Workers' Compensation

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One of the general assembly's primary goals in enacting the North Carolina Workers' Compensation Act (the Act) in 19291 was to "grant certain and speedy relief to employees, or, in the case of death, to their dependents."2 One way the general assembly sought to further this goal was to create a conclusive presumption of dependence for those most likely to have been factually dependent on the deceased worker.3 This presumption alleviates the expense and delay that would result if these claimants were forced to prove actual dependency.

In Winstead v. Derreberry,4 a case of first impression, the North Carolina Court of Appeals interpreted the statutory presumption of dependency as it applies to stepchildren. The court held that to qualify for the presumption, a stepchild must have been substantially dependent on the decedent.5 This Note analyzes Winstead and concludes that although the court's interpretation of the Act is sound, its articulation of the substantial dependency test is somewhat vague and provides little guidance on how the test is to be applied. This uncertainty creates an opportunity for future courts to expand the test beyond a simple inquiry into the sources from which the stepchild has received support. Any expansion of the scope of the substantial dependency test would threaten to destroy the efficiency that is the goal of the statute.

In Winstead plaintiff's natural father, Kenneth Winstead, died in an accident compensable under the North Carolina Workers' Compensation Act.6 At the time of his death, Mr. Winstead lived with his second wife, Elizabeth Winstead, a daughter from his previous marriage, Melanie Winstead, and Elizabeth Winstead's two children from her previous marriage, Chad and Ronald Brewer (Chad and Ronald). Both parents were employed and both contributed to the support of the family.7 In addition to Mr. and Mrs. Winstead's earnings, the family received approximately 100 dollars per month from Chad and Ronald's natural father, as well as some support from Mr. Winstead's first wife.8

At a hearing before a deputy director of the North Carolina Industrial Commission (the Commission), Mr. Winstead's employer conceded liability for Mr. Winstead's death. Thus, the only point in controversy was the distribution of the death benefits.9 Under the Act, the class made up of those survivors

5. Id. at 42, 326 S.E.2d at 71.
7. Winstead, 73 N.C. App. at 36, 326 S.E.2d at 68.
8. Id.
9. Id.
determined to be "wholly dependent" on the decedent share the death benefits equally, to the exclusion of all others.\textsuperscript{10} Certain classes of claimants, including the decedent's children, are conclusively presumed to be wholly dependent.\textsuperscript{11} The Deputy Commissioner concluded as a matter of law that as stepchildren, Chad and Ronald met the statutory definition of "child"\textsuperscript{12} and, therefore, were conclusively presumed to be wholly dependent on Mr. Winstead and entitled to share equally in the death benefits with Melanie.\textsuperscript{13} Melanie appealed the award to the full Commission, which affirmed the Deputy Commissioner's decision.\textsuperscript{14}

On appeal Melanie argued that the definition of "child" in section 97-2(12), "stepchildren or acknowledged illegitimate child dependent on the deceased," requires that a stepchild be dependent as a condition for being presumed wholly dependent, and that the dependency the Act requires is legal dependency and not factual dependency.\textsuperscript{16} She contended that because stepparents have no legal duty to support their stepchildren under North Carolina law, Chad and Ronald were not legally dependent on Mr. Winstead and, therefore, were not entitled to share in the death benefits.\textsuperscript{18}

Melanie also argued that implementing the Commission's interpretation of the Act would violate the equal protection clauses of the state\textsuperscript{19} and federal\textsuperscript{20} constitutions.\textsuperscript{21} Under the Commission's interpretation, stepchildren would be presumed wholly dependent on both their stepparents and natural parents, and as a result, would have a potential for double recovery which would not be available to children who do not have a stepparent.\textsuperscript{22}

The court of appeals agreed with Melanie that the Act requires that a stepchild must be dependent on the deceased to be presumed wholly dependent.\textsuperscript{23} It did not agree, however, that the statute requires legal dependency. The court held instead that a stepchild qualifies for the presumption if he or she was "substantially dependent" on the deceased employee.\textsuperscript{24} The court based this holding on its grammatical interpretation of the language of section 97-
and on its recognition that because stepchildren have no legal right to support from their stepparents, they could never meet a requirement of legal dependency. The court established a five factor test for determining substantial dependency. Under the court’s test, a stepchild has the burden of proving he or she was “substantially dependent on the financial support of the deceased stepparent as compared with all other sources of financial support available to maintain his [or her] accustomed standard of living.”

The court determined that in the year immediately preceding Mr. Winstead’s death, Chad and Ronald had been eighty-four percent dependent on him, and in the year before they had been sixty-nine percent dependent on him. Based on these calculations, the court held that Chad and Ronald were substantially dependent on Mr. Winstead and affirmed the Commission’s award. Relying on decisions from other jurisdictions, the court summarily rejected Melanie’s constitutional argument.

Workers’ compensation has been defined as “a plan or system for compensating workmen injured and physically disabled as a direct result of their employment, regardless of the question of fault or negligence.” The first comprehensive state workers’ compensation act in the United States was passed in New York in 1910. By 1921 all but a few states had enacted workers’ compensation statutes. This sudden onslaught of legislation was spurred by the “ugly facts of industrial accidents” near the turn of the century. During that time

25. Id.
26. Id. at 40, 326 S.E.2d at 70.
27. The court stated:

The factors to be considered are the actual amount and consistency of the support derived by the stepchild from (1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild.

Id. at 42, 326 S.E.2d at 71.
28. Id.
29. Id. at 43, 326 S.E.2d at 72. The parties stipulated that in 1981, Mr. Winstead earned $17,832, Mrs. Winstead earned $6,652, and Chad and Ronald’s natural father contributed $1,200, and that in 1982, Mr. Winstead earned $20,478, Mrs. Winstead earned $2,781, and Chad and Ronald’s natural father contributed $1,200. The court calculated Mr. Winstead’s share of Chad and Ronald’s support by finding the percentage of the total contributions of Mr. Winstead, Mrs. Winstead, and the stepchildren’s natural father that Mr. Winstead’s earnings represented. Id.
30. Id. at 43, 326 S.E.2d at 72 (citing Flint River Mills v. Henry, 239 Ga. 347, 236 S.E.2d 583 (1977), appeal dismissed, 434 U.S. 1003 (1978); Shahan v. Beasley Hot Shot Service, 91 N.M. 462, 575 P.2d 1347 (1978)). The court stated that these decisions were directly on point and that it was “persuaded that these decisions are sound.” Id. at 43, 326 S.E.2d at 72.
31. 1 W. SCHNEIDER, SCHNEIDER’S WORKMEN’S COMPENSATION § 1, at 1 (1941).
32. J. KEECH, WORKMEN’S COMPENSATION IN NORTH CAROLINA 1929-1940, at 10 (1942). Prior to 1910 two states—Maryland and Montana—had passed acts that covered only a few industries; both were held unconstitutional shortly after their passage. Id.
33. PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (W. Keeton 5th ed. 1984) [hereinafter cited as PROSSER & KEETON].
34. J. KEECH, supra note 32, at 1. “On the basis of average, every laborer will be injured at least twice during his lifetime, every second man will be crippled, and every twenty fifth man will be killed.” H. SAMPSON, WORKMEN’S COMPENSATION LAWS 1 (1914).

For a discussion of the decrease in industrial injury rates by the 1950s, see E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 5-6 (1961).
workers labored under unsafe and inhumane conditions. Employers had little incentive to correct these conditions because the common-law tort system provided a series of defenses that effectively prevented the vast majority of injured workers from receiving compensation for their injuries. Even when compensation was recoverable, litigation often involved long delays, and litigation expenses left successful plaintiffs with very limited compensation.

Workers' compensation legislation was enacted in response to these conditions, for the purpose of shifting the economic burden of industrial injuries from workers to employers and, ultimately, to consumers. Worker's compensation is intended to provide swift and certain relief for injured workers and their families and to eliminate the need for the prolonged and costly litigation that typified the common-law tort system.

The majority of workers' compensation acts in the United States have certain structural similarities. All the acts provide death benefits to the dependents of workers who die in compensable accidents. Most statutes contain a category of relatives who are presumed dependent—usually the employee's widow or widower and children—and who recover without any proof of actual dependency, and a category of persons who must establish factual dependency to recover. In some states, a claimant must be a member of a statutory class of compensable relatives to receive any benefits regardless of his or her degree of actual dependency. Other states allow recovery by anyone actually dependent on the deceased. In most states claimants who were factually or presumptively

35. See H. Sampson, supra note 34, at 7-8; Walton, Workmen's Compensation and the Theory of Professional Risk, 11 Colum. L. Rev. 36, 39-40 (1911) (discussing the dangers faced by industrial workers in the early 1900s).

36. See E. Cheit, supra note 34, at 10-11; W. Dodd, Administration of Workmen's Compensation 3-11 (1936); Prosser & Keeton, supra note 33, § 80, at 568-72 (discussing the "unholy trinity" of the common-law tort defenses—contributory negligence, assumption of risk, and the fellow servant rule—and other impediments to worker recovery); Walton, supra note 35, at 38-39.

Schneider estimated that before enactment of worker's compensation legislation, 70% of all injured workers were unable to recover any compensation. 1 W. Schneider, supra note 31, § 1, at 3. See also W. Dodd, supra, at 16-26 (discussing the inadequacies of the common-law system).

37. Prosser & Keeton, supra note 33, § 80, at 572-73; 1 W. Schneider, supra note 31, § 1, at 2. In 1914 one author calculated that the average time between injury and final judgment in California was almost five years. H. Sampson, supra note 34, at 4.

38. See Prosser & Keeton, supra note 33, § 80, at 572-73; H. Sampson, supra note 34, at 4.

39. See Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951); Daniels v. Schwobord, 55 N.C. App. 555, 558, 286 S.E.2d 582, 584 (1982); A. Honnold, A Treatise on the American and English Workmen's Compensation Laws § 2, at 6-8 & n.9 (1917); N.Y. State Bar Ass'n, Report of Special Committee Appointed to Study the Workmen's Compensation Law 7 (1957); 1 W. Schneider, supra note 31, § 3, at 3-5.


42. See id. § 62.10, at 11-4; § 62.30, at 11-62 to -64.


wholly dependent have priority over those who were only partially dependent.\textsuperscript{45}

North Carolina's Workers' Compensation Act\textsuperscript{46} follows this general pattern. Section 97-38 of the Act divides death benefit claimants into three classes: "wholly dependent," "partially dependent," and "next of kin."\textsuperscript{47} These classes are arranged in order of priority according to degree of dependency on the decedent. If there are wholly dependent claimants they share all benefits equally to the exclusion of the other classes. If there are no wholly dependent claimants, then the benefits are divided among the partially dependent claimants according to their degrees of dependency. If there are no wholly or partially dependent claimants and all parties agree, the total amount of benefits payable is discounted to its present value and distributed equally among the deceased's next of kin.\textsuperscript{48}

Under this system of benefits, if there are any wholly dependent claimants, then other claimants must show that they are wholly dependent to receive any benefits. Furthermore, the amount each claimant will receive is directly related to the number of claimants who qualify as wholly dependent.

There are two ways in which a claimant may qualify as wholly dependent under the Act. A claimant may either be wholly dependent as "shall be determined in accordance with the facts as the facts may be at the time of the accident," or, if the claimant is the decedent's widow, widower, or child, he or she may be "conclusively presumed to be wholly dependent" under section 97-39.\textsuperscript{49}

\textsuperscript{45} 2 A. Larson, \textit{supra} note 41, § 64.30, at 11-196 to -199.
\textsuperscript{47} Id. § 97-38.
\textsuperscript{48} Id. The Act requires death benefits to be distributed as follows:

1. Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

2. If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

3. If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined, 'as next of kin' in G.S. 97-40, whether or not such persons or such classes are of kin to the deceased employee in equal degree, and all so elect, he or they may take share and share alike, the computed value of the amount provided for whole dependents in (1) above . . . .

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The Act defines a child as follows: "The term 'child' shall include a posthumous child, a child legally adopted prior to the injury to the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him."

Over time, several rules of statutory construction have been applied to the Act. Probably the rule most often repeated is that the Act "should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions." This maxim has been applied to further the humanitarian purposes of worker's compensation in cases in which a less generous construction would deny benefits to needy claimants. This policy of liberal construction is limited, however, by another time honored rule of construction: "liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation' . . . .."

In keeping with this doctrine, North Carolina courts have refused to expand the language of the statute in some cases, even though the result for the individual claimant may have been harsh. In one recent case the North Carolina Supreme Court attributed the


52. Two articulations of this purpose are "to relieve against hardship," Kellams v. Carolina Metal Products Co., 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958), and "to compel industry to take care of its own wreckage," Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

53. See, e.g., Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968) (acknowledged illegitimate child who had not received support for five years prior to death of his father held "dependent," and thus qualified under the presumption of being wholly dependent as a "child"); Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940) (decedent's mother held wholly dependent even though she had some limited earnings of her own); Reeves v. Parker-Graham-Sexton, Inc., 199 N.C. 236, 154 S.E.2d 66 (1966) (deceased left no dependents, therefore his estate was entitled to receive his death benefits).

54. Winstead, 73 N.C. App. at 38, 326 S.E.2d at 69 (quoting Deese v. Lawn and Tree Expert Co., 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982)). The Court identified other rules of construction that are traditionally applied to the Act:

[Because] it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation ... the judiciary should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced." ... [I]n all cases of doubt, the intent of the legislature regarding the operation of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes, and spirit. ... [Finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal ....]

seemingly inequitable results that the Act sometimes produces to the "inherent variety of life itself," rather than to the structure of the Act's system of benefit distribution.\textsuperscript{56} Claimants have challenged the constitutionality of the Act on equal protection grounds, but these challenges have been rejected.\textsuperscript{57} The supreme court has suggested that any inequity that might exist "is a matter for the legislature to consider and correct, if it be so inclined."\textsuperscript{58}

Until \textit{Winstead}, no North Carolina appellate court had been called on to determine the requirements a stepchild must meet to be presumed wholly dependent under the Act.\textsuperscript{59} In \textit{Chinault v. Pike Electrical Contractors}\textsuperscript{60} a stepchild was allowed to share in death benefits with a decedent's natural children. The stepchild's right to receive benefits, however, was not at issue in the case. The \textit{Winstead} court in reviewing \textit{Chinault} was "unable to determine the interpretation of the Act on which [the Commission] based its award to the stepchild" and therefore, declined to accord plaintiff any precedential value on the question of the proper interpretation of the statute's dependency requirements.\textsuperscript{61}

In \textit{Winstead} the North Carolina Court of Appeals divided its analysis of the Act's dependency requirements for stepchildren into two issues: whether a stepchild must establish that he or she was dependent on the decedent to qualify as a child, as defined in section 97-2(12), and if so, what degree of dependency is required.

The Commission awarded benefits to Chad and Ronald because, under its interpretation of the Act, deceased employees' stepchildren are presumed wholly dependent regardless of their degree of factual dependence. In advocating this position before the court of appeals, Chad and Ronald argued that in section 97-2(12), which states that "[t]he term child shall include . . . a stepchild or acknowledged illegitimate child dependent on the deceased . . .,"\textsuperscript{62} the word "dependent" does not modify the word "stepchild."\textsuperscript{63} The court rejected this

\begin{itemize}
\item eighteenth years of age, entitled to all benefits to the exclusion of other acknowledged illegitimate child who reached eighteen less than two months before her father's death), \textit{disc. rev. denied}, 304 N.C. 587, 289 S.E.2d 564 (1981); Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971) (widow who was living separately from decedent pursuant to a separation agreement was not allowed to show justifiable cause for separation, even though the separation was allegedly due to physical abuse by her husband), \textit{cert. denied}, 281 N.C. 755, 191 S.E.2d 353 (1972).
\item \textit{Winstead}, 73 N.C. App. at 41, 326 S.E.2d at 71. At issue in \textit{Chinault} was whether the share of death benefits awarded to a dependent child should be redistributed among the other dependents when that child became ineligible to receive benefits on his eighteenth birthday. \textit{Chinault}, 53 N.C. App. at 605, 281 S.E.2d at 461. The Commission's award to the stepchild was uncontested and was based on its finding that the stepchild was wholly dependent as a matter of fact and its conclusion of law that all the claimants were "actually and or presumptively dependent on the deceased." \textit{Id.} at 605-06, 281 S.E.2d at 461-62.
\item \textit{N.C. GEN. STAT.} § 97-2(12).
\item \textit{Winstead,} 73 N.C. App. at 40-41, 326 S.E.2d at 70.
\end{itemize}
position on two grounds. First, it noted that the phrase in section 97-2(12) appears between two commas and found that under a normal grammatical interpretation of the statutory language, "dependent" modifies "stepchild."\(^6\)

Second, the court pointed out that under the Commission's view all stepchildren would be presumed wholly dependent and, therefore, stepchildren would receive benefits in every case.\(^6\) The court stated that this result would be inconsistent with the general assembly's purpose to provide benefits to the people who had relied on the decedent for financial support.\(^6\)

Although it rejected Chad and Ronald's contention that the Act requires no dependence at all, the court was also unwilling to accept Melanie's argument that the Act imposes a requirement of legal dependence.\(^6\) Melanie first argued that because the statute abrogated the common-law rule that a stepparent has no duty to support a stepchild, it should be strictly construed. Melanie also argued that the rule requiring a liberal construction of the Act applies only to liability questions and does not apply to issues involving distribution of assets among competing claimants.\(^6\)

The first of these arguments is in direct contradiction to precedent. Although statutes that abrogate the common law, such as the Act, generally are strictly construed,\(^6\) North Carolina courts have recognized that the Act is a remedial measure intended to be substituted for the common law and thus must be interpreted liberally to achieve its purpose.\(^7\) "The statutes creating [workers' compensation] . . . are superior to the common law in those respects in which they can and do, amend or abrogate it. There is no presumption of superiority in the common law where they seem to clash."\(^7\)

The court also rejected

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64. Id. at 41, 326 S.E.2d at 71.
65. Id. The court noted that persons in each class described under § 97-2(12), except for natural children, are subject to some additional requirement before they may qualify as a "child:" "adoption must be completed before the injury proximately causing death, illegitimate children must be acknowledged and dependent, and married children must be 'wholly dependent' on the deceased." Id. at 39, 326 S.E.2d at 70. The word "stepchildren," appearing as it does in the middle of a list of categories subject to limitations and in the clause "stepchildren and acknowledged illegitimate children dependent upon the deceased," N.C. GEN. STAT. § 97-2(12), lends itself to this interpretation.

66. This interpretation is consistent with the court's analysis of the legislative intent behind the statute, "to afford the conclusive presumption of dependency to those persons who would most usually be factually dependent upon the deceased." Winstead, 73 N.C. App. at 40, 326 S.E.2d at 70. A natural child is more likely to be wholly, factually dependent on his or her parents than a stepchild is likely to be wholly, factually dependent on his or her stepparents. Therefore, requiring a stepchild to show some degree of dependency to qualify for the presumption brings the effect of the statute more closely in line with the intent of the general assembly.
67. Id. at 40, 326 S.E.2d at 70.
68. Id. at 38, 326 S.E.2d at 69.
70. Deese v. Lawn and Tree Expert Co., 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982) (During the 400 week eligibility period of § 97-38, when a dependent who is receiving benefits becomes ineligible to continue receiving them, his or her share is redistributed among the other claimants.); Hewett v. Garret, 274 N.C. 356, 163 S.E.2d 372 (1968) (acknowledged illegitimate child who had not received support for five years prior to the employee's death qualified for the presumption of being wholly dependent). Applying a liberal construction to issues concerning distribution of benefits is consistent with the policy of worker's compensation. See infra notes 107-10 and accompanying text.
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Melanie's second argument summarily, citing *Deese v. Lawn and Tree Expert Co.*\(^7\) and *Hewett v. Garret*\(^3\) as cases in which courts applied a liberal standard of interpretation to issues of distribution.\(^7\)\(^4\)

Melanie argued that in previous cases in which a claimant's qualifications for the presumption of dependency were at issue, North Carolina courts have interpreted the Act to require legal dependency. In support of this argument, Melanie quoted *Lippard v. Express Co.*:\(^7\)\(^5\) "The dependency which the statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father."\(^7\)\(^6\) The *Lippard* court wrote this language to support an award to an acknowledged illegitimate child who was born after his father's death.\(^7\)\(^7\) The court held that the legal relationship between the decedent and his illegitimate child was enough to qualify the child for benefits despite his lack of actual dependency.\(^7\)\(^8\)

The court reached a similar decision in *Hewett v. Garret*,\(^7\)\(^9\) in which it awarded benefits to an acknowledged illegitimate child even though he had not received support from the decedent for five years prior to the decedent's death. The court held that legal dependency was "sufficient" to qualify the child for the presumption of dependency even though the claimant was not factually dependent.\(^8\)\(^0\) In neither *Lippard* nor *Hewett* did the court suggest that legal dependency is required for a child to qualify for the presumption of dependency. Rather, each court merely held that legal dependency is sufficient to qualify a child for the presumption.

Melanie cited three other types of cases in which she claimed courts had interpreted the Act to require legal dependency as a condition for the presumption of dependency:\(^8\)\(^1\) a case in which a widow was living separately from the deceased pursuant to a separation agreement,\(^8\)\(^2\) a case involving claims by a common-law wife,\(^8\)\(^3\) and a case involving claims by the child of a common-law wife.\(^8\)\(^4\) Although the courts in these cases applied a legal dependency standard, the distinction between factual and legal dependency was not directly at issue,

\(^7\) 306 N.C. 275, 293 S.E.2d 140 (1982).
\(^7\)\(^3\) 274 N.C. 356, 163 S.E.2d 372 (1968).
\(^7\)\(^4\) Winstead, 73 N.C. App. at 38-39, 326 S.E.2d at 70.
\(^7\)\(^5\) 207 N.C. 507, 177 S.E. 801 (1935).
\(^7\)\(^6\) Id. at 509, 177 S.E. at 802, quoted in Claimant-Appellant's Brief at 6, Winstead.
\(^7\)\(^7\) Lippard, 207 N.C. at 508, 177 S.E. at 801.
\(^7\)\(^8\) Id. at 509, 177 S.E. at 802.
\(^8\)\(^0\) Id. at 360, 163 N.C. at 375 (emphasis added).
\(^8\)\(^1\) Claimant-Appellant's Brief at 7-8, Winstead.
\(^8\)\(^2\) Id. at 7 (citing Bass v. Mooresville Mills, 11 N.C. App. 631, 634, 182 S.E.2d 246, 248 (1971), cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972) (wife of decedent who was living apart from him pursuant to a separation agreement was not allowed to argue that she was separated from the decedent for just cause to be held entitled to benefits under the Workers' Compensation Act).
\(^8\)\(^3\) Claimant-Appellant's Brief at 7, Winstead (Citing Fields v. Hollowell, 238 N.C. 614, 620, 78 S.E.2d 740, 744 (1953), in which decedent's common-law wife was denied benefits because "such a claim is conceived in sin and shapened in iniquity.")
\(^8\)\(^4\) Claimant-Appellant's Brief at 8, Winstead (citing Wilson v. Utah Constr. Co., 243 N.C. 96, 98-99, 89 S.E.2d 864, 867 (1955) (absent acknowledged paternity, son of common-law wife of de-
and the cases were decided on other grounds. Thus, their precedential value is limited.

Rather than distinguish each of the cases that Melanie cited, the court rejected her interpretation of the Act on the basis of the consequences that would result if legal dependency were a requirement for the presumption. The court noted that a stepchild in North Carolina has no legal right to support from a stepparent. Therefore, the court concluded that "[t]he argument fails under its own logic" because it could "envision no practical set of circumstances under which a stepchild could be legally dependent upon the stepparent short of legal adoption." Under Melanie's interpretation, the language of section 97-2(12) that provides a conclusive presumption of dependency to a "stepchild...dependent upon the deceased" would be pointless because no such individuals exist. The general assembly specifically included stepchildren in the statutory definition of "child" in section 97-2(12), and this specific inclusion cannot be reconciled with an interpretation of that section which makes it impossible for a stepchild to be a "child" for the purposes of the Act.

The court's holding that the Act does not require a stepchild to be legally dependent to qualify for the presumption is also supported by its analysis of the legislative purpose behind the definition of "child" in section 97-2(12). The court noted the classes of persons that the Act presumes to be wholly dependent as a "child:" (1) children legally adopted prior to the employee's injury, (2) dependent stepchildren, (3) dependent, acknowledged illegitimate children, and (4) wholly dependent, married children. It concluded that the general assembly's intent in granting the presumption to these classes was "to afford the conclusive presumption of dependency to those persons who would most usually be factually dependent upon the deceased thereby alleviating the burdensome requirement of proof of dependency in every case." Substantially dependent stepchildren are among those "who would most usually be factually dependent upon the deceased," and to force them to prove they are factually wholly

ceased employee denied benefits on grounds that decedent's illicit relationship with the child's mother did not create any legal obligation to support the child).

85. In Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955), and Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 748 (1953), the decisions to deny benefits rested on the illicit nature of the relationships involved and the court's reluctance to reward such relationships. In Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1972), the issue was whether the claimant who was living apart from her husband pursuant to a valid separation agreement could argue that she was living apart for just cause to qualify for benefits as a "widow" as defined in North Carolina General Statutes § 97-2(14).

86. Winstead, 73 N.C. App. at 40, 326 S.E.2d at 70.

87. Id.

88. N.C. GEN. STAT. § 97-2(12).

89. Winstead, 73 N.C. App. at 40, 326 S.E.2d at 70.

90. "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant .......


91. Winstead, 73 N.C. App. at 37-38, 326 S.E.2d at 69. For the language of § 97-2(12), see supra note 15.

92. Winstead, 73 N.C. App. at 40, 326 S.E.2d at 70.
dependent in each case would be inconsistent with the purpose behind the presumption.

Having determined that section 97-2(12) requires that a stepchild be factually dependent to qualify as a “child” for the purposes of the Act, the court was forced to develop some method for deciding whether Chad and Ronald had received enough support from Mr. Winstead to be considered dependent on him. 93 As the court noted, the Act merely states that stepchildren must be “dependent.” 94 In contrast, whenever claimants must be wholly dependent under the Act, the general assembly used the specific term “wholly dependent.” 95 The absence of such language in reference to stepchildren strongly suggests that something less than total dependency is required. Rather than create any precise formula for determining whether a stepchild has been sufficiently dependent to qualify for the presumption, the court held that a stepchild has the burden of establishing “substantial dependency.” 96

The facts of Winstead made it unnecessary for the court to define the standard any further. 97 The five factors in the court’s substantial dependency test are, in essence, a listing of the four most likely sources from which a stepchild might have received support, and a catch-all category that accounts for “any other funds regularly received.” 98 Although this test is helpful in determining a stepchild’s degree of dependency on the decedent, it does little to establish what degree of dependency should be considered substantial. Perhaps it is most accurate for the existence of substantial dependence “to be determined under the facts of each case.” 99 If the Commission is to accurately decide whether substantial dependency exists in a given case, however, the courts must provide some guidance as to what level of dependency is “substantial.”

During the fifty-six years the Workers’ Compensation Act has been in force, the question of what level of dependency a stepchild must demonstrate in order to be presumed wholly dependent had never been raised before an appellate court until Winstead. 100 Winstead established that the Act does not require stepchildren to be legally dependent to qualify for the presumption. In light of this clarification of the statutory provisions regarding stepchildren, the question naturally arises whether the general assembly was wise to write the Act in this way.

The substantial dependency test created by Winstead is more compatible with the policies of the Act than a requirement of legal dependency would be. The presumption of dependency is given to spouses and children to allow those

93. Id. at 41, 326 S.E.2d at 71.
94. N.C. GEN. STAT. § 97-2(12).
95. “The term ‘wholly dependent,’ therefore, is a term of art as employed by the General Assembly . . . .” Winstead, 73 N.C. App. at 42, 326 S.E.2d at 71.
96. Id.
97. Because the court found that the stepchildren had been 84% dependent during the last year of their stepfather’s life, id. at 43, 326 S.E.2d at 72, the case did not provide a significant test of the boundaries of substantial dependence.
98. Id. at 42, 326 S.E.2d at 71. For a list of the factors, see supra note 27.
100. Id. at 37, 326 S.E.2d at 68.
persons most likely to have been factually dependent on the deceased employee to obtain relief quickly by excusing them from the burdensome process of proving dependency. The Act excuses legitimate children, widows, and widowers from the requirement of proving dependency to qualify for the presumption, ostensibly because the likelihood they were wholly dependent on the decedent is so strong as to make any evidentiary requirement more costly than it is worth. Apparently, the North Carolina General Assembly presumed that stepchildren are not as likely to have been wholly dependent and elected to require them to show they were dependent on the decedent to qualify to be presumed wholly dependent. Once a stepchild has proven that he or she was substantially dependent on the deceased employee, the likelihood that the stepchild was wholly dependent is as high as the likelihood that members of the other classes were wholly dependent. The primary benefit of the presumption—that it "effectuates the Act's goal of swift and certain awards of benefits"—is equally served when the presumption is applied to stepchildren as when it is applied to other classes.

In those cases in which the presumption works to allow stepchildren who are not wholly dependent to receive benefits, it fulfills much the same role as the rule mandating that the Act be liberally construed. The hardship endured by a needy claimant is just as great when the claimant is denied benefits because of a narrow construction of the Act's dependency requirements as when they are denied because of a narrow construction of its rules concerning liability. The harm that could result from an overly generous construction of the Act in favor of stepchildren is that other dependents of a deceased stepparent will receive smaller awards. Workers' compensation is meant to alleviate hardship and was never intended to provide full compensation for claimants' losses. Accordingly, it is more in keeping with the legislative intent to err on the side of providing lesser benefits to a greater number of claimants than on the side of denying benefits to stepchildren who were substantially dependent on the decedent.

101. The Winstead court derived this interpretation of the general assembly's purpose from the nature of the classes to which the presumption is granted: (1) natural children, (2) adopted children, (3) dependent, acknowledged illegitimate children, and (4) dependent stepchildren. Id. at 39-40, 326 S.E.2d at 70. The court considered these to be the classes of claimants who would "most usually be factually dependent on the deceased." Id.

102. Id.

103. It is apparent that the general assembly thought so, because it included them in the class entitled to the presumption along with widows, widowers, and natural children. In evaluating the validity of the presumption as a predictor of the dependence of stepchildren, it is important to remember that the statute also applies a presumption of dependency to natural children and spouses, even though the presumptive result is not always accurate for those classes either.

104. Winstead, 73 N.C. App. at 40, 326 S.E.2d at 70.

105. See supra notes 51-53 and accompanying text.

106. This is true because the total fund from which benefits are distributed is set at 66.66% of the decedent's weekly wages and does not vary according to the number of claimants who share in the award. See N.C. GEN. STAT. § 97-38 (1985).


108. This statement is not meant to suggest that dependents who are forced to live on their portion of 66.66% of the decedent's weekly wage are not in need of the full share of the benefits to which they are entitled. However, allowing a stepchild who was substantially dependent on the
Melanie's attack on the Commission's decision was not limited to issues of statutory construction. Melanie also attacked the Commission's decision on constitutional grounds, claiming that allowing stepchildren who are not legally dependent to recover under the Act is a violation of the equal protection clause of the fourteenth amendment to the United States Constitution and its counterpart in the North Carolina Constitution. This argument is based on the potential for double recovery that would exist if stepchildren are allowed to receive benefits on the death of their stepparent and are still presumed wholly dependent on their natural parents. The court dismissed this argument without explanation, relying on two cases from other jurisdictions that it found to be directly on point.

The court's holding that the possibility of double recovery for stepchildren is not a denial of equal protection to natural children is easily supportable. In previous cases in which the constitutionality of the statutory presumption has been challenged, courts have applied a standard of scrutiny requiring that "to withstand an equal protection claim, a legislative classification must be reasonable, must not be arbitrary, and must rest on some ground of difference having a fair and substantial relationship to the object of the legislation." Application decedent to obtain an equal portion of the award will lead to a distribution in which each claimant will receive a share of the benefits that is closer to the share of the deceased employee's income he or she received while the employee was alive. Denying benefits to a substantially dependent stepchild might force the state to shoulder the burden of replacing the substantial support the stepchild had previously received from the decedent. The other claimants would benefit merely because their siblings are stepchildren rather than natural children.

Although workers' compensation is not intended as a substitute for life insurance, see id., the benefits often represent a significant portion of the funds available to the dependents of a deceased employee. Another factor that militates in favor of the presumption that the Act extends to stepchildren is that the distribution it produces is likely to parallel that which the employee would have chosen if he had had the opportunity to choose how the benefits would be distributed. By definition, those stepchildren who are granted the presumption are people who the employee voluntarily chose to support during his or her life. Whatever motives lead the employee to choose to provide substantial support to the stepchild during the employee's life, whether they be emotional, moral, or even charitable, it is only reasonable to believe that those same motivations would lead the employee to prefer that the stepchild share in the death benefits. That the current system, as interpreted in Winstead, distributes benefits to the people the worker chose to support during his or her life is a strong policy argument for this interpretation.

109. Winstead, 73 N.C. App. at 43, 326 S.E.2d at 72.
110. U.S. CONST. amend. XIV.
111. N.C. CONST. art. I, § 19.
112. Winstead, 73 N.C. App. at 43, 326 S.E.2d at 72. Under the court's ruling in Winstead, a stepchild who is factually dependent on his or her stepparent would receive death benefits on the death of the stepparent, and if one of the child's natural parents was later involved in a compensable accident, the child would be presumed wholly dependent as a natural child and recover again.


114. Carpenter v. Tony E. Hauley, Contractors, 53 N.C. App. 715, 721-22, 281 S.E.2d 783, 787, disc. rev. denied, 304 N.C. 587, 289 S.E.2d 564 (1981). In Carpenter an acknowledged illegitimate child was denied death benefits because she reached 18 years of age less than 2 months before the death of her father and because she was supported by her grandparents and thus was not a dependent of the deceased. The court rejected her contention that the statutory system for distributing death benefits arbitrarily established a special class of persons wholly dependent on the deceased in violation of the equal protection clause of the fourteenth amendment. Id.; see also Coleman v. City...
of the presumption to dependent stepchildren helps to accomplish "[o]ne of the primary purposes of the Worker's Compensation Act," because in alleviating the need for expensive, time-consuming evidentiary hearings, it helps to "grant certain and speedy relief" to the decedent's dependents. To dependents who have lost their source of support, a slow and "costly remedy is no remedy at all." In light of the variety of family circumstances that exist in society, it is unlikely that any classification system could be devised that would provide benefits to those most deserving of them in every case. The general assembly is entitled to exercise its judgment to create a system of distribution reasonably related to the objectives of the Act. A system of presumptions that brings about more expedient, less costly relief by eliminating the need for the expense and delay of a full-scale, fact-finding procedure can hardly be said to bear no substantial relationship to the objective of the legislation.

Winstead unequivocally settled the issue whether a stepchild who is not legally dependent may qualify for the presumption of section 97-29. The test Winstead established for determining which stepchildren qualify for the presumption is not as clear, however, and the court of appeals' opinion provides little guidance on where courts should draw the line. When, as in Winstead, the stepchildren have been eight-four percent and sixty-nine percent dependent on the deceased during the last two years of his life, a finding of substantial dependency was easy to justify.

It is simple, however, to imagine a variety of circumstances in which the decision might not be so obvious. The term "substantial" does not suggest a requirement of a degree of factual dependency even approaching total dependency. Under the Winstead test, "[t]he ultimate question of fact to be determined is whether the stepchild was substantially dependent on the financial support of the deceased stepparent . . . to maintain his accustomed standard of living." Arguably, a stepchild could receive a significant amount of support
from other sources and still be substantially dependent on the decedent to “maintain his accustomed standard of living.” Under the Act, as interpreted by *Winstead*, a stepchild who just barely meets the substantial dependency standard is entitled to share equally in the death benefits with a natural child who is factually wholly dependent, or even to receive the entire award to the exclusion of all persons partially dependent on the deceased. The stepchild need only have been substantially dependent for three months preceding the accident that caused the employee’s death to qualify for the presumption. Furthermore, the factors set out in *Winstead* account for “the actual amount and consistency of the support derived by the stepchild from” all sources. The factors do not take into account the possibility that the stepchild’s natural parent may be able to provide more support than he or she actually provided during the stepparent’s life or the existence of other potential sources of support from which the stepchild did not receive support before the stepparent’s death. Thus, given the current Act and the substantial dependency test established in *Winstead*, a stepchild who has been partially dependent on the stepparent for only a short time, who receives a significant amount of support from his or her natural parent, and whose natural parent is capable of providing full support, could share benefits equally with wholly dependent children or receive the full benefits to the exclusion of all partially dependent claimants.

There can be little doubt that in some situations the application of a conclusive presumption that dependent stepchildren are wholly dependent will lead to anomalous results. Cases will arise in which an abstract sense of justice strongly tempts a court to ignore the language of the Act and distribute benefits on equitable principles. Although applying equitable principles may lead to salutary results in a given case, allowing a court to deviate from the statutory presumptions in distributing benefits or even allowing claimants to argue for an equitable distribution may destroy the very advantages—speed and certainty of recovery—that the system is designed to provide.

On its face, *Winstead*’s five factor test for substantial dependency considers only the relatively clear cut factual question of what sources have supported the claimant in the past. The court’s interpretation of the statute is well supported by both the statutory language and policy, and is difficult to challenge as an accurate interpretation of the current statute. A danger exists, however, that

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121. A person from whom a claimant receives 50% of his or her financial support could reasonably be considered a substantial source of support for that claimant. The loss of 50% of a person’s total resources would certainly have more than a “merely nominal” effect on their economic condition and would make it impossible for that person to maintain their “accustomed standard of living.” See id.

122. Under the Act

Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent then that person shall receive the entire compensation payable.

N.C. GEN. STAT. § 97-38(1).

123. *Id.* § 97-39.


125. See supra note 27.
the Commission and the courts will either expand the test to account for the family circumstances of the decedent or other equitable considerations, or will address these equitable factors sub silentio under the guise of applying the test. The court’s admonition that the test “is a question of fact to be determined under the facts of each case” could be interpreted as an invitation to engage in this type of expansive inquiry. The very purpose of a presumption is to alleviate the need for a detailed consideration of the circumstances of each case. If a court allows equitable considerations to enter into its determination of the distribution of benefits, the proceeding will be transformed from a limited investigation of a few specific questions of fact into full-scale litigation with all its accompanying disadvantages. Failure to limit the scope of workers’ compensation cases to the specific issues raised by the statute has the potential to destroy the procedural efficiency and certainty of results that are essential to the effective operation of the system.

In the wake of Winstead, North Carolina’s courts and the general assembly face a difficult challenge: establishing boundaries for the substantial dependency test that reconcile the conflicting goals of reaching equitable decisions in individual cases and providing efficient and certain results in all cases. A legislative refinement of the statute might provide greater certainty, but any changes that would provide certainty would limit the ability of the courts to remedy even the most egregious results. It is unlikely that a statute could perform the fine balancing required by the delicate relationship between efficiency and fairness.

The balancing of these interests in individual cases is a task best left to the courts. In exercising their judgment in this area, however, courts should be mindful of the danger to all workers’ compensation claimants each time a case is decided on the basis of factors beyond the scope of the Act. Courts should retain some flexibility to consider factors beyond the claimants’ historic sources of income, but should exercise that discretion only in the most extreme cases. The temptation may be strong to reach the fairest result in each case, but the goal of the system is “to relieve against hardship rather than to afford full compensation

126. Examples of the type of factors a court might consider relevant to an equitable distribution of benefits include: Whether the stepchild’s natural parent who was not the decedent’s spouse is living, the natural parent’s financial condition, the likelihood that the natural parent will voluntarily assume responsibility for the child’s support, and the closeness of the stepchild’s relationships with the decedent and the decedent’s natural children.

127. Winstead, 73 N.C. App. at 42, 326 S.E.2d at 71.

128. If a court elects to weigh and balance factors outside the scope of the statute, it will be forced into a full-scale investigation of all relevant facts and circumstances to determine where the equities lie. If it becomes apparent that an appellate court may apply extra-statutory considerations to overrule a decision that the Commission has made based on a strict application of the language of the statute, all claimants will be encouraged to introduce evidence on extra-statutory matters and to argue for equitable relief. Hearings before the Commissioner will be greatly complicated and numerous appeals will be raised that otherwise would be foreclosed by the statute. The delay and uncertainty that would result would significantly affect the ability of the worker’s compensation system to serve the needs of workers. “To necessitous claimants a costly remedy is no remedy at all. To a disabled workman and his family delay itself is a denial of justice.” J. Keech, supra note 32, at 43.

129. That the general assembly intended for the courts to exercise some judgment over the level of dependency required by the statute is evident from its failure to provide any more guidance than the words “dependent upon the deceased.” N.C. GEN. STAT. § 97-2(12) (1985).
for injury,"130 and it is a necessary result of a system of presumptions that some claimants will be denied the full measure of benefits they might receive in a formal equitable proceeding. It is only by sacrificing exact results in these cases that the system is able to provide the benefits for which it was created.

It is often said that workers' compensation systems are essentially a compromise.131 Employers sacrifice the protections afforded by tort law, and in return, workers accept statutorily limited recoveries.132 Through this compromise, the parties sacrifice the accuracy of results produced by a full-scale determination of common-law liability in exchange for a system that provides predictable results and brings quick relief against hardship. Through its system of conclusive presumptions, the Act extends this basic concept of compromise to the area of distribution of death benefits. Under North Carolina's system for distributing death benefits, some claimants are forced to sacrifice the full extent of the benefits they would receive if formal proof of total dependency were required of all claimants in return for escaping the enormous expense and delay that such a process would entail.

This sacrifice of accuracy in some individual cases is constitutional because it bears a fair and substantial relationship to the objectives of the legislation.133 Whether it is wise or just, however, is measured by a stricter standard: whether it is effective in achieving these goals. The Act's distribution system is based on generalizations about hypothetical average families and, therefore, must necessarily produce unfair results for some individuals. This injustice is the price exacted in exchange for the benefits of swift and certain relief that accompany it and is tolerable only because it is outweighed by the benefits that it procures. It is impossible for North Carolina's courts to completely eliminate this potential for injustice within the boundaries of the Act. It is possible, however, that if the substantial dependency test is used as a means to eliminate injustice in individual cases by allowing extra-statutory factors to affect the distribution of benefits, the efficiency for which those injustices are tolerated could be destroyed.

The rule established in Winstead that stepchildren must prove substantial dependence on the decedent to be presumed wholly dependent is an accurate interpretation of the Act's requirements. The five factor test the court created provides a comprehensive view of a stepchild's historic sources of support on which his or her dependency can be determined. In applying this test, North Carolina courts should confine themselves to the economic factors it identifies and refrain from considering extraneous matters except in the most extreme sit-

132. E. CHETT, supra note 34, at 12; A. HONNOLD, supra note 39, § 2, at 11-12 & nn.13-14.
uations. Otherwise, workers' compensation claimants will be left with a system that is neither just nor efficient.

JOEL ALAN FISCHMAN
Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule

Assessing liability for occupational exposures that cause or aggravate chronic lung diseases such as asbestosis, silicosis, and chronic obstructive lung disease has traditionally been problematic. Difficulty often arises because of the numerous nonoccupational factors that might contribute to an employee's disability. Difficulty also arises because employees in the textile industry may work for several employers, each of whom contributes to the disease and the employee's ultimate disability. In addressing this problem, jurisdictions generally recognize one of two theories of liability—apportionment between each employer based on their respective contributions to the employee's disease, and the last injurious exposure rule, which holds that the last employer to subject an employee to harmful conditions is liable for the entire disability notwithstanding the many employers whose work conditions contributed to the employee's disease. North Carolina has expressly adopted the latter policy, providing in Gen.


2. A "characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates." N.C. GEN. STAT. § 97-62 (1985); see also Hatch, supra note 1, at 227-28 (Identifying silicosis as a type of pneumoconiosis).

3. The term chronic obstructive lung disease describes a condition represented by a combination of diseases such as chronic bronchitis, emphysema, asthma, and byssinosis. AMERICAN LUNG ASS'N, OCCUPATIONAL DISEASES—AN INTRODUCTION 14 (1979); see A. Bouhuys, J. Schoenberg, G. Beck & R. Schilling, Epidemiology of Chronic Lung Disease in a Cotton Mill Community, in 5 TRAUMATIC MEDICINE & SURGERY FOR THE ATTORNEY 607, 614-18 (serv. vol. 1978). In Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), the North Carolina Supreme Court established that chronic obstructive lung disease is an occupational disease and does not require a specific finding of byssinosis, the disease traditionally connected to cotton dust exposure. Id. at 100-01, 301 S.E.2d at 369. For a discussion of the ramifications of labeling a plaintiff's disease "chronic obstructive lung disease," see Note, Workers' Compensation—Rutledge v. Tultex Corp./King's Yarn: Leaving Precedent in the Dust?, 62 N.C.L. REV. 573 (1984).

4. This problem is characterized as "dual causation" and typically arises when the individual who develops byssinosis or chronic obstructive lung disease has smoked for much of his or her life and has been exposed to cotton dust. Other nonoccupational factors include chronic bronchitis and asthma. 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.64(a), at 7-465 (1986).

5. See 4 A. LARSON, supra note 4, § 95.12, at 17-111; id. § 95.31. Professor Larson discusses both apportionment and the last injurious exposure rule, see infra text accompanying note 6, as different theories of rights between insurers. The theories also apply to successive employers who are ultimately liable if they are not covered by an insurance company unless the jurisdiction applies a different rule for successive employers than for successive insurers. Id. § 95.24, at 17-148 n.45. Throughout this Note these theories are discussed in the employer context.

The concept of apportioning cause arises in dual causation cases, see supra note 4, if a jurisdiction apportions one employer's liability between employment-related and nonemployment-related causes of disability. The plaintiff receives no compensation for the portion of his or her disability attributable to the nonemployment factors. See 4 A. LARSON, supra note 4, § 41.64(d). See generally Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983) (in effect overruling the earlier adoption of apportionment of cause in Burlington Indus. v. Morrison, 304 N.C. 1, 282 S.E.2d 458 (1981), by characterizing plaintiff's disease as "chronic obstructive lung disease" rather than byssinosis).

6. 4 A. LARSON, supra note 4, § 95.12, at 17-112; id. § 95.20; see Locke, Adapting Workers' Compensation to the Special Problems of Occupational Diseases, 9 HARV. ENVTL. L. REV. 249, 270-71 (1985); Vokoun, Using the Last Exposure Rule in the Determination of Liability of Employers and
eral Statutes section 97-57 that "the employer in whose employment the employee was last injuriously exposed to the hazards of [the employee's occupational] disease, and the insurance carrier . . . which was on the risk when the employee was so last exposed under such employer, shall be liable." 

Because an employee typically is exposed to the same hazardous conditions while working for each employer, application of the last injurious exposure rule usually is not difficult. The only relevant determination is the degree of exposure necessary to impose liability, including both the requisite length of exposure to the harmful substance and the amount necessary to render such exposure injurious. Application of the last injurious exposure rule in the textile industry, however, can be difficult. Although a textile employee is exposed to dust in each employment, he or she might be exposed to two different kinds of dust—cotton fiber dust, which has been proven to cause the development of lung disease, and synthetic fiber dust, which has not yet been shown to cause the disease. In these cases, therefore, before determining whether the requisite degree of exposure exists, it must first be determined "whether exposure to a substance which is not known to cause an occupational disease may nevertheless be a last injurious exposure to the hazards of such disease under N.C.G.S. § 97-57 if it makes the disease, already in progress, worse." 

In Caulder v. Waverly Mills the North Carolina Supreme Court concluded that exposure to synthetic fiber dust can indeed be a "last injurious exposure" as contemplated by section 97-57. In a brief opinion the court determined that because plaintiff's exposure to synthetic dust aggravated his chronic lung disease, it was injurious despite the dust's inability to cause the disease itself. The court also held that the synthetic fiber dust met the threshold test of being a "hazard" of an "occupational" disease because it was peculiar

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*Insurers for Occupational Diseases, 20 A.B.A. Forum 102, 104-05 (1984). See generally infra notes 63-67 and accompanying text (discussing the policy behind the last injurious exposure rule).*


9. See 4 A. Larson, supra note 4, § 95.26. Generally, there must have been only some exposure contributing to the condition, even if the period of exposure was relatively brief. A few jurisdictions, however, require a substantial amount of exposure—exposure at the defendant's employment to such a degree and for such a length of time that the substance could have caused the disease. *Id.; see, e.g., Fluor Alaska, Inc. v. Peter Kiewit Sons' Co., 614 P.2d 310 (Alaska 1980); Halverson v. Larrivy Plumbing & Heating Co., 322 N.W.2d 203 (Minn. 1982).*

In North Carolina there must be only a slight degree of exposure to find the last employer liable. See, e.g., Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983); Haynes v. Feldspar Producing Co., 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942).


11. Caulder v. Waverly Mills, 314 N.C. 70, 72, 331 S.E.2d 646, 647 (1985); see Appellants' Brief at 3, Caulder.


14. *Id.* at 76, 331 S.E.2d at 650.

15. *Id.*
to plaintiff's workplace at Waverly Mills.\textsuperscript{16} This Note analyzes the Caulder court's decision in light of existing North Carolina law and policy. It points out that although the court's conclusions comply with the literal language of some prior cases, the unique facts of Caulder provided an opportunity for the court to examine some finer issues that the court's brief opinion failed to address. The Note suggests that an examination of the policies underlying the last injurious exposure statute and workers' compensation generally supports a conclusion contrary to the majority's result. It concludes that the general assembly should confront the problem of chronic obstructive pulmonary disease and address the questions Caulder left unanswered.

The facts in Caulder were uncontroverted. Clifton Caulder worked in the textile industry from 1945 to 1980. Before beginning work for defendant Waverly Mills in 1967, Caulder was exposed mainly to cotton dust. After he joined Waverly Mills, however, he was exposed almost exclusively to synthetic fiber dust.\textsuperscript{17} From July 1979 through February 1980, when insurer-defendant Employers Mutual Insurance Company (Employers Mutual) was responsible for paying Waverly Mills' workers' compensation obligations, Caulder was exposed exclusively to synthetic fiber dust.\textsuperscript{18} When Caulder left Waverly Mills in February 1980 he was totally disabled. Before coming to work for that mill, however, Caulder suffered from no physical incapacity.\textsuperscript{19} Although synthetic fiber dust was not proven to be a medical cause of plaintiff's disease, the expert medical testimony indicated that plaintiff's exposure to the synthetic fiber dust at Waverly Mills contributed to his ultimate disability by aggravating a pre-existing condition that probably had been caused by exposure to cotton dust.\textsuperscript{20} The North Carolina Industrial Commission concluded, and the court of appeals affirmed, that Caulder suffered from chronic obstructive lung disease, that this condition was an occupational disease under General Statutes section 97-53(13), that this condition resulted in plaintiff's disability, and "that Caulder was last injuriously exposed to the hazards of his disease while employed by Waverly Mills and while Employers Mutual Insurance Company was on the risk . . . ."\textsuperscript{21} On appeal, defendants challenged only the finding that plaintiff was last injuriously exposed during his employment at Waverly Mills,\textsuperscript{22} claiming that expo-

\textsuperscript{16.} Id. at 74-75, 331 S.E.2d at 649.
\textsuperscript{17.} Id.
\textsuperscript{18.} Id. Because textile mill employers change insurance carriers frequently, they must identify which carrier was "on the risk" when plaintiff was last exposed to the harmful substance. See, e.g., Appellant's New Brief at 6-12, Caulder (defendant Employers Mutual claimed it was not the carrier on the risk when Caulder was exposed to a harmful substance). An insurance company might be liable as the carrier on the risk even if it had assumed coverage within the last 24 hours, if that was when plaintiff was last exposed. See 4 A. Larson, supra note 4, § 95.26(a).
\textsuperscript{19.} Caulder, 314 N.C. at 76, 331 S.E.2d at 649.
\textsuperscript{20.} Id. at 76, 331 S.E.2d at 649-50.
\textsuperscript{21.} Id. at 76, 331 S.E.2d at 650 (emphasis added).
\textsuperscript{22.} Id. at 71-72, 331 S.E.2d at 647; Appellant's Brief at 8, Caulder. Although defendants also claimed that Employers Mutual was not the carrier on the risk and that plaintiff was not injuriously exposed at any time during his employment, this Note addresses only the situation in which an employee is exposed exclusively to synthetic fiber dust by the last employer.
sure to a substance that is not a medically accepted cause of a disease cannot be a last injurious exposure.\textsuperscript{23}

In an opinion written by Justice Exum, the North Carolina Supreme Court rejected this claim, emphasizing the medical testimony that plaintiff's exposure to dust while at Waverly Mills had aggravated his disease and thus had contributed to his disability.\textsuperscript{24} The court recognized that to constitute a "last injurious exposure," the degree of exposure to the harmful substance need only be slight, as long as it "'proximately augmented the disease to any extent ....'\textsuperscript{25} Because the expert testimony clearly indicated that the exposure had aggravated plaintiff's disease, the court concluded that his exposure to synthetic fiber dust could be a "last injurious exposure."\textsuperscript{26}

After concluding that it was "satisfied that [by the phrase 'hazards of the disease'] the legislature intended to include more than substances which are capable in themselves of producing an occupational disease,"\textsuperscript{27} the court addressed the specific question whether exposure to synthetic fiber dust could constitute a hazard of an occupational disease under section 97-57. The court held that the statute requires that the substance be "peculiar to the workplace" before the employer responsible for the exposure can be liable.\textsuperscript{28} A substance is peculiar to the workplace, the court added, if it is "one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed."\textsuperscript{29} The synthetic fiber dust to which Caulder was exposed was a "hazard" of the occupational disease, the court held, because it "is a substance to which, because of its nature, workers in those plants [that process synthetic fibers] have a greater exposure than does the public generally."\textsuperscript{30}

In a dissent joined by Chief Justice Branch, Justice Meyer argued that the majority's analysis of whether synthetic fiber dust was "peculiar to the workplace" went beyond the test traditionally used to identify an occupational disease under section 97-53(13).\textsuperscript{31} He asserted that the majority's determination that greater concentrations of a substance could satisfy the requirement was too broad because it could apply to high concentrations of ordinary substances.\textsuperscript{32} This loosening of the standard, Meyer argued, was unnecessary on the facts of the case and could have "a far-reaching, detrimental impact on the employment

\textsuperscript{23} Appellant's New Brief at 13, Caulder; see Caulder, 314 N.C. at 71, 331 S.E.2d at 647.
\textsuperscript{24} Caulder, 314 N.C. at 76, 331 S.E.2d at 649-50.
\textsuperscript{25} Id. at 74, 331 S.E.2d at 648 (quoting Haynes v. Feldspar Producing Co., 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942)).
\textsuperscript{26} Id. at 76, 331 S.E.2d at 650.
\textsuperscript{27} Id. at 74, 331 S.E.2d at 649.
\textsuperscript{28} Id. at 74-75, 331 S.E.2d at 649.
\textsuperscript{29} Id. at 75, 331 S.E.2d at 649.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 77-78, 331 S.E.2d at 650 (Meyer, J., dissenting). For a discussion of § 97-53(13), see infra notes 57-59 and accompanying text.
\textsuperscript{32} Caulder, 314 N.C. at 79, 331 S.E.2d at 651 (Meyer, J., dissenting).
opportunities for . . . textile workers," presumably because an employer with dusty premises will hesitate to hire an employee who has spent a significant amount of time in cotton mills.

The portion of North Carolina's Workers' Compensation Act covering occupational diseases provides that occupational diseases are compensable under the Act, provides a statutory list of prima facie occupational diseases, and designates which employers will be liable for an employee's disease. Plaintiffs suing under the last injurious exposure rule typically must first prove they suffer from an occupational disease as defined in General Statutes section 97-53. Plaintiffs must then prove that they were last exposed to the hazards of the disease at a particular defendant's premises. Typically, once plaintiffs establish that they have an occupational disease, they need only prove that they were exposed in the slightest degree to the harmful substance to satisfy the "last injurious exposure" requirement.

The Caulder court's conclusions arguably are in accord with such a statutory analysis and with North Carolina precedent. North Carolina case law recognizes that employers must take their employees as they find them, even if those employees have pre-existing conditions that substantially contribute to subsequent disability. Although this concept usually has been applied in the injury context and no occupational disease case has expressly analogized a pre-existing disease to a pre-existing injury, the practice in North Carolina has

33. Id. at 80, 331 S.E.2d at 652 (Meyer, J., dissenting).
36. Id. § 97-53.
37. Id. § 97-57.
38. Id. § 97-53. Claimants with lung disease connected to cotton dust exposure must sue under the catchall provision of § 97-53(13) because such diseases are not among the enumerated prima facie occupational diseases. See id. § 97-53. For a discussion of section 97-53(13), see infra notes 57-59 and accompanying text.
40. See, e.g., Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942). Because the substances in question usually are medically connected to the plaintiff's disease, the separate analysis of whether a substance is a "hazard" as contemplated by § 97-57 had not arisen until Caulder. As the Caulder court interpreted the section, a plaintiff must show that the substance is peculiar to the workplace to be a hazard, and then that he or she was exposed even slightly to the substance at defendant's workplace. See Caulder, 314 N.C. at 71-76, 331 S.E.2d at 646-50.
42. See Appellant's New Brief at 14, Frady v. Groves Thread, 56 N.C. App. 61, 286 S.E.2d 844 (1982), neither aff'd nor rev'd per curiam, 312 N.C. 316, 321 S.E.2d 835 (1984), in which appellant-plaintiff argued:

There is no requirement in the typical accident case that the accident had any causal connection with the underlying condition. If the accident aggravated the underlying condition whether the underlying condition was caused by a previous accident or disease or anything
been to emphasize *disability* rather than the inception of a disease.\(^{43}\)

Furthermore, the trend has been to concentrate on a hazardous condition's contribution to such disability rather than its actual ability to cause the disease.\(^{44}\) In fact, in *Walston v. Burlington Industries*\(^{45}\) the North Carolina Supreme Court apparently recognized an "agravation of pre-existing disease" theory by amending the language of its original opinion, "[d]isability caused by and resulting from a disease is compensable [only] when . . . the disease is an occupational disease, or is aggravated or accelerated by an occupational disease,"\(^{46}\) to read, "or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment."\(^{47}\) It therefore was logical for the court to place responsibility on Waverly Mills if a condition of its workplace aggravated plaintiff's pre-existing lung injury.

The *Caulder* opinion, however, ignored several related issues. For example, the court failed to address whether a distinction should be drawn between last exposure to a substance that can trigger development of a disease and last exposure to a substance that can only aggravate the symptoms of an existing disease. This issue does not arise when all employers expose an employee to cotton dust, because the last exposure is to a substance that is also a medical cause of the disease. At least one defendant, however, has argued that the distinction between cause and aggravation is important. In *Frady v. Groves Thread*,\(^{48}\) although the court did not address the question, defendant argued that courts must distinguish between substances that cause disease and those that merely aggravate the symptoms of an existing disease; otherwise an employer in any other, the resulting disability is compensable. There would appear to be no reason to apply a different rule in occupational disease cases.

\(^{43}\) The event of disability rather than the date of the inception of a disease determines when a plaintiff's cause of action arises. N.C. GEN. STAT. § 97-58 (1985); see Taylor v. Cone Mills Corp., 36 N.C. App. 291, 301, 289 S.E.2d 60, 65, rev'd on other grounds, 306 N.C. 314, 293 S.E.2d 189 (1982). Disability is the "state of being incapacitated," N.C. GEN. STAT. § 97-55 (1985), or the inability to earn the wages in the same or other employment that an employee was able to earn at the time of the injury. Id. § 97-2(9); see Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 174, 282 S.E.2d 828, 829 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982). Professor Larson suggests that the date of disability is used because of the difficulty in determining when a disease develops, if it is one that develops over a long period of time. 4 A. LARSON, *supra* note 4, § 95.25(a).

\(^{44}\) See, e.g., Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 104-05, 301 S.E.2d 359, 371-72 (1983); Haynes v. Feldspar Producing Co., 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942); cf. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983) (for cotton dust to be a dual cause of plaintiff's chronic lung disease, his or her exposure to it must have significantly contributed to, or been a significant causal factor in, the disease's development). The determination whether there is a last injurious exposure under § 97-57, however, may be distinguished from the determination whether an occupational disease exists at all under § 97-53(13). Although the former section requires only the slightest contribution, e.g., Haynes v. Feldspar Producing Co., 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942), the latter section might require a significant contribution to the development of the disease before it can be considered occupational. See, e.g., Mills v. Mills, 68 N.C. App. 151, 156, 314 S.E.2d 833, 836 (1984).


\(^{46}\) Id. at 679-80, 285 S.E.2d at 828.


dusty atmosphere could be liable for a disability resulting from the dust's exacerbation of lung disease symptoms.  

Similarly, one scholar has carried the distinction between causing a disease and merely aggravating a pre-existing condition one step further and suggested a distinction between different types of aggravation. Aggravating a pre-existing disease or allergy might differ from aggravating a pre-existing weakness, he suggests, because the latter "has the effect of increasing a worker's susceptibility to disease" whereas the former merely exacerbates a condition rather than causes it.

Furthermore, dicta in the Caulder majority opinion may have expanded the types of substances that can be hazards under the last injurious exposure rule. Recognizing that to be a hazard as contemplated by section 97-57 a substance must be "peculiar to the workplace," the court held that synthetic fiber dust is by nature peculiar to textile mills such as defendant's. Although unnecessary under the facts, the majority noted that a substance could also satisfy the requirement that it be "peculiar to the workplace" if it is merely found in greater concentrations than the public generally encounters. Although the concentration of a substance in the workplace might sometimes be relevant in determining whether a hazard exists, the dissent pointed out that the majority's unqualified test suggests that even ordinary substances such as sand, dust, or steam could be hazards under section 97-57 if found in large enough concentrations. The Caulder majority failed to address this possibility.

Because the majority opinion considered only whether synthetic fiber dust was peculiar to Waverly Mill's employment and, therefore, a "hazard," the court's analysis conflicts with a well-reasoned authority. In Frady, a case involving facts virtually identical to those in Caulder, the North Carolina Court of Appeals suggested that the threshold issue in determining whether there was a hazard under section 97-57 was whether there was an occupational disease.

49. See Appellee's New Brief at 8, Frady. Appellees argued that according to the expert testimony any dusty area could have aggravated the symptoms of chronic lung disease to the point of disability and, therefore, this condition was not confined to defendant's employment. Id.

50. Wilson, Occupational Disease—The Problems of a Comprehensive System of Coverage, 11 INDUS. L.J. 141, 148 (1982). However, Professor Wilson suggests an alternative way of viewing this problem. A court could hold that "if the employment actually causes the disability, i.e., causes the aggravation or otherwise, but not necessarily the disease, and the cause of the disability was a peculiar risk of the employment, ... then that will be an occupational disease and will be compensated as such." Id. at 149. He suggests that the difference depends on the definition of occupational disease. Id.; see also 1B A. LARSON, supra note 4, § 41.63, at 7-454 (aggravation of pre-existing disease or weakness as an occupational disease). For a discussion of the definition of occupational disease, see infra notes 57-62 and accompanying text.

51. Caulder, 314 N.C. at 75, 331 S.E.2d at 649.

52. Id.

53. Id.

54. Because the court might require a significant contribution to find there is an occupational disease, see, e.g., Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984), the concentration of the harmful substance may be relevant.


56. 56 N.C. App. 61, 286 S.E.2d 844 (1982), neither aff'd nor rev'd per curiam, 312 N.C. 316, 321 S.E.2d 835 (1984) (supreme court left the court of appeals' decision intact, but emphasized that due to a failure to raise enough votes to either affirm or reverse the court, the opinion has no precedential value).
under section 97-53(13). A disease that a particular substance could not have caused would not be an occupational disease with respect to that substance, and the question of last injurious exposure would never arise. The Caulder court, however, did not first analyze whether Clifton Caulder had an occupational disease, presumably because defendant did not challenge the finding that plaintiff suffered from such a disease. Instead, the Caulder court incorporated only the "peculiar to the workplace" part of the test into its interpretation of "hazard." Most importantly, however, the Caulder majority's reasoning conflicts with the policies supporting the last injurious exposure rule and workers' compensation generally. Scholars examining the last injurious exposure theory of liability generally recognize that exposure to many employers' working conditions

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57. Id. at 65, 286 S.E.2d at 847. The catchall subsection of N.C. GEN. STAT. § 97-53(13) (1985), provides that an occupational disease can be "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." See also supra notes 38-40 and accompanying text (suggesting the statute, read as a whole, first requires finding an occupational disease). 58. N.C. GEN. STAT. § 97-53(13) (1985); see, e.g., Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981). 59. Frady, 56 N.C. App. at 65, 286 S.E.2d at 847; see also Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981) (requiring proof of causal connection between the disease and the employment); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979) (suggesting that a disease is characteristic of a profession if there is a recognized link between the nature of the job and an increased risk of contracting the disease). 60. Frady, 56 N.C. App. at 65, 283 S.E.2d at 847. 61. See Caulder, 314 N.C. at 71, 331 S.E.2d at 647. 62. The Frady opinion was filed after the supreme court issued its first Walston opinion, Walston I, but before the court amended the language of that first opinion in Walston II. See supra notes 45-47 and accompanying text. Because the court of appeals in Frady based part of its decision on that critical language in Walston I, see Frady, 56 N.C. App. at 65, 283 S.E.2d at 847, that was changed by Walston II, it is possible that the Frady court would have concluded that chronic obstructive lung disease was an occupational disease with respect to the synthetic fiber dust. Presumably this is why neither party in Caulder used the Frady decision to support its position. However, as Justice Meyer emphasized in his dissent in Caulder, the Walston opinion as amended still contains the qualifying language "characteristic of and peculiar to claimant's employment." Caulder, 314 N.C. at 78, 331 S.E.2d at 651 (Meyer, J., dissenting). A related inquiry that the Caulder court did not make is exactly what is or is not peculiar to the employment—dust in general or synthetic fiber dust in particular. See id. at 79, 331 S.E.2d at 651 (Meyer, J., dissenting). As Justice Meyer suggested, characterizing the substance as "dust arising from the processing of synthetic fibers," id. at 75, 331 S.E.2d at 649, may lead to application of the statute to common dust such as construction site dust. Id. at 79, 331 S.E.2d at 651 (Meyer, J., dissenting). On the other hand, when a court seeks to determine whether a substance is peculiar to the workplace, once it defines the substance as synthetic fiber dust, then clearly it is by nature peculiar to a synthetics processing mill, just as construction dust would be peculiar to a construction site. 63. A second theory of liability is apportionment. The apportionment theory is usually recognized as the fairer of the two because it divides liability among all employers who were actually responsible for the plaintiff's disability. Liability is divided among the employers in proportion to degrees of exposure at each respective workplace. See, e.g., 4 A. LARSON, supra note 4, § 95.12, at 17-111. According to Professor Larson, apportionment is "complicated by . . . out-of-state employers, statutes of limitations, and the difficulty of determining the proportion of liability attributable to each [employer]." Id. (footnotes omitted).
may contribute to a disability. A disease might develop over a period of time and might not manifest itself as a disability until after the employee quits working. Because the determination of which and in what degree an employer contributed to the disease becomes an unwieldy process, applying a last injurious exposure rule of liability saves both time and money. Although placing the entire responsibility on one employer may seem unfair in a given case, the inequitable results in that case are justified when an industry is viewed as a whole. The rule is only justified, however, when considering a specific industry in which each employer consistently exposing employees to the harmful substance theoretically will be the last employer at some time and thus should its share of responsibility for the industry's overall hazardous work conditions. If, however, the Caulder decision means that an employer can be liable under section 97-57 even if it is not one of a homogeneous group of employers responsible for creating the dangerous employment conditions, the majority opinion destroys the traditional justification for the last injurious exposure rule of liability.

Moreover, once this reasoning has been established, it can be carried to illogical extremes, thus undermining the general policy behind workers' compensation. The textile employee who leaves the cotton mill to work on a construction site or even the employee who leaves the cotton mill to become a janitor could be exposed to dust that might aggravate his or her lung disease to the point of disability. Imposing liability on these employers would cause the

64. See, e.g., 4 A. Larson, supra note 4, § 95.24, at 17-148.
65. 4 A. Larson, supra note 4, § 95.11, at 17-109; Vokoun, supra note 6, at 107-08 (last exposure rule developed as a rule of convenience); Comment, Living with Oregon's Adoption of the Last Injurious Exposure Rule in Successive Injury Cases: Which Employer's Insurance Carrier Should Pay?, 16 Willamette L. Rev. 137, 138 (1979).
67. 4 A. Larson, supra note 4, § 95.24, at 17-148 to -149. Some commentators distinguish between the last exposure rule, which holds the last employer liable regardless of the employee's degree of exposure from that employer, and the last injurious exposure rule, which requires that there be some injury or causal connection between the condition and the disability. E.g., Vokoun, supra note 6, at 112-16. However, the last exposure test might still require exposure to a substance that could cause the disease if it were present in a large enough quantity. See id. at 104 (discussing a case holding that "the last employment [must be] of the same type which risked the disease just as did the first employment"). But see id. at 112 (suggesting that some jurisdictions would find the test satisfied if "the employee's work with the last employer aggravated the prior condition" or the last employment was the same type as the first whether or not it aggravated the disease). Therefore, because the last injurious exposure test is a narrower test than the last exposure test, id., it seems logical that this rule too would require exposure to a substance that could actually cause the disease.

Vokoun cites the North Carolina case of Rutledge v. Tultex Corp./King's Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), as adopting this latter rule by requiring the condition to be a significant causal factor. Id. at 113. However, even though N.C. GEN. STAT. § 97-57 (1985) designates "last injuriously exposed," (emphasis added), the courts have not consistently required this significant causal connection. See supra note 9 and accompanying text; text accompanying note 25.
68. Justice Meyer in his dissent suggested that the majority's opinion failed to clarify whether great concentrations of ordinary dust like that from cooking fumes, construction sites, a school yard, or cigarette smoke in a company office could lead to liability for the employer. Caulder, 314 N.C. at 79, 331 S.E.2d at 651 (Meyer, J., dissenting). According to Justice Meyer, the majority's characterization of the substance "not as 'synthetic fiber dust' but as 'dust arising from the processing of synthetic fibers'" could lead to such expansive liability. Id.; see Appellee's New Brief at 8, Prady.
workers' compensation system to cease to be a balance between providing compensation to employees and fairness to employers and in effect would become a means of general health insurance.

Resolution of these issues may lie with the North Carolina General Assembly. The general assembly could amend the catchall definition of occupational diseases in section 97-53(13) to address the definition of "hazard," the difference between aggravation of a disease and aggravation of a disability, and the exact meaning of "characteristic of and peculiar to claimant's employment." Virginia, for example, by statutorily mandating that the occupational disease result "as a natural incident of the work as a result of the exposure occasioned by the nature of the employment," requires that there be a direct causal relationship between the work conditions and the disease. The Virginia statutes also require that the disease "must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence . . . ."

Furthermore, some commentators have suggested that five conditions must be met to find a compensable occupational disease:

(1) The disease must have its inception in the employment. (2) The hazard must distinguish the occupation from the [risks to which the general public is exposed]. (3) The hazard must have identifying characteristics. (4) A causal or generally recognized relationship must exist between the hazard and the disease. (5) The compensability of the disease must be determined by an administrative agency.

In addition, because the textile industry and the development of chronic obstructive lung disease are so prevalent in North Carolina, the general assem-


70. See Comment, The Ordinary Disease Exclusion in Virginia's Workers' Compensation Act: Where Is It Going After Ashland Oil Co. v. Bean?, 18 U. RICH. L. REV. 161, 168 (1983). In Vause v. Vause Farm Equip Co., 233 N.C. 88, 63 S.E.2d 173 (1951), the court determined that "While such compensation is primarily charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such product . . . ."

However, it must be borne in mind that the Act was never intended to provide the equivalent of general accident or health insurance. Id. at 91, 63 S.E.2d at 176 (quoting Cox v. Kansas City Ref. Co., 108 Kan. 320, 322, 195 P. 863, 865 (1921); see also Duncan v. City of Charlotte, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951) (emphasizing that the rule of a causal connection is the very anchor of workers' compensation and that this prevents it from becoming a means of general health insurance); Note, supra note 3, at 583 (Rutledge does not turn the workers' compensation act into a means of general health insurance because it requires a significant contribution to the disability).

71. As early as 1942 the court expressed its general dissatisfaction with the last injurious exposure rule but recognized that the general assembly must address the problem. Haynes v. Feldspar Producing Co., 222 N.C. 163, 170, 22 S.E.2d 275, 279 (1942).


73. Id. § 65.1-46(6).


75. See, e.g., Ellis, The Brown Lung Battle, N.C. INSIGHT, April 1981, at 16, 16 (approximately 11,000 North Carolina textile workers are estimated to be disabled by brown lung, or byssinosis);
bly might deal with these issues by specifically addressing this disease as it has asbestosis and silicosis. If necessary to control compensation for chronic obstructive lung disease, the general assembly could provide by statute that synthetic fiber dust is a hazard of the disease as contemplated by section 97-57, thus effectively eliminating the potential for illogical results made possible by the Caulder decision.

In conclusion, Caulder belies the confusion that exists in North Carolina occupational disease law. The supreme court limited its analysis and avoided issues that, if addressed, might have eliminated some of the unanswered questions in this area of the law. Although the court may have provided relief for plaintiff, its opinion ultimately may harm textile workers in general. As the dissent cautioned, the Caulder holding may make employers whose dusty work conditions traditionally have not been connected to chronic obstructive lung disease reluctant to hire individuals who have spent considerable time in cotton mills.

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76. See, e.g., N.C. GEN. STAT. §§ 97-57, -58(a), -61.5(b) (1985).
77. Perhaps the Caulder court found in plaintiff's favor because he had no one else to sue. N.C. GEN. STAT. § 97-58 (1985) does allow an employee to sue the employer responsible, even if the employee's disability developed after employment or even if the employer was not the last employer. However, the employee has only two years after discovery of a disability to bring suit, id., and it is possible that by the time of the opinion, Caulder's two years had expired.