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excellent considering the court's statement in *Sides* that in cases of doubtful applicability, the rule should be resolved against the municipality.⁵⁰

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Workmen's Compensation—Apportionment of Disabilities Is Limited Under the North Carolina Act

The purpose¹ of the North Carolina Workmen's Compensation Act² is to relieve employees injured in industrial accidents from the cost of their resulting disabilities by passing the cost on to the consuming public.³ To effectuate this purpose the Supreme Court of North Carolina has adopted a policy of liberal construction of the Act, particularly of the coverage clauses.⁴ In *Pruitt v. Knight Publishing Co.*,⁵ a case of first impression,⁶ the North Carolina Court of Appeals held that a disability resulting from an industrial accident aggravation of a previous non-compensable injury cannot be apportioned under the North Carolina Act: the employer is responsible for the entire disability.⁷ In so holding, the court followed the rule adopted by

50. 287 N.C. at 25, 213 S.E.2d at 304.

1. The North Carolina Act itself contains no statement of purpose; the purpose may be inferred from the critics' discussions of the North Carolina Act and the Workmen's Compensation Acts generally. See note 3 *infra*. The North Carolina Supreme Court has spelled out the purpose of the Act in several decisions, e.g., *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966); *Lewis v. W.B. Lea Tobacco Co.*, 260 N.C. 410, 412, 132 S.E.2d 877, 879 (1963); *Kellams v. Carolina Metal Prods., Inc.*, 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958).

2. N.C. GEN. STAT. §§ 97-1 to -122 (1972), *as amended*, (Cum. Supp. 1975).

3. COMMISSION OF THE AMERICAN FEDERATION OF LABOR, WORKMEN'S COMPENSATION: REPORT UPON OPERATION OF STATE LAWS 13 (1914); *Malone, The Limits of Coverage in Workmen's Compensation—the Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973).

4. E.g., *Hollman v. Public Util. Dep't*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965); *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 480, 57 S.E.2d 760, 762 (1950) (dictum); *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 192, 41 S.E.2d 592, 597 (1947) (concurring opinion); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930).

5. 27 N.C. App. 254, 218 S.E.2d 876 (1975).

6. No supreme court or appellate court case on the *Pruitt* issue has been found. Since the North Carolina superior court decisions and the North Carolina Industrial Commission decisions are unreported, it is not possible to say with certainty whether the issue has previously been presented in those forums.

7. 27 N.C. App. at 257, 218 S.E.2d at 878.

the large majority of jurisdictions.⁸ As the dissent in *Pruitt* pointed out, however, the effect of the *Pruitt* decision may be to encourage discrimination in the hiring of handicapped persons and persons with previous injuries.⁹

The industrial accident in *Pruitt* occurred when plaintiff employee suffered a back injury while struggling to dislodge a stuck top from the gear box of a machine.¹⁰ Both sides stipulated that plaintiff's injury resulted from an accident arising out of, and in the course of, plaintiff's employment with defendant employer.¹¹ Plaintiff sustained temporary total disability for one year, for which the employer compensated him.¹²

A controversy arose, however, over the payment of plaintiff's permanent partial spinal disability of thirty-five percent. Approximately ten years prior to the industrial accident, plaintiff suffered a noncompensable back injury in an automobile accident.¹³ Plaintiff's doctor testified that the industrial accident aggravated the previous back injury, and he attributed twenty-five percent of plaintiff's permanent partial spinal disability to the original back injury and the other ten percent to the industrial accident aggravation of that injury.¹⁴

In conformity with the doctor's testimony, the hearing commissioner based plaintiff's award on a ten percent permanent partial disability and the full commission affirmed the award.¹⁵ On appeal, the court of appeals reversed and remanded the case with directions to award compensation for the entire thirty-five percent disability.¹⁶ One judge dissented from the court's opinion.¹⁷ The *Pruitt* decision is the first that a North Carolina appellate court has rendered on the subject of apportionment in industrial accident aggravations of previous noncompensable injuries.¹⁸ Both the supreme court and the court of appeals, however, have considered similar issues which bear discussion in relation to *Pruitt*.

8. See A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 12.20, 59.20 (1972; 1976). 11 W. SCHNEIDER, *SCHNEIDER'S WORKMEN'S COMPENSATION* § 2303 (perm. ed. 1957).

9. 27 N.C. App. at 260, 218 S.E.2d at 880 (dissenting opinion).

10. *Id.* at 255, 218 S.E.2d at 877-78.

11. *Id.* at 255, 218 S.E.2d at 878.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 259, 218 S.E.2d at 880.

17. *Id.* See text accompanying note 9 *supra*.

18. See note 6 *supra*.

In *Schrum v. Catawba Upholstery Co.*¹⁹ the Supreme Court of North Carolina disallowed apportionment in the case of a workman who had a forty percent uncorrected loss of vision in his right eye due to astigmatism and then lost the entire vision of that eye in an industrial accident.²⁰ The court reasoned that since most adults have some impairment of vision²¹ and the Act sets out a scheduled payment for the loss of vision in an eye,²² an apportionment rule would require many people to come away with less compensation than the Act provides.²³ Such a result would be inconsistent with the court's policy of liberal coverage under the Act.²⁴ The court also pointed out that disallowance of apportionment avoids the necessity of examining into the condition of every employee's vision who suffers an industrial loss of vision.²⁵

In two later supreme court cases,²⁶ the court in dicta foreshadowed the outcome of *Pruitt*. In both cases, the court expressed the view that an employee should be compensated under the Act for a disability arising out of his employment, even if the employee's own pre-existing disease or infirmity contributed to the disability.²⁷ Each time, how-

19. 214 N.C. 353, 199 S.E. 385 (1938).

20. The court held that the Act of 1929, ch. 120, § 33, [1929] N.C. Pub. L. 131 (now N.C. GEN. STAT. § 97-33 (Cum. Supp. 1975)), requiring apportionment in certain circumstances, was inapplicable. Section 97-33 of the General Statutes provides:

Prorating permanent disability received in other employment.—If any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident . . . he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.

21. 214 N.C. at 355, 199 S.E. at 387.

22. Section 97-31 of the North Carolina Act (similar to the Act of 1929, ch. 120, § 31, [1929] N.C. Pub. L. 130-31) in pertinent part provides:

Schedule of injuries; rate and period of compensation.—In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(16) For the loss of an eye, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 120 weeks.

(19) Total . . . loss of vision of an eye shall be considered as equivalent to the loss of such . . . eye. . . .

23. 214 N.C. at 355, 199 S.E. at 387.

24. *Id.*

25. *Id.*

26. *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951) and *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951).

27. In *Vause*, the employee's hip injury resulted from an epileptic seizure which the employee suffered while doing business in his company's truck. 233 N.C. at 89,

ever, the court found that the claimant was not entitled to compensation on another ground,²⁸ which precluded any consideration of apportionment.²⁹

In *Wyatt v. Sharp*³⁰ the Commission awarded compensation for the death of the employee when his weak heart gave out after a very minor fall in the course of his employment.³¹ The North Carolina Supreme Court limited its review of the case to the evidentiary question whether the facts supported the Commission's award.³² Its affirmative answer,³³ however, necessarily implies that, as a matter of substantive law, a job-related accident gives rise to compensation even though it merely aggravates a pre-existing infirmity of the employee. Full compensation was awarded without consideration of the possibility of apportionment.³⁴

Two 1972 North Carolina Court of Appeals cases dealt with the closely related problem of occupational disease. In *Self v. Starr-Davis Co.*³⁵ the court upheld an award of compensation when the employee's death was caused primarily by a non-job-related tumor and only secondarily by his industrial asbestosis.³⁶ As in *Wyatt*,³⁷ the award was one of full compensation for the death of the employee and the court did not discuss the possibility of apportionment at all.³⁸ Apportionment was considered, however, and rejected in *Mabe v. North Carolina Granite Corp.*³⁹ In that case the employee's pre-existing infirmity consisted of

63 S.E.2d at 174. In *Anderson*, the claimant wrenched his back while lifting a heavy safe out of a truck. His physician testified that, due to a congenital infirmity of the spine, the claimant was more prone to receive back injuries than the normal man. 233 N.C. at 373, 64 S.E.2d at 265-66.

28. In *Vause*, the employee parked the company truck in awareness of the impending seizure. The court found that by stopping the truck, the employee severed any causal relation between his employment and the injury. 233 N.C. at 98, 63 S.E.2d at 180-81. In *Anderson*, the court found no disability, since the employee lost no time from work or wages as a result of the injury. Therefore, there was nothing to compensate. 233 N.C. at 375, 64 S.E.2d at 267.

29. It is not clear whether the court's dicta mean that, if no other obstacle to compensation existed, the claimants would be entitled to *full* compensation or only an apportioned compensation.

30. 239 N.C. 655, 80 S.E.2d 762 (1954).

31. *Id.* at 657, 80 S.E.2d at 763.

32. *Id.* at 658, 80 S.E.2d at 764.

33. *Id.*

34. *Id.*

35. 13 N.C. App. 694, 187 S.E.2d 466 (1972).

36. *Id.* at 699, 187 S.E.2d at 470.

37. See text accompanying notes 30-34 *supra*.

38. 13 N.C. App. at 696, 187 S.E.2d at 468.

39. 15 N.C. App. 253, 189 S.E.2d 804 (1972).

his old age and lack of education.⁴⁰ When he became forty percent disabled from industrial silicosis, he could no longer perform the hard labor that had previously been his source of income.⁴¹ Due to his old age and lack of education, he could get no other type of employment.⁴² In affirming an award of one hundred percent permanent disability, the court of appeals said:

[A]n employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition. . . . By the same token, if an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity.⁴³

All of these North Carolina appellate cases demonstrate a strong tendency on the part of the courts to compensate fully employees for disabilities caused by industrial accident or disease, even when the industrial accident or disease is only a secondary cause of the disability and the primary cause is the employee's own pre-existing infirmity.

Pruitt was the first case to present the court of appeals squarely with the question whether a disability resulting from the combined effects of an industrial accident and a previous noncompensable injury should be apportioned between the two causes under the North Carolina Act, or whether the employer should pay for the entire disability. The court concluded that apportionment was neither required by the Act nor proper in *Pruitt*.⁴⁴ In support of its conclusion, the court reasoned that the Act provides compensation for disabilities, which are defined in terms of loss of earning power.⁴⁵ Since the employee suffered no loss of earning power until the industrial accident occurred,⁴⁶ that accident is the sole cause of his disability and he should receive full compensation for it.⁴⁷ The court further noted that the majority of jurisdictions disallow apportionment in a *Pruitt* situation unless they

40. *Id.* at 254, 189 S.E.2d at 805.

41. *Id.*

42. *Id.*

43. *Id.* at 256, 189 S.E.2d at 807 (citation omitted).

44. 27 N.C. App. at 259, 218 S.E.2d at 880.

45. *Id.* at 257, 218 S.E.2d at 879. See note 54 *infra*.

46. *Id.*

47. *Id.*

are compelled to require it by express provisions of their Workmen's Compensation Act.⁴⁸ Two provisions of the North Carolina Act do require apportionment;⁴⁹ but the court held that they were inapplicable to the facts of *Pruitt*.⁵⁰ Since the Act does not expressly provide for apportionment in a *Pruitt* situation,⁵¹ the court followed the majority rule.⁵²

Policy considerations are important when one is construing a humanitarian statute like the Workmen's Compensation Act. Two such considerations support the majority's holding in *Pruitt*. First is the belief "that industry in general should bear the financial burden of all industrial accidents rather than the workers who happen to be victims of particular accidents and that the only way this can be accomplished is through the agency of the employer who in computing costs and fixing the price of his finished product will include the industrial losses due to accidents."⁵³ This emphasis on the "financial burden" is reflected in the North Carolina Act, which provides for the compensation of "disabilities" and defines "disability" in financial terms.⁵⁴ Not until an employe's earning capacity is impaired is he entitled to compensation. If an employee has a latent physical impairment which does not impair his earning capacity, then there is no economic loss to be borne by either the employee or the industry. It is only when an accident triggers the defect into becoming a disability that economic loss occurs. If the accident is industrially related, then the purpose of the Act is served by placing the economic burden on the employer.⁵⁵

48. *Id.* at 258, 218 S.E.2d at 879-80.

49. See note 22 *supra*. N.C. GEN. STAT. § 97-35 (1972) provides:

How compensation paid for two injuries; employer liable only for subsequent injury.—If any employee receives a permanent injury as specified in G.S. § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only.

50. 27 N.C. App. at 259, 218 S.E.2d at 880.

51. Sections 97-33 and 97-35, see notes 20 and 49 *supra*, are the only apportionment provisions in the Act.

52. 27 N.C. App. at 258, 218 S.E.2d at 879.

53. COMMISSION OF THE AMERICAN FEDERATION OF LABOR, WORKMEN'S COMPENSATION: REPORT UPON OPERATION OF STATE LAWS 13 (1914).

54. N.C. GEN. STAT. § 97-2(9) (1972) provides that "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

55. See text accompanying note 53 *supra*.

Secondly, the North Carolina Supreme Court has consistently evinced the policy that "our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction."⁵⁶ As pointed out in *Schrum*, an apportionment rule would necessitate an inquiry into the exact percentage of disability attributable to the employee's pre-existing defect.⁵⁷ Such a requirement would have caused no problem in *Pruitt*, in which there was no lack of apportionment evidence. In a case, however, in which no apportionment evidence exists, the court would have either to award full compensation or to deny compensation altogether. If the court were to adopt the latter rule, then claimants would be denied the benefits of the Act because of their inability to produce evidence which is difficult to obtain. If it were to adopt the former rule, then these claimants would be awarded full compensation whereas the *Pruitts* (*i.e.* those who can prove apportionment) would be denied the full benefits of the statute.⁵⁸ Either rule contravenes the policy of the Act that benefits not be denied on a technical ground.

Judge Clark's dissent in *Pruitt* points out a countervailing policy consideration. If the employer must pay for the entire disability when part of it is traceable to an earlier noncompensable injury, then employers may protect their pocketbooks by discriminating in their hiring practices against persons with physical infirmities. One commentator suggests that such discrimination is lessened by the fact that the types of latent infirmities involved in these cases are not visible.⁵⁹ Many of these infirmities are visible, however, to a trained medical eye after a thorough medical examination. Employers can, therefore, avoid high risk employees by requiring prospective employees to submit to a medical examination, or by requiring them to provide a complete medical history. Another way employers may protect themselves is to delegate previous-injury employees to tasks that are not hazardous to their condition. If the pay-scale corresponds to the risk level of the task, then the previous-injury employees again suffer from economic discrimina-

56. *Hollman v. Public Util. Dep't*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). See also note 3 *supra*.

57. *Schrum v. Catawba Upholstering Co.*, 214 N.C. 353, 355, 199 S.E. 385, 387 (1938).

58. In practice, of course, such a rule would encourage the *Pruitts* to hide their apportionment evidence.

59. Note, *Workmen's Compensation—Successive Insurers and the Accident Which Aggravates a Pre-existing Condition*, 1956 WIS. L. REV. 331, 333.

tion. The Wisconsin Workmen's Compensation Act contains a special provision designed to discourage the former type of discrimination.⁶⁰ North Carolina's Act does not protect against either type of discrimination.

In other jurisdictions, as in North Carolina, the courts have rejected apportionment unless the legislature clearly indicated that it was appropriate.⁶¹ When required, the resulting diminished compensation has usually been mitigated by application of a legislative Second Injury Fund to the situation.⁶² North Carolina has a Second Injury Fund which supplements the compensation received by employees under the Act's apportionment provisions.⁶³ The combined effect of the apportionment provisions and the Second Injury Fund is to compensate fully the injured employee⁶⁴ without placing an undue burden on the employer. In fact, the purpose of these provisions is to relieve the employer of part of his burden when that burden is too great,

60. WIS. STAT. § 102.31(5) (1973) provides that insurance companies will have their license revoked if they "encourage, persuade or attempt to influence any employer, arbitrarily or unreasonably to refuse employment to, or to discharge employees" Also, an employer who qualifies for exemption from the insurance coverage requirement will have that status revoked if he "shall arbitrarily or unreasonably refuse employment to or shall discharge employees because of a nondisabling physical condition" WIS. STAT. § 102.31(4) (1973).

61. See text accompanying note 8 *supra*.

62. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.20, at 10-268 (1976).

63. Section 97-40.1 of the North Carolina Act in pertinent part provides:
Second Injury Fund.—

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under that section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

Since the Second Injury Fund provision is keyed to the apportionment provisions, the monies automatically become available to employees who qualify under the terms of section 97-40.1.

64. Once found qualified under section 97-40.1, the claimant automatically receives the difference between what he receives under the apportionment provision and what he would receive if he were entitled to full compensation. Telephone conversation with Ms. Christine Denson, Deputy Commissioner, North Carolina Industrial Commission, on February 25, 1976.

thus removing any motive to discriminate against the employees who present the risk of such a burden.⁶⁵

The *Pruitt* situation should fall within the above category. When, as in *Pruitt*, a definite percentage of the disability can be attributed to the prior injury, requiring the employer to compensate the employee for that portion of his disability seems an undue burden. Moreover, discrimination is feasible in a *Pruitt* situation because weaknesses due to prior injuries can readily be discovered by employers and because the North Carolina Act provides no deterrent to discrimination. Concededly, the difficulty of obtaining accurate apportionment evidence hinders the process of making a fair apportionment. The fairest solution seems to be to put the burden of proving a basis for apportionment on the employer. The employer would fully compensate the employee unless he met his burden, in which case he would compensate the employee only for that portion of the disability attributable to the industrial accident and the Second Injury Fund would take up the slack. Under this system, the employee would be assured of full compensation while the employer would be given an opportunity to mitigate his burden.

One way of achieving this result is to construe the Act such that the apportionment and Second Injury Fund provisions are applicable to the *Pruitt* situation. The court of appeals, however, properly rejected this construction, because the plain language of the North Carolina apportionment provisions clearly does not extend to the *Pruitt* situation. Rather, the solution appears to be a legislative amendment to the Act, bringing disabilities caused by the combined effects of an industrial accident and a prior non-disabling weakness within the ambit of the apportionment provisions of the North Carolina Act when the employer successfully carries the burden of proving a basis for apportionment.

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65. 12 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 2544, at 336 (perm. ed. 1959).

