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# Payne v. Cone Mills Corp.: Should A Doctor's Suspicions Bar A Plaintiff's Meritorious Claim?

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# *Payne v. Cone Mills Corp.*: Should A Doctor's Suspicions Bar A Plaintiff's Meritorious Claim?

Byssinosis,[1] more commonly referred to as brown lung disease, afflicts textile workers who are repeatedly exposed to raw cotton dust.[2] In North Carolina byssinosis is considered an occupational disease.[3] A textile worker who contracts byssinosis is entitled to file a claim for workers' compensation benefits,[4] but the claim must be filed within two years[5] of the date on which both prongs of a two-prong test are satisfied.[6] The first prong requires that the claimant be disabled. The second prong requires that the claimant has been informed, through a doctor's diagnosis, that his textile job caused or contributed to his disease.[7] Whether an ambiguous, speculative diagnosis could give a patient sufficient information to satisfy the notice prong was the central issue in *Payne v. Cone Mills Corp.*[8]

In *Payne* the court of appeals held that a claimant, who filed his claim in 1979, had received sufficient notice in 1970 of the occupational nature of his disease to initiate the two-year limitation period.[9] In 1970 Payne's doctor informed him that he "suspected" Payne "might be allergic to some airborne

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1. Byssinosis is a disease caused by prolonged exposure to cotton dust with symptoms of nasal irritation, dry irritating cough, and wheezing respiration of asthmatic character. C. FRANKEL, 5A LAWYER'S MEDICAL CYCLOPEDIA § 33.59a, at 82 (rev. ed. 1972).

2. Bouheys, Schoenberg, Beck & Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 607, 616 (Service Vol. 1978) (report of study finding excessive chronic lung disease among all types of textile workers who are exposed to substantial levels of dust including carders, spinners, yarn preparers, and weavers); Dickie & Chosy, *Some Important Occupational Diseases*, 3 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 729, 742 (Service Vol. 1975).

3. *See* Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 101, 301 S.E.2d 359, 369 (1983) (chronic obstructive lung disease as well as byssinosis compensable occupational disease in North Carolina); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 95, 265 S.E.2d 144, 145 (1980).

N.C. GEN. STAT. § 97-53 (1979) authorizes compensation for byssinosis:

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

4. N.C. GEN. STAT. § 97-52 (1979) provides:

> Disablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Worker's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases
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> . . . .

5. *Id.* § 97-58 (b) & (c). *See infra* notes 22-24 and accompanying text.

6. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 712-13, 304 S.E.2d 215, 222 (1983); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 98-99, 265 S.E2d 144, 147 (1980).

7. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 97-99, 265 S.E.2d 144, 147-48 (1980).

8. 60 N.C. App. 692, 299 S.E.2d 847 (1983), *disc. rev. denied*, 308 N.C. 387, 302 S.E.2d 252 (1983).

9. *Id.* at 698, 299 S.E.2d at 850.

allergen at work."[10] His claim for disability compensation, filed nine years after that diagnosis, was barred by expiration of the limitation period.[11] It is far from certain, however, that the speculative diagnosis Payne received in 1970 was sufficient to apprise him that he had contracted a permanent, disabling, occupational disease, for which he was required to file a claim against his employer within two years or forego his right to receive compensatory payment. Although Payne did not receive a conclusive diagnosis of byssinosis until 1979, the court of appeals held that the earlier, inconclusive diagnosis was sufficient to begin the limitation period.[12]

The *Payne* decision reformulates the notice prong of the two-pronged test established by the North Carolina Supreme Court in *Taylor v. J.P. Stevens & Co.*[13] Instead of commencing the limitation period on the day the claimant received actual notice, the *Payne* decision suggests that a plaintiff must file his claim when he knew or should have known of the nature and work-related qualities of his disease. Although the court claimed to have applied the *Taylor* rule favoring plaintiff—that a claimant need not file his claim until a doctor has informed him of the nature and work-related clause of his disease[14]—it is difficult to reach the court's conclusion using the *Taylor* test. Furthermore, even if the court intended to follow and apply the *Taylor* test, the court undercut strong policies supporting workers' compensation[15] in applying the facts to the test, by evaluating those facts in a light unfavorable to the worker. If courts follow the *Payne* approach in similar cases, other claimants may find their workers' compensation claims barred by the time they learn conclusively that they are afflicted with a compensable disease.

A better approach, more consistent with the guiding principle of workers' compensation that "industry '[must] take care of its [own] wreckage,'"[16] would require strict application of *Taylor*'s notice requirement—that the two-year limitation period does not run until a qualified physician unambiguously informs the plaintiff of the nature and work-related cause of his disease.[17] Moreover, in applying this requirement to specific cases, courts should evaluate the knowledge that each plaintiff actually gained from his diagnosis in light of all surrounding circumstances, including the plaintiff's education, the specificity of the diagnosis, and the extent to which workers generally were aware of the particular occupational hazard at the time the diagnosis was given. If these guidelines had been followed the *Payne* court probably would not have barred plaintiff's claim.

The facts of the *Payne* case were as follows. Claimant James R. Payne, a

10. *Id.* at 696, 299 S.E.2d at 849.

11. *Id.* at 698, 299 S.E.2d at 850.

12. *Id.*

13. 300 N.C. 94, 97-99, 265 S.E.2d 144, 147-48 (1980).

14. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

15. *See, e.g.*, Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

16. Morrison v. Burlington Indus., 304 N.C. 1, 14, 282 S.E.2d 458, 468 (1981) (quoting Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943)).

17. *Taylor*, 300 N.C. at 101, 265 S.E.2d at 148.

cotton mill worker, had received hospital treatment in 1970 for asthmatic bronchitis secondary to exposure to textile particles. His doctor advised him not to return to work because he "suspected that he might be allergic to some airborne allergen at work."[18] It was not until 1979 that Payne was diagnosed conclusively as having byssinosis.[19] Although the Industrial Commission ruled that the doctor had not advised Payne of the nature and work-related cause of his disease in 1970, the court of appeals held that the evidence did not support this ruling. Therefore, plaintiff's claim was dismissed for lack of jurisdiction.[20]

In making its determination, the court of appeals addressed two questions: (1) did the court in *Taylor* correctly construe sections 97-58(b) and 97-58(c); and (2) given a proper construction, did the Industrial Commission correctly find the facts? In conclusory language, the court stated that to satisfy section 97-58 the communication by the physician to the plaintiff must inform the plaintiff of the nature and work-related cause of the disease and his resulting disability. The court decided that the physician's 1970 diagnosis had satisfied the statutory requirements.[21] A study of the *Payne* evidence and the facts found by the appellate court raises a significant question whether the court actually applied the test it outlined.

In *Taylor*, when the North Carolina Supreme Court first instituted the requirement that the claimant be informed of the nature and work-related cause of his disease, the court construed ambiguous language in North Carolina General Statutes section 97-58, subsections (b) and (c), by interpreting the legislature's intent.[22] The statute provides:

> (b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has the same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be.[23]

The court reasoned that if a literal interpretation of the language of the statute contravened the manifest purpose of the statute, the goals behind the statute should control.[24]

Construing the statute in this light, the court has held that the time period begins running upon the occurrence of two events: disability and notice. First, to be disabled, an employee must have suffered injury from an occupational disease that renders him incapable of earning the wages he was receiv-

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18. *Payne*, 60 N.C. App. at 696, 299 S.E.2d at 849.

19. *Id.* at 695, 299 S.E.2d at 848-49.

20. *Id.* at 698, 299 S.E.2d at 850. The plaintiff must establish compliance with the statute's two-year time limit for the Industrial Commission to have jurisdiction over his claim. *See infra* note 29.

21. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

22. *Taylor*, 300 N.C. at 101-02, 265 S.E.2d at 148. *See infra* note 39 and accompanying text.

23. N.C. GEN. STAT. § 97-58 (b) & (c) (1979).

24. *Taylor*, 300 N.C. at 102, 265 S.E.2d at 148-49.

ing when the incapacitating injury occurred.[25] Second, an employee is considered "on notice" when he is first advised by a physician that he has the disease, even though disability may have occurred much earlier.[26] Recognizing that byssinosis is an "insidious"[27] disease with peculiar associated problems, the *Taylor* court held that an employee is not informed of his disease until a physician notifies him of "the nature and work-related quality of the disease."[28] This standard was designed to reduce the likelihood that unaware deserving claimants might lose their compensation rights by passage of time.[29]

In 1981 the North Carolina Court of Appeals had two occasions to apply the *Taylor* notification standard. In *Poythress v. J.P. Stevens and Co.*[30] plaintiff's physician diagnosed her condition as byssinosis resulting from "inhalation of cotton lint fibers leading to a disease of the lung characterized by foreign body reaction in a febrile but coughing patient."[31] The diagnosis was made in 1963. As a result of her doctor's diagnosis and recommendation, claimant retired five months later. She did not file a claim for workers' com-

25. *See* Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 709, 304 S.E.2d 215, 220 (1983) (a worker is incapable of earning wages that he was receiving when he is unable to work as he had in the past; whether claimant still was able to earn the same hourly wage was not determinative of the question).

26. *Id.* at 706, 304 S.E.2d at 218 (1983); *Taylor*, 300 N.C. at 102, 265 S.E.2d at 149.

27. *Taylor*, 300 N.C. at 101, 265 S.E.2d at 148.

28. *Id.*, at 102, 265 S.E.2d at 149. *See also* McCall v. Cone Mills Corp., 61 N.C. App. 118, 122-23, 300 S.E.2d 245, 247 (1983); *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850; McKee v. Crescent Spinning Co., 54 N.C. App. 558, 561, 284 S.E.2d 175, 178 (1981).

29. Although the courts reduced the likelihood that unsuspecting diseased claimants might lose their right to receive compensation, the courts heightened the procedural requirements related to this statute. *See* Dowdy v. Fieldcrest Mills, Inc., 398 N.C. 701, 704-05, 304 S.E.2d 215, 218 (1983); Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 378-79, 283 S.E.2d 573, 576-77 (1981). For example, § 97-58(c) is not considered a statute of limitations to be pleaded and proved by the defendants. Instead, in *Poythress* the court of appeals held that the section's two-year time limit is a condition precedent with which plaintiffs must comply before jurisdiction is conferred on the Industrial Commission. *Poythress*, 54 N.C. App. at 378-79, 283 S.E.2d at 576-77; *Dowdy*, 308 N.C at 704, 304 S.E.2d at 218. Because the claimant bears the burden of proving that his claim was filed timely, failure to meet this condition creates an absolute jurisdictional bar. Unlike a statute of limitations, for which the jurisdictional bar may be waived by the defendant's failure to raise it, an employer cannot waive the bar caused by the expiration of the workers' compensation period. *Poythress*, 54 N.C. App. at 379, 283 S.E.2d at 577. *See also Dowdy*, 308 N.C. at 705, 304 S.E.2d at 218 (jurisdiction is challengeable at any time throughout the proceeding).

Since § 97-58(c) creates a condition precedent to establishing the jurisdiction of the Industrial Commission, appellate courts must review de novo the evidence supporting an Industrial Commission ruling on whether the claimant filed his claim within the prescribed time period. Lucas v. Stores, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976); Richards v. Nationwide Homes, 263 N.C. 295, 303-04, 139 S.E.2d 645, 651 (1965). The Industrial Commission's findings of substantive facts are conclusive on appeal when supported by competent evidence. N.C. GEN. STAT. § 97-86 (1979) states: "The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact, but either party to the dispute may . . . appeal from the decision of said Commission to the court of appeals for errors of law . . . . " *See also* Walston v. Burlington Indus., 304 N.C. 670, 677, 285 S.E.2d 822, 828 (1981), *amended on reh'g*, 305 N.C. 296, 285 S.E.2d 822 (1983); Morrison v. Burlington Indus., 304 N.C. 1, 6, 282 S.E.2d 458, 464 (1981). Jurisdictional facts found by the Industrial Commission are not conclusive on appeal, however, because jurisdiction is a question of law. Higher courts have the power and, indeed, the duty to consider all the evidence in the record, and make independent findings of jurisdictional facts. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261; *Richards*, 263 N.C. at 303-04, 139 S.E.2d at 651.

30. 54 N.C. App. 376, 283 S.E.2d 573 (1981).

31. *Id.* at 378, 283 S.E.2d at 575.

pensation until 1977.[32] The court of appeals held that plaintiff had been informed of the nature and work-related cause of her disease in 1963.[33]

In *McKee v. Crescent Spinning Co.*[34] the court of appeals reached the opposite result. Claimant, Roy E. McKee, filed his claim in 1978, twelve years after a doctor informed him that he had "a breathing problem"[35] and "if it doesn't get better soon he had better get out of the mill."[36] Four years after McKee's first diagnosis, another physician told him that he had "brown lung." Neither physician, however, further explained the cause of his sickness. McKee continued to work in the mill until 1971.[37] The *McKee* court considered the recommendation to "get out of the mill" only an admonition, not specific enough to relay the causation of the breathing problem to claimant. The "brown lung" diagnosis, which was clearly meaningless to claimant, also failed to explain the cause of the disease.[38]

The *Taylor* court adopted the "nature and work-related cause" formulation of the notice requirement because it found that the legislature never intended that (1) a plaintiff would have to make a correct medical diagnosis of his own condition prior to notification from a doctor to make his claim timely, or that (2) the statutory scheme would be construed to render the time for notice and filing of the claim inequitably short.[39] In the *McKee* opinion, the court of appeals noted a third justification for the notice requirement: a plaintiff should not be required to inquire further and discover the relationship between his condition and his employment if his doctor fails to inform him adequately.[40]

The court of appeals' ruling in *Payne* violated all three of these policies. By finding that Payne indeed had been informed of the nature and work-re-

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32. *Id.*

33. *Id.* at 383, 283 S.E.2d at 578.

34. 54 N.C. App. 558, 284 S.E.2d 175 (1981).

35. *Id.* at 559, 284 S.E.2d at 176.

36. *Id.* at 562, 284 S.E.2d at 178.

37. *Id.* at 559, 284 S.E.2d at 176.

38. *Id.* at 562, 284 S.E.2d at 178.

39. *Taylor*, 300 N.C. at 102, 265 S.E.2d at 149. North Carolina's workers' compensation time limitation rule is more favorable to plaintiffs than other states' rules. There are six different rules for determining when the statute of limitations begins to run on a workers' compensation claim. *See* Annot., 11 A.L.R.2d 277 (1950). Arranged from the most to the least onerous to plaintiffs, the time limitation period begins to run (1) at the time the negligent act occurred; (2) at the time of the last industrial exposure; (3) when the disease is contracted; (4) whenever the plaintiff should have known of the disease's causation; (5) when disability results; and (6) the North Carolina approach, *see supra* text accompanying notes 25-29. The numerous philosophies embraced by the states are a product of their differing statutes and judicial interpretations.

When the North Carolina Supreme Court adopted the *Taylor* test instead of a "knew or should have known" standard, the court placed North Carolina among the states lending the most favorable treatment to workers' compensation plaintiffs stricken with byssinosis. As noted by *Taylor*, the "insidious" nature of byssinosis with its peculiar associated problems requires a liberal reading of § 97-58 to afford plaintiffs their rightful opportunity to file claim. *Taylor*, 300 N.C. at 97, 265 S.E.2d at 146. By comparison to other states' positions, North Carolina could have provided more liberal treatment to plaintiffs only by construing § 97-58 as a statute of limitations, *cf.* McKinney v. Feldspar Corp., 612 S.W.2d 157, 158 (Tenn. 1981) (construing that state's versions of § 97-58) instead of a jurisdictional condition precedent.

40. *McKee*, 54 N.C. App. at 563, 284 S.E.2d at 178.

lated cause of his disease[41] when his physician only had advised him that he "suspected" the disease was connected causally to Payne's occupation,[42] the court of appeals implied that Payne either should have diagnosed his own condition based on information from which a qualified medical doctor could only speculate, or should have inquired further about the relationship between his condition and his employment by seeking a second, more concrete opinion. By holding that such a vague diagnosis triggered the statutory time period, the court of appeals rendered the time for filing the claim inequitably short.[43]

Implicit in the *Payne* court's holding is the notion that, in 1970, Payne knew or should have known from his doctor's diagnosis that he had contracted a compensable occupational disease. It is, however, not at all certain that Payne knew anything at all about byssinosis in 1970. Textile workers generally were poorly educated about the symptoms of byssinosis and their rights to compensation for occupational disability.[44] It was not until 1980, ten years after Payne's diagnosis, that a widely read North Carolina newspaper publicized the problem of byssinosis.[45] If the *Payne* court had considered claimant's probable lack of knowledge about the disease in 1970, it is doubtful that it would have found his doctor's speculative diagnosis to be sufficient notification to start the running of the statutory time period.

In two other cases decided later in 1983, North Carolina courts again held that the Industrial Commission lacked jurisdiction to hear plaintiffs' claims because more than two years had elapsed since the plaintiffs were informed of the nature and work-related cause of their diseases. The facts in these cases, *McCall v. Cone Mills, Inc.*[46] and *Dowdy v. Fieldcrest Mills, Inc.*,[47] however, strongly indicated that the plaintiffs actually had received notice, as required in section 97-58, of their occupational diseases. The *McCall* case was decided just one month after the court of appeals rendered the *Payne* decision. In that case claimant's decedent, Martin McCall, had been diagnosed as suffering from "allergic pneumonitis due to exposure to cotton fibers and hypertensive vascular disease."[48] The record was unclear whether his doctor told him that he had byssinosis.[49] Shortly after discharge from the hospital, decedent retired, in part because his physician had informed him that "his lungs were full of lint" and it's "going to kill you."[50] From this evidence, the *McCall* court found that decedent had been informed sufficiently of his disease, its nature,

41. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

42. *Id.* at 696, 299 S.E.2d at 849.

43. *But see Poythress*, 54 N.C. App. at 375, 283 S.E.2d at 579 (A claimant has no right to be told that he has a claim for workers' compensation; he need be told only the nature and work-related aspect of his disease for the two-year time limit to begin to run.).

44. *See Poythress*, 54 N.C. App. at 381, 283 S.E.2d at 579.

45. *See* Brown Lung: A Case of Deadly Neglect, The Charlotte Observer, Feb. 3-10, 1980 (byssinosis series). This Pulitzer Prize winning feature documented the varied aspects of byssinosis for the paper's approximately 170,000 readers.

46. 61 N.C. App. 118, 300 S.E.2d 245 (1983).

47. 308 N.C. 70, 304 S.E.2d 215 (1983).

48. *McCall*, 61 N.C. App. at 121, 300 S.E.2d at 247.

49. *Id.* at 120-21, 300 S.E.2d at 246-47.

50. *Id.* at 121, 300 S.E.2d at 247.

and its relation to his work to begin the running of the two-year time limit.[51]

Five months after the *Payne* case, the North Carolina Supreme Court reviewed the same time-limit jurisdiction issue in *Dowdy*.[52] Like *McCall*, *Dowdy* presented much stronger evidence supporting the expiration of the two-year limit than *Payne*. Five years before Dowdy filed his claim for workers' compensation, his doctor informed him that he was "severely disabled and he should not be exposed any further to airborne irritants namely cigarette smoke and industrial dust."[53] The examining doctor also stated that the "impairment is *probably* due in part to the cotton dust exposure in spite of the fact that the diagnosis of byssinosis is not warranted in view of the only occasional occurrence of complaints in relation to cotton dust exposure."[54] The doctor found that Dowdy, a cigarette smoker, had chronic obstructive lung disease with distinct aggravation by cotton dust exposure.[55] He encouraged Dowdy to refrain from smoking and avoid exposure to cotton dust.[56] On this evidence, the court held that Dowdy had been informed by a medical authority of his occupational disease, its nature, and its relation to his employment. Apparently, when Dowdy's doctor told him that his disease "severely restricted his ability to breath," he was informed of the nature of the disease. By relating the disease "to cotton dust in [Dowdy's] work envirvonment at the defendant's mill," the doctor was deemed to have informed Dowdy of the work-related cause.[57] Although chronic obstructive lung disease was not recognized as a compensable disease in 1973,[58] that fact was irrelevant for section 97-58 purposes.[59]

The *Taylor* court may have intended its two-pronged test to establish a bright-line standard that would require all questions of doubtful notification to be resolved in the claimant's favor.[60] If that was the court's intention, it has been obscured by the holdings of *Poythress*, *McKee*, *McCall*, *Dowdy*, and *Payne*. These five cases do not fall on one side or the other of a bright-line

51. *Id.* at 122-23, 300 S.E.2d at 247.

52. 308 N.C. at 701, 304 S.E.2d at 215.

53. *Id.* at 707, 304 S.E.2d at 219.

54. *Id.* (emphasis added).

55. *Id.*

56. *Id.* at 706, 304 S.E.2d at 219.

57. *Id.* at 712-13, 304 S.E.2d at 222.

58. *See* Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 101, 301 S.E.2d 359, 369 (1983) (chronic obstructive lung disease recognized as a compensable occupational disease under certain circumstances); Note, *Workers' Compensation*-Rutledge v. Tultex Corp./Kings Yarn: *Leaving Precedent in the Dust?*, 62 N.C.L. REV. 573 (1984).

59. *Poythress*, 54 N.C. App. at 380, 283 S.E.2d at 576.

60. Although § 97-58 is a condition precedent to obtaining jurisdiction, *Poythress*, 54 N.C. App. at 375-79, 283 S.E.2d at 576-77; *Dowdy*, 308 N.C. at 704, 304 S.E.2d at 218; *see supra* note 29, it closely resembles a statute of limitations in its purpose. *See* Lunkin v. Triangle Farm, Inc., 208 La. 538, 543, 23 So. 2d 209, 210 (1945) (discussing purposes of a workers' compensation statute of limitations). The North Carolina Supreme Court has cautioned that " 'the statute of limitations . . . is not such a meritorious defense that [judicial interpretation] should be strained in aid of it.' " Hardbarger v. Deal, 258 N.C. 31, 35, 127 S.E.2d 771, 774 (1962) (quoting Rochester v. Tub, 54 Wash. 2d 71, 74, 337 P.2d 1062, 1064 (1959)). By analogy, courts should not stretch facts unnecessarily in defendant's favor to find that the two-year time limit prescribed by § 97-58 has expired.

standard, but may be arranged more appropriately along a continuum of fact situations—ranging from those with facts clearly showing that the plaintiff had received notice sufficient to satisfy the *Taylor* test to those with facts demonstrating that the plaintiff had received no diagnosis that triggered the running of the statute. *McCall* and *Poythress* may be placed together at one end of the continuum because they both exemplify situations in which plaintiff clearly received the notice mandated by *Taylor*; both claimants received affirmative diagnoses that their diseases were caused by cotton lint.[61] *McKee* appears at the other end of the continuum because its facts show that plaintiff did not receive adequate *Taylor* notice. A doctor advised McKee to leave the mill only if his condition failed to improve, but did not even speculate about the cause of the disease.[62] From this, McKee could draw only a vague inference that his mill work either aggravated or contributed to his already well-developed disease. The *Dowdy* facts fall between these two ends, closer to the notice end. The diagnosis that Dowdy's condition was "probably" due to cotton dust[63] indicated that the doctor offered his opinion within a reasonable degree of medical certainty. Given the very nature of the disease, affirmative diagnosis often is difficult.[64] Thus, this diagnosis was sufficient to notify a plaintiff according to the *Taylor* guidelines.

The *Payne* facts fall somewhere between the notice in *Dowdy* and the lack of notice in *McKee*. Dowdy was told that his disease was "probably" caused by cotton dust;[65] Payne's physician only "suspected" that his breathing problems resulted from agents in the mill environment.[66] The court of appeals implied that Payne knew or should have known from this diagnosis that he had an occupational disease.[67] McKee, on the other hand, did not have even the benefit of speculation as to the cause of his disease.[68]

By implicitly holding Payne to a "knew or should have known" standard of notification, the *Payne* court transformed section 97-58 from a claimant-favorable statute, as construed by the *Taylor* and *McKee* courts, to a defendant-favorable statute. *Payne* permitted a speculative diagnosis, rendered at a time when public awareness of the byssinosis problem was minimal, to satisfy the *Taylor* rule. The holding in *Payne* circumvented the purpose of the statute by causing the time limit to run before claimant received actual notification of the nature and cause of his disease.

*Payne*'s departure from the *Taylor* approach should not be followed and should be disapproved by the North Carolina Supreme Court. In future cases the North Carolina appellate courts should hold that the two-year limitation

61. *McCall*, 61 N.C. App. at 120-23, 300 S.E.2d at 246-47; *Poythress*, 54 N.C. App. at 378, 283 S.E.2d at 575.

62. *McKee*, 54 N.C. App. at 561-62, 284 S.E.2d at 178.

63. *Dowdy*, 308 N.C. at 707, 304 S.E.2d at 219.

64. *See* Wood v. J.P. Stevens & Co., 297 N.C. 636, 640, 256 S.E.2d 692, 696 (1979).

65. *Dowdy*, 308 N.C. at 708, 304 S.E.2d at 221.

66. *Payne*, 60 N.C. App. at 696, 299 S.E.2d at 849.

67. *See supra* notes 44-45 and accompanying text.

68. *McKee*, 54 N.C. App. at 561, 284 S.E.2d at 178.

period does not begin to run until a qualified physician *unambiguously* informs the plaintiff of the nature and work-related cause of his disease. In each case, the question whether the claimant was adequately informed about his disease should be answered with reference to the plaintiff's individual knowledge and the overall public awareness of the occupational disease at the time of the diagnosis. Courts should guard against any construction of section 97-58 that would permit the time limit to run before the claimant receives meaningful notification of the nature and cause of his disease.

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