiff's wife testified that plaintiff became withdrawn, wanted to be left alone and attempted suicide. His doctor stated that his depression built over a long period of time and that one trial alone did not cause his depression, but it was something that took a number of years. *Baker* at 784, 463 S.E.2d at 560. In February, 1990, plaintiff's brother was found dead. Plaintiff was convinced his brother was murdered but no murder investigation was initiated. Plaintiff did not return to work following the death of his brother and a month later was hospitalized for depression. *Baker* at 785, 463 S.E.2d at 561.

The *Baker* court emphasized the test for mental disability cases is still the standard test for occupational disease cases.

The standard for identifying occupational diseases under the Workers' Compensation Act was set out in *Rutledge*. For a disease to be occupational under N.C. Gen. Stat. § 97-53(13), it must be:

(1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365.

The Commission found as fact that plaintiff suffered from work-related depression and concluded as a matter of law that this depression was an occupational disease in October 1989. *See, e.g., Harvey v. Raleigh Police Dept.*, 85 N.C.App. 540, 355 S.E.2d 147, disc. review denied, 320 N.C. 631, 360 S.E.2d 86 (1987) (recognizing depression as an occupational disease of police officers under the Workers' Compensation Act). However, the Commission concluded that plaintiff's occupational disease was not compensable because it did not result in disability.

This conclusion does not account for the possibility that the occupational disease simply developed into a disabling, compensable disease due to aggravation by the death of plaintiff's brother. In the context of occupational diseases, the proper factual inquiry for determining causation is whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Rutledge, 308 N.C. at 102, 301 S.E.2d at 370. In *Rutledge*, the Supreme Court adopted the principle that it was not necessary that the work-related injury be the sole cause of the worker's incapacity for work but that full benefits would be allowed when it is shown that "the employment is a contributing factor to the disability."

Id. at 104, 301 S.E.2d at 371 (quoting *Bergmann v. L. & W. Drywall*, 222 Va. 30, 32, 278 S.E.2d 801, 803 (1981)). Under this significant contributing factor standard, therefore, the Commission should have determined, by examining competent evidence, whether but for the occupational disease, the depression would not have developed to the point of disability.

Baker at 787-88, 463 S.E.2d 562-63.

The *Baker* court then reiterated the rule that an intervening cause (such as plaintiff's brother's death) is a bar to recovery in a workers' compensation case only if

it is the result of plaintiff's own intentional conduct. The issue for the Commission on remand was to determine whether plaintiff's occupation was a significant causal factor in the development of his disabling depression. The death of his brother was simply one fact to consider. On remand, the Full Commission did find plaintiff's disabling depression arose from a compensable occupational disease. Plaintiff's brother's death aggravated and "impacted the end of a process that had begun earlier as a result of work-related stress." *Baker v. City of Sanford*, I.C. No. 121940 (1996).

In *Pulley v. City of Durham*, 121 N.C.App. 688, 468 S.E.2d 506(1996), plaintiff worked as a police officer for the City of Durham. After nine years, plaintiff saw a clinical psychologist because plaintiff felt bad physically and was having trouble concentrating at work and handling the stresses of her job. The psychologist initially found that plaintiff's primary stressors were related to her husband, child and bankruptcy. Later the doctor changed her working hypothesis and concluded that plaintiff's problems were really long standing events of post traumatic stress syndrome arising from multiple traumatic situations she had encountered as a public safety officer over a long period of time. Plaintiff left her employment with defendant, and filed a claim for workers' compensation benefits for occupational stress allegedly caused by her employment. Subsequently, plaintiff was treated by a psychiatrist who also rendered an opinion that plaintiff's employment as a public safety officer was casually connected to plaintiff's psychological problems.

The claim was denied by the Deputy Commissioner, but on appeal, the Full Commission reversed and found that plaintiff suffered from emotional and psychiatric disabilities causally connected to the stressors of her employment as a public safety officer. The Full Commission awarded plaintiff temporary total disability compensation benefits.

The Court of Appeals held that there was competent evidence to satisfy the three elements of an occupational disease under N.C. Gen. Stat. § 97-53 (13) and affirmed the Commission. Additionally, the Court disposed of defendant's argument that the expert testimony should have been excluded because it was based upon speculation. The Court noted that "an expert witness may base his opinion upon facts within his own knowledge or upon information supplied to him by others; however, an expert is not competent to testify to the issue of casual relation founded upon mere speculation or possibility." *Ballenger v. Burris Industries*, 66 N.C.App. 556, 567, 311 S.E.2d 881, 887, *discretionary review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). The Court found that there was competent evidence in that both expert witnesses

relied upon observations, research and experience in finding that their testimony was competent.

In *Lovekin v. Lovekin and Ingle*, 2000 WL 1459591 (N.C.App. 2000) the court found that a lawyer's heart attack was not compensable as an injury by accident because the stressful events occurred over the course of several months. The court refused to consider whether plaintiff's coronary heart disease constituted an occupational disease because the issue was not properly raised on appeal.

C. Industrial Commission Decisions

The Industrial Commission has decided several mental stress occupational disease cases. In *Martin v. Koppers Co./Nello L. Teer*, Industrial Commission No. 976731 (May 8, 1992), the plaintiff was a tower operator whose duties included operating nine belts, seven screens, several crushers, and loading approximately 200 trucks per day from 23 different bins. She worked at a rock quarry. The work was potentially hazardous and mistakes by plaintiff could seriously injure or kill her fellow employees. Plaintiff worked in isolation high in the tower, surrounded by glass. Plaintiff's requests for relief in order to go to lunch, the bathroom or take breaks were often ignored. During her last few months of work, plaintiff was subjected to conflicting instructions from her supervisors and was often blamed for plant breakdowns that were not her fault. "Plaintiff felt that her supervisors were unfairly critical of her regardless of how well she performed." *Martin* at 4. "In 1987, plaintiff's average hours on the job were 53.75 hours per week; in 1988, plaintiff averaged 52.46 hours; in 1989, plaintiff averaged 51.6 hours. In the final days in which plaintiff worked in May of 1989, plaintiff averaged 62.50 hours per week." *Martin* at 4.

At the time plaintiff's employment ended she was experiencing severe headaches, uncontrollable crying, insomnia, and was beginning to hear noises and voices. *Martin* at 4. Approximately a month later she was hospitalized on a psychiatric ward. She was diagnosed as suffering from major depression. *Martin* at 5. Deputy Commissioner Scott Taylor concluded that plaintiff's employment exposed her to a greater risk of developing major depression than the public in general. *Martin* at 6. The Deputy Commissioner then found that there was a causal connection between the employment and the mental illness of major depression. *Martin* at 6. Plaintiff was awarded temporary total disability compensation for the three year period between when she left work and the date of the hearing. Her temporary total

disability compensation was to continue until she could return to work or defendants obtained permission to stop paying benefits. *Martin* at 7.

In *Murphrey v. Onslow County School*, I. C. No. 136348 (January 18, 1994), the Full Commission denied benefits to a school teacher who began to experience panic attacks, shortness of breath, and anxiety after twenty-one years of teaching. Although plaintiff's teaching duties had been recently changed so that she now taught in both the high school and the middle school, the Commission found that her stress reactions and resulting depression were not due to causes and conditions characteristic of and peculiar to her occupation. Further, the Commission found that her occupation did not expose her to a greater risk of developing this emotional condition than members of the public generally. Therefore, plaintiff's benefits were denied on the basis that she did not suffer from an occupational disease.

In *Williford v. BellSouth Telecommunications*, I.C. No. 640303 (1997), Deputy Commissioner Morgan Chapman found that a service representative met the criteria for a stress induced occupational disease. In *Williford*, plaintiff was a 40 year old high school graduate who worked for defendant for 10-11 years as a service representative. Her duties included taking calls from customers, adding services, changing services billing inquiries, questioning customers and trying to sell additional services. Her job had conflicting expectations: (1) she was expected to develop rapport with customers, determine and sell potential service needs, and explain extensive disclosure information; at the same time (2) her calls were timed and she was reprimanded if her calls were too long. *Williford* at 3.

Plaintiff's calls were also monitored by supervisors in Charlotte, a green light would turn on without warning telling her she was being listened to. The computer also monitored the length of each call, timed logged in and break periods. She was asked to work a great deal of overtime. Her supervisor was unsympathetic and unsupportive. *Williford* at 3.

She was diagnosed with an adjustment disorder with depressed affect which progressed to major depression. The Deputy Commissioner found compensability due to very stressful working conditions in her position as a service representative, which placed her at an increased risk of developing major depression as compared to the general public not so employed. Plaintiff's employment was a significant contributing factor in development of depression illness, even though there were other causal factors involved unrelated to job. *Williford* at 5.

In *Meacham v. American Studios, Inc.*, I.C. No. 444730, 1996 WL 935099 (1996), the Full Commission found plaintiff suffered from an occupational disease due to job stress. Plaintiff, a 56 year old male, vice president of production, worked for defendant for nine years. His duties were to provide film processing service to customers, while keeping cost down. Prior to 1993, his normal work week was 40 to 60 hours. In May 1993, the employer experienced a bad first quarter. The employer decided to compress production time from 3 weeks to 2 weeks. The workload for plaintiff's department increased 40% and his work week expanded to 95-110 hours. Plaintiff's vacation was cancelled. Employee turnover in the department went from 10% to over 60%. The employer purchased new machinery, which did not work properly. Plaintiff was required to supervise all 3 shifts. Plaintiff's increased work load continued for the rest of the year and into 1994.

In February, 1994, plaintiff became dysfunctional. He was diagnosed by his family physician as suffering from depressive anxiety, a stress related disorder, casually related to work stress and long hours. He was treated by his family doctor for depression and anxiety. He was taken out of work on March 24, 1994 and eventually referred to a psychiatrist. The diagnoses were major depression disorder and panic disorder with agoraphobia. The depression was caused by stress at work and complicated by an anxiety disorder.

The job stressors, including the increased workload, fewer employees, longer hours, no vacation, and higher production demands, placed plaintiff at increased risk of developing a major depression disorder and there was a causal connection between the work and the disabling condition. *Meacham* at *3.

These cases give a clear indication that both the appellate courts and the Industrial Commission will apply the basic test for occupational disease cases to claims for psychiatric, mental, and emotional disabilities.

VII. CONCLUSION

For a disease to be occupational under N.C. Gen. Stat. § 97-53(13), it must be: (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3)

there must be "a causal connection between the disease and the [claimant's] employment." *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365.

As a practical matter occupational disease cases are very fact specific. Attorneys should understand the job and all of its requirements and make certain that a comprehensive description of the job requirements will be in evidence, through testimony, video or demonstration. This is especially important, and often difficult, in repetitive motion injury cases. That comprehensive description, on the record, will be needed by the expert to render an opinion and by the Commission or court to render a decision. Attorneys must then have a firm understanding of the medical issues, especially causation and alternative causation theories.

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