3-1-1984

Workers' Compensation -- Rutledge v. Tultex Corp./Kings Yarn: Leaving Precedent in the Dust?

Gregory Stuart Smith

Follow this and additional works at: http://scholarship.law.unc.edu/nclr
Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol62/iss3/7
Workers' Compensation—Rutledge v. Tultex Corp./Kings Yarn: Leaving Precedent in the Dust?

Considered one of the five most dangerous occupational substances, cotton dust already has contributed to the disability of up to 11,000 textile workers in North Carolina. Because most of these workers' disabilities cannot be completely attributed to their occupational exposure, the issue of apportionment of workers' compensation awards according to occupational and nonoccupational causes is of great significance to workers, employers, and policy makers.

The recent North Carolina Supreme Court case of Rutledge v. Tultex Corp./Kings Yarn allows a plaintiff to be compensated fully even when his disease is caused in part by nonoccupational factors. In a 4-3 decision, the court determined that apportionment of benefits is unnecessary when a worker's disability is caused completely by chronic obstructive lung disease to which occupational exposure has contributed significantly. Crucial to the court's decision was its declaration that Rutledge's occupational disease was "chronic obstructive lung disease" rather than the traditionally recognized occupational disease "byssinosis." By characterizing chronic obstructive lung disease as an occupational disease, the court was able to avoid, and severely

---

3. See IB A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.64(b), at 7-432 (1982) (byssinosis seldom occurs without history of smoking). See also Ellis, supra note 2, at 19 (statement of William Stephenson, Chairman, N.C. Indus. Comm'n) ("In more than 90% of the [cotton dust] cases that come before us, the claimants have some malady other than byssinosis.").
5. 308 N.C. 85, 301 S.E.2d 359 (1983).
6. Id. at 101, 301 S.E.2d at 370.
7. Id. at 101, 301 S.E.2d at 369-70.
8. The broad term "chronic obstructive lung disease" describes a condition caused by one or more specific lung diseases (bronchitis, byssinosis, emphysema, etc.) which in their chronic stages are generally medically indistinguishable. See id. at 94, 301 S.E.2d at 366; A. BOUHUYS, J. SCHOENBERG, G. BECK & R. SCHILLING, EPIDEMIOLOGY OF CHRONIC LUNG DISEASE IN A COTTON MILL COMMUNITY, 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 607 (Service Vol. 1978).
9. "Byssinosis," commonly known as brown lung disease, is a bronchial irritation often found in workers exposed to cotton dust. While the disease frequently possesses unique characteristics in its acute stages, see Survey of Developments in North Carolina Law, 1980--Administrative Law, 59 N.C.L. REV. 1017, 1036 n.161 (1981) (describing the "classical history" of brown lung development), byssinosis in its chronic stages generally is considered to be medically indistinguishable from other specific chronic obstructive lung diseases. Rutledge, 308 N.C. at 94-95, 301 S.E.2d at 366.
limit the precedential value of, *Morrison v. Burlington Industries*, which had required apportionment when the narrower occupational disease of byssinosis was found to be partially responsible for a plaintiff's disability.\(^1\)

The Rutledge court's apparent departure from precedent sparked considerable controversy that began with the filing of a lengthy dissenting opinion and culminated in a legislative proposal designed to negate the Rutledge holding.\(^2\) Although the effort to overrule Rutledge legislatively failed, the Rutledge rule has not settled the issue of apportionment in lung disease cases. Instead, by not expressly overruling the Morrison case and its progeny,\(^3\) the Rutledge opinion has further complicated the already confusing workers' compensation law governing "dual causation."\(^4\) This note examines the success and significance of the Rutledge court's attempts to reconcile its result with the Morrison apportionment rule.

Plaintiff Margaret Rutledge worked for twenty-three years in various cotton mills prior to her employment with defendant Kings Yarn in 1976.\(^5\) Her pulmonary impairment began in 1969 with a cough at work and progressed until 1979 when it disabled her from all but "sedentary work . . . in a clean environment."\(^6\) Rutledge had been exposed to respirable cotton dust in all of the mills, but her exposure was less severe in defendant's newer, cleaner mill than in the others.\(^7\) She also smoked approximately one pack of cigarettes per day throughout her period of employment in the cotton industry.\(^8\)

The Industrial Commission's pulmonary specialist diagnosed Rutledge as having "chronic obstructive pulmonary disease, with [elements] of pulmonary emphysema and chronic bronchitis."\(^9\) He opined that plaintiff's exposure to cotton dust "probably was a cause" of her lung disease,\(^10\) although cigarette smoking was "one of the more probable causes."\(^11\) He also stated that her lung problems were "caused by circumstances which existed prior to her em-

11. Id. at 13, 282 S.E.2d at 467.
12. See infra notes 91-94 and accompanying text.
14. "Dual causation" refers to the causation problem when a personal element such as smoking combines with an employment element to produce lung disease. A. LARSON, supra note 3, § 41.64(a), at 7-424.
15. Rutledge, 308 N.C. at 87, 301 S.E.2d at 361-62.
16. Id. at 87, 301 S.E.2d at 362.
17. Id.
18. Id. at 87, 301 S.E.2d at 361.
19. Id. at 87, 301 S.E.2d at 362.
20. Id. at 90-91, 301 S.E.2d at 363. The expert also stated that Rutledge did "not give a classical history of byssinosis," id. at 123, 301 S.E.2d at 382 (Meyer, J., dissenting), although he admitted that textile workers are at an increased risk of developing chronic lung disease "irrespective" of whether they show such a history, id. at 112, 301 S.E.2d at 376 (Meyer, J., dissenting).
21. Id. at 92, 301 S.E.2d at 364.
ployment [by Kings Yarn]," although plaintiff's Kings Yarn exposure could have had "some [minimally] aggravating effect on [her] underlying condition."

The Deputy Industrial Commissioner determined that because Rutledge's exposure at Kings Yarn had "neither caused nor significantly contributed" to plaintiff's disease, she had "not contracted chronic obstructive lung disease as a result of any exposure while working with defendant employer." The full Industrial Commission subsequently adopted the deputy's findings and conclusion as its own.

The North Carolina Court of Appeals found that the Commission had erred in requiring Rutledge to prove that her last employment had caused an occupational disease rather than simply allowing her to prove it to have been the last job to injuriously expose her to cotton dust. The court found the error harmless, however, because the court agreed with the Commission's conclusion that the plaintiff had not contracted an occupational disease.

The North Carolina Supreme Court agreed with the court of appeals that the Commission had erred in requiring Rutledge to prove that exposure at her last employment had done anything more than "proximately [augment] her disease to any extent, however slight." A majority of the supreme court disagreed that the error was harmless, however, because they believed that sufficient evidence existed to support a finding that Rutledge's chronic obstructive lung disease was a compensable occupational disease. Over a lengthy and vigorous dissent, the majority held that a worker could be compensated to the full extent of disability caused by chronic obstructive lung disease if her cotton dust exposure significantly contributed to that disease.

Although North Carolina recognized compensable occupational diseases as early as 1935, byssinosis has never appeared on the statutory list of prima facie occupational diseases. Cotton dust claimants therefore found it neces-

---

23. Id. at 347, 289 S.E.2d at 73.
24. Rutledge, 308 N.C. at 88, 301 S.E.2d at 362.
25. Id.
26. Id.
28. Id. It does not appear that the Commission reached such a conclusion. The Commission merely had ruled that Rutledge had not contracted an occupational disease as a result of her exposure at defendant's plant. See New Supreme Court Brief for Appellant at 15, Rutledge, 308 N.C. 85, 301 S.E.2d 359 (1983).
29. Rutledge, 308 N.C. at 89, 301 S.E.2d at 362.
30. Id. at 90, 301 S.E.2d at 363. Chronic obstructive lung disease was found to meet the requirements of North Carolina's catch-all occupational disease provision, N.C. GEN. STAT. § 97-53(13) (1979). See infra text accompanying note 35.
31. Rutledge, 308 N.C. at 107, 301 S.E.2d at 373.
32. Id. at 101, 301 S.E.2d at 369-70.
34. See N.C. GEN. STAT. § 97-53 (1979). Prima facie occupational diseases in North Carolina include asbestosis, id. § 97-53 (24), and silicosis, id. § 97-53 (25), as well as diseases such as carbon monoxide poisoning, id. § 97-53 (22), which are not purely occupational in nature.
sary to rely on North Carolina's catch-all provision, which currently deems occupational "any disease . . . 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." In 1979, after the catch-all provision had been amended three times and clarified in *Booker v. Duke Medical Center*, the North Carolina Supreme Court finally recognized byssinosis as an occupational disease.

The *Booker* court determined that the occupational exposure need not be the sole originating cause of a worker's disease for that disease to be compensable. But the issue of how much compensation would be allowed when a worker's diseases were caused by both occupational and nonoccupational factors was not squarely addressed by the supreme court until *Morrison v. Burlington Industries*. Despite finding that plaintiff was permanently and totally disabled, the court in *Morrison* awarded compensation for only permanent partial disability because only part of plaintiff's disability had been caused by occupational factors. The court ruled that the Industrial Commission was correct in apportioning Morrison's recovery according to the percentage of her disability caused, aggravated, or accelerated solely by occupational factors.

The *Morrison* court failed to identify clearly the occupational disease before it. Although plaintiff's claim sought compensation for "an occupational disease—to wit, byssinosis," the Commission and the court followed the lead of the medical experts, consistently referring to her incapacity to work as being caused by "chronic obstructive lung disease due in part to cotton dust exposure." It is uncertain whether the court intended this phrase to mean byssinosis, an occupational disease which was to be fully compensated because it constituted that portion of plaintiff's chronic obstructive lung disease caused by her occupational exposure, or whether the court recognized chronic obstructive lung disease as a separate occupational disease, which would be com-

---

35. *Id.* § 97-53(13).
38. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979) (error for lower court to take judicial notice that byssinosis was not a compensable occupational disease).
41. *Morrison*, 304 N.C. at 2, 282 S.E.2d at 463.
42. *Id.* at 8, 282 S.E.2d at 461. Apportionment was permitted even though a similar rule had been rejected for accident claims. See *Little v. Anson County Schools Food Serv.*, 295 N.C. 527, 246 S.E.2d 743 (1978). While admitting to forming a dichotomy, the *Morrison* court felt that extending accident law to diseases was a legislative function. *Morrison*, 304 N.C. at 19, 282 S.E.2d at 470. This conclusion was criticized in Note, *(45% of) my Breath, supra* note 13, at 123.
44. *E.g.*, *Id.* at 8, 282 S.E.2d at 464.
pensated only partially according to the disease's work related components.\textsuperscript{45} This ambiguity surrounding the phrase "chronic obstructive lung disease" later would provide the loophole through which the Rutledge majority would reconcile its opinion with Morrison.

In a lengthy dissent to the Morrison opinion, Justice Exum stated that neither precedent\textsuperscript{46} nor the facts supported the majority's position. In Exum's view, no apportionment was necessary because Morrison's chronic obstructive lung disease—an occupational disease in its own right—was completely responsible for her disability,\textsuperscript{47} and because her cotton dust exposure had "significantly contributed" to that ultimate disease.\textsuperscript{48}

In Hansel v. Sherman Textiles,\textsuperscript{49} decided the same day as Morrison, the supreme court recognized byssinosis as an occupational disease,\textsuperscript{50} but refused to allow recovery of full benefits because part of plaintiff's disability was attributable to asthma and chronic bronchitis, which were not occupational in origin.\textsuperscript{51} The majority, relying heavily on Morrison, remanded the case to the Industrial Commission for determination of the relative contributions of occupational and nonoccupational factors to Hansel's disability.\textsuperscript{52} In a separate concurring opinion, Justice Exum reiterated his "significant contribution to the ultimate disease" standard\textsuperscript{53} and noted the problems inherent in the Industrial Commission's attempt to scientifically assign percentages to causes of lung disease that are medically indistinguishable when in the chronic stages.\textsuperscript{54}

The commentators' reactions to the majority opinions in Morrison and Hansel were almost unanimously negative.\textsuperscript{55} Despite the critics' opposition to the apportionment rule and the lower court's difficulty in applying it,\textsuperscript{56} the rule continued to be binding. The most recent pre-Rutledge opinion of the

\textsuperscript{45} The "components" of chronic obstructive lung disease include pulmonary emphysema, chronic bronchitis, and possibly asthma, as well as byssinosis. Rutledge, 308 N.C. at 92, 301 S.E.2d at 364.

\textsuperscript{46} Morrison, 304 N.C. at 24-34, 282 S.E.2d at 473-79 (Exum, J., dissenting). For a pre-Morrison review of North Carolina law supporting Exum's conclusions, see Note, supra note 4.

\textsuperscript{47} Id. at 19, 282 S.E.2d at 470-71 (Exum, J., dissenting).

\textsuperscript{48} Id. at 44, 282 S.E.2d at 484 (Exum, J., dissenting). The significant contribution test had been previously suggested in Note, Compensating Victims of Occupational Disease, 93 HARV. L. REV. 916, 932 (1980).


\textsuperscript{50} Id. at 48, 283 S.E.2d at 103.

\textsuperscript{51} Id. at 53, 283 S.E.2d at 106.

\textsuperscript{52} Id. at 58-59, 283 S.E.2d at 109.

\textsuperscript{53} Id. at 64, 283 S.E.2d at 112 (Exum, J., concurring).

\textsuperscript{54} Id. at 66, 283 S.E.2d at 113 n.8 (Exum, J., concurring).

\textsuperscript{55} See, e.g., A. LARSON, supra note 3, § 41.64(c), at 7-436 n.87 (Supp. 1983) ("remarkable" that Morrison court apportioned without an express apportionment statute); Note, (45% of) my Breath, supra note 13, at 125 (Morrison departs from precedent, creates an artificial distinction between accident and disease claims, and usurps legislature's function). For a somewhat more favorable critique, see Note, Apportionment, supra note 13, at 820 (Morrison rule consistent with purposes of Workers' Compensation Act, although a departure from precedent).

North Carolina Supreme Court on the cotton dust issue was Walston v. Burlington Industries. The pulmonary expert in Walston diagnosed the plaintiff as having "possible" byssinosis that "could possibly" have played a role in causation but which was more likely to have played a contributory role. The court affirmed the Industrial Commission's finding that Walston did not have an occupational disease.

Finally writing for the majority, Justice Exum in Rutledge avoided the apportionment rule by distinguishing Morrison and Hansel, despite Rutledge's own argument in her court of appeals brief to the effect that Rutledge and Morrison had "very similar facts." Stating that the commission and court in Morrison and Hansel had found the claimants' occupational diseases to be byssinosis rather than chronic obstructive lung disease, Exum characterized Rutledge as a case of first impression: "[the] question now clearly before us for the first time is whether a textile worker's chronic obstructive lung disease may be an occupational disease. . . ." The Rutledge majority answered this question affirmatively, holding that a disease may be occupational if the worker's exposure has contributed significantly to it. The court then remanded the case to the Industrial Commission to determine whether Rutledge's years of textile labor had contributed significantly to her chronic obstructive lung disease, and instructed the Commission that apportionment would be unnecessary if the significant contribution standard were satisfied.

Justice Meyer, joined by two others in dissent, persuasively argued that the majority's attempts to avoid Morrison, Hansel, and Walston "subtly but effectively" overruled them. The dissenters believed that chronic obstructive lung disease was "not a specific disease in and of itself" and should not have been classified as an occupational disease. They argued that if the Rutledge court had examined the plaintiff's specific lung diseases—as previous courts have done—then the plaintiff's lung disease would not have been classified as an occupational disease.
had done—the majority would have found that occupational exposure had contributed to some of Rutledge's diseases (e.g., byssinosis) and not to others (e.g., emphysema). By lumping all of Rutledge's specific lung diseases under one generic term (chronic obstructive lung disease) and permitting the generic term to qualify as an occupational disease, the majority necessarily reached the conclusion that plaintiff's occupational exposure had contributed to her disabling disease—if it had contributed to a component, it had contributed to the whole. The dissenters called this analysis a "word trick," arguing that Rutledge was not distinguished from its predecessors by a difference in facts but rather by what the majority had chosen to label the occupational disease.

Although Rutledge's departure from the precedent established by Morrison and Hansel can be explained by the change in the membership of the North Carolina Supreme Court, that explanation adds little to an understanding of the law. By distinguishing Morrison and Hansel without overruling them, the Rutledge majority intimated that apportionment may still be appropriate in some cases. The critical question remaining after Rutledge is: under what circumstances is apportionment still required? Rutledge "in effect overruled Morrison's apportionment rule in any case in which it is found that the [plaintiff's] disability was entirely caused by chronic obstructive lung disease." It may be argued, however, that apportionment still is required if the worker's disability is not caused entirely by chronic obstructive lung disease, or if his occupational disease is identified as byssinosis rather than chronic obstructive lung disease.

The Rutledge majority conceded in dicta that apportionment would be permissible if nonoccupational, nonpulmonary ailments "contributed independently" to a plaintiff's incapacity to work. The court did not provide any examples of such "independent contributing factors," or explain how the Industrial Commission might recognize them. Some clues to the meaning of the term may be gleaned, however, from the Morrison court's majority and dissenting opinions. In Morrison plaintiff's lung difficulties prompted her employer to transfer her to a dust-free environment where she was required to stand while working. Because of her preexisting phlebitis, Morrison was unable to work standing up, and thus was totally disabled from working in any part of the textile plant. The Morrison majority identified phlebitis, varicose veins, and diabetes as independent contributing factors, requiring apportionment.
ment because they had contributed to her disability without having been caused, aggravated, or accelerated by her employment. The Morrison dissenters, in an opinion written by Justice Exum, argued that plaintiff's phlebitis was not an independent contributing factor and should not be apportioned out. They maintained that the phlebitis could not have contributed independently to plaintiff's disability because that disease alone had never kept her from working, and asserted that Morrison's lung disease was entirely responsible for her disability.

The Rutledge majority opinion, also written by Exum, did not adopt expressly the Morrison dissent's description of independent contributing factors, but did employ implicitly the same standard. By construing the Industrial Commission's findings to mean that Rutledge's disability was due "entirely" to her pulmonary disease, and by excluding plaintiff's significant nonpulmonary factors from the scope of the Commission's consideration of the case on remand, the Rutledge majority in effect used the independent contribution standard described in the Morrison dissent, and ignored the standard appearing in the Morrison majority opinion.

If the North Carolina Supreme Court expressly adopts the Morrison dissenters' independent contribution standard in some future case, that decision will have far-reaching consequences. The new standard may be expected to shift the burden of proof to the employer, forcing him to prove independent causation (actual loss of work due to the independent source) rather than merely contribution. Strict adherence to the independent contribution standard would restrict severely apportionment of benefits due to nonoccupational ailments, and might prevent apportionment altogether in multiple pulmonary disease cases even if a scientifically accurate test were developed that could differentiate occupational and nonoccupational lung diseases.

An interesting question is raised when one considers whether, after Rutledge, apportionment still is required when the Industrial Commission declares a plaintiff's occupational disease to be byssinosis rather than chronic obstructive lung disease. Because Rutledge did not overrule Morrison and Hansel, one must assume that other components of chronic obstructive lung disease, such as chronic bronchitis and pulmonary emphysema, nonoccupational in their origin, would be apportioned out as separate diseases unless

75. Id. at 5, 282 S.E.2d at 462. There is some ambiguity about whether the court actually factored out the non-lung-related causes. See id. at 21-22, 282 S.E.2d at 471-73 (Exum, J., dissenting).
76. Id. at 19, 282 S.E.2d at 470 (Exum, J., dissenting).
77. Id. at 19, 282 S.E.2d at 470-71 (Exum, J., dissenting).
78. Rutledge, 308 N.C. at 108, 301 S.E.2d at 374. The Commission did not use the word "entirely," but simply stated that plaintiff was disabled "because of her pulmonary impairment." Record on Appeal at 3.
79. Rutledge, 308 N.C. at 108-09, 301 S.E.2d at 374.
80. See id. at 101, 301 S.E.2d at 369-70.
81. The Rutledge majority opinion suggests that apportionment is permissible only when the independent contributing factors are nonpulmonary diseases. Id. at 108, 301 S.E.2d at 374.
82. See, e.g., A. Larson, supra note 3, § 41.64(b), at 7-430 (Dr. Selikoff's 1972 medical breakthrough enabled doctors to distinguish between cancer and asbestosis).
they had been aggravated or accelerated by the plaintiff's occupational exposure. Rather than affirming that the Industrial Commission could have found that chronic obstructive lung disease was occupational, as it did in Rutledge, the court, to prevent apportionment in such a case, would have to rule that the Commission must find chronic obstructive lung disease to be the occupational disease and byssinosis merely one of its components, rather than a separate disease. Such a decision would mandate that much of Morrison and Hansel be overruled explicitly.

The court already may be headed in that direction. In Dowdy v. Fieldcrest Mills, Inc., handed down after Rutledge, the court determined that for statute of limitations purposes, plaintiff had been disabled by an occupational disease (chronic obstructive lung disease) in 1973, although he was not informed of his occupational disease (byssinosis) until 1974. In rejecting plaintiff's argument that he had been informed of a different occupational disease than he had contracted, which prevented the start of the statute of limitations period, the court said:

[W]e think it unimportant here to determine whether byssinosis is a particular type of chronic obstructive lung disease or a separate disease often found in conjunction with or evolving from chronic obstructive lung disease. For purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis... The Dowdy dicta seems to retreat from the sharp distinction between the two diseases that enabled Rutledge's majority to reject apportionment without expressly overruling Morrison. The language provides future courts with a basis for reading chronic obstructive lung disease into a future commission finding of byssinosis in order to prevent apportionment.

Rutledge appears to return North Carolina to the nonapportionment rule espoused in pre-Morrison North Carolina decisions and in the majority of

84. Id. at 708, 304 S.E.2d at 220. The court stated that Dowdy's occupational disease was chronic obstructive lung disease, despite the fact that his claim was filed for byssinosis and the Industrial Commission had referred to his occupational disease as byssinosis. Dowdy v. Fieldcrest Mills, Inc., 59 N.C. App. 696, 697, 298 S.E.2d 82, 83 (1982), rev'd on other grounds, 308 N.C. 701, 304 S.E.2d 215 (1983).
85. Dowdy, 308 N.C. at 711-12, 304 S.E.2d at 221. In a separate concurring opinion, the Rutledge dissenters argued that it was unnecessary for the Dowdy majority to decide that chronic obstructive lung disease, diagnosed in 1973, was the plaintiff's occupational disease. Because Dowdy was informed of his byssinosis in 1974, and because the statute of limitations would have barred a cause of action arising in 1973 or 1974, there was "absolutely no reason to select the date of 1973 except to fortify the language of Rutledge ..." Id. at 717, 304 S.E.2d at 224 (Meyer, J., dissenting).
86. Id. at 712, 304 S.E.2d at 222.
87. It was unnecessary for Dowdy to explicitly overrule Morrison. Because Dowdy's claim was barred, no apportionment was possible.
88. See, e.g., Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978) (no apportionment when industrial accident combines with nonoccupational infirmities, such as age and education, to cause disability); Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972) (no apportionment when the 40% disability caused by silicosis combined with nonoccupational factors to cause total disability); Self v. Starr-Davis Co., 13 N.C. App. 694,
other jurisdictions. Generally, compensation is not determined by examining the relative contributions of multiple lung diseases "except in states having special statutes on aggravation of disease." The controversy surrounding Rutledge led to an attempt to enact just such a special statute in North Carolina. Claiming that economic hardship would result from the Rutledge decision, textile manufacturers sought legislative relief. A bill was introduced in the senate and sent to committee, where hearings were held but no action was taken. Rutledge's rule requiring full compensation whenever a plaintiff's employment has contributed significantly to his occupational disease is a fairer approach to workers' compensation than Morrison's apportionment rule. The difficulties in administering a rule of legal liability based on a scientifically inaccurate standard of apportionment, together with the compromises inherent in the workers' compensation system, would seem to call for a rule of liberal construction of the occupational disease statutes. Rutledge's rule of full

187 S.E.2d 466 (1971) (no apportionment when asbestosis accelerates and contributes to death by brain tumor). See generally Note, (45% of) My Breath, supra note 13, at 115 (prior to Morrison, North Carolina appellate courts consistently rejected apportionment unless the apportionment statute specifically applied).

89. See Note, (45% of) My Breath, supra note 13, at 122-24. North Carolina may be the only state to judicially apportion pathology. See Ellis, supra note 2, at 20 (statement of Charles E. Hassell, attorney for plaintiff in Morrison). The concept of apportionment was expressly rejected in the landmark case of Pullman Kellog v. Workers' Compensation Appeals Bd., 26 Cal. 3d 450, 605 P.2d 422, 161 Cal. Rptr. 783 (1980). See also Rutledge, 308 N.C. at 104, 301 S.E.2d at 371 (citing cases from other jurisdictions rejecting apportionment).

90. 2 A. LARSON, supra note 3, § 59.22, at 10-365. See also Note, (45% of) My Breath, supra note 13, at 123-24 (North Carolina legislature's failure to amend the Workers' Compensation Act to provide for apportionment in occupational disease cases after the Mabe decision indicates that the legislature intended to prevent apportionment).

91. See Raleigh News and Observer, May 8, 1983, at 8A, col. 4. (executive director of N.C. Textile Mfrs. Ass'n. estimates Rutledge decision could cost industry up to $200 million). These costs are now being borne by the textile workers or by another compensation system. See, e.g., OCCUPATIONAL SAFETY AND HEALTH REP., October 15, 1981, at 388 (study showing that 95% of byssinotics receive Social Security payments; only 5% receive workers' compensation awards).

As an alternative to seeking legislative relief from the Rutledge holding, textile manufacturers could minimize the financial impact of Rutledge by refusing to hire smokers. See A. LARSON, supra note 3, § 41.64(c), at 7-432 n.83.1 (employment discrimination against smokers is legal and has been implemented by Johns-Manville). Adoption of such a policy now, however, would not reduce their retroactive liability. Long-term liability also will be reduced by recently enacted strict OSHA standards. See 29 C.F.R. § 1910.1043 (1982); see also 4A R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 205E-6 (3d ed. 1983). Nonetheless, their enactment without regard to cost-benefit analysis—upheld in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981)—no doubt will increase the employers' costs in the short run.

92. Retired North Carolina Supreme Court Justice Huskins, author of the Morrison and Walston opinions, was hired to draft a bill to nullify Rutledge and mandate apportionment. Raleigh News and Observer, May 5, 1983, at 1A, col. 4. Huskins' bill received local press attention and prompted a crowd of byssinosis victims to demonstrate their opposition by marching inside the state legislature building, forcing the legislators to take a personal look at the victims' extensive disabilities. Id., May 19, 1983, at 1C, cols. 2-3.

93. See N.C. Sen. Bill 471 (1983). The bill as introduced did not achieve its stated purpose. The occupational disease provision merely reiterated the language of Morrison, enabling it to again be circumvented by naming chronic obstructive lung disease as the occupational disease. Moreover, the bill went beyond Rutledge, extending the doctrine to nontextile workers and requiring apportionment of industrial accident cases as well. Id.


95. See Edes, Compensation for Occupational Diseases, 31 (10) LAB. L.J. 595, 599 (1980);
compensation obtained through such liberal construction does not threaten to turn the North Carolina Workers' Compensation Act into "general accident and health insurance," as the dissenters feared, for it is tempered by the requirement that the plaintiff prove that his employment exposure significantly contributed to his disability. That Justice Exum concurred in the Walston decision denying plaintiff's occupational disease claim implies that not every case will meet this significant contribution test, making Rutledge truly a "balance." 96

Although Rutledge seems to return North Carolina to the majority and better view of occupational disease compensation, the court's hesitancy to expressly overrule Morrison leaves the law in a state of confusion at a time when clarity is sorely needed. 97 At its earliest opportunity, the court should clarify the distinction, if any, between byssinosis and chronic obstructive lung disease for apportionment purposes, admitting the court's significant legal and philosophical differences with Morrison and Hansel. 98

GREGORY STUART SMITH

Note, supra note 48, at 925 (occupationally diseased workers do not receive equitable trade-off when they relinquish right to sue employers).

96. Rutledge, 308 N.C. at 105, 301 S.E.2d at 371. A Commission finding of probable employment contribution should lead to full recovery, while one of merely "possible" contribution would preclude any recovery.

See Swink v. Cone Mills, Inc., — N.C. App. —, 309 S.E.2d 271 (1983) (reversing on rehearing the pre-Rutledge decision in Swink v. Cone Mills, Inc., 61 N.C. App. 475, 300 S.E.2d 848 (1983)). The earlier Swink case had upheld an Industrial Commission denial of benefits to a worker who had been exposed to cotton dust for 38 years but who also had a history of smoking and tuberculosis. The court of appeals in the second case remanded the case to the Commission on the question of causation, correctly noting that a "mere possibility" of industrial aggravation, held insufficient to support plaintiff's claim in Walston, would not meet the Rutledge "significant contribution" test. Id. at —, 309 S.E.2d at 272.

97. The number of byssinosis-type claims has mushroomed in recent years. See Ellis, supra note 2, at 18 (913 filed in N.C. in 1970s, 684 in 1980 alone; up to 50% of these claims disputed).

98. Sufficient justification exists for overruling Morrison outright. As noted by the commentators, Morrison was a "strained and self-serving interpretation of precedent," Note, Apportionment, supra note 13, at 820, and could be overruled as an aberration in order to "reestablish North Carolina's progressive tradition in the field of workers' compensation law," Note, (45% of) my Breath, supra note 13, at 125. Perhaps more palatable would be to overrule Morrison on the basis of medical experts' refusals to assign percentages to the relative contributions of chronic lung diseases. These practical difficulties, the extent of which perhaps was not recognized fully by the Morrison court, could constitute changed circumstances—even since 1981—justifying Morrison's demise.