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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. MISREPRESENTATION AS TO PRIOR PHYSICAL CONDITION

The South Carolina Workmen's Compensation Act[1] is a legislative response to an emphatic public demand for a system which affords every industrial worker protection against the hazards of his employment.[2] With limited exceptions,[3] employees are entitled to protection irrespective of fault, negligence or wilfulness.[4] The Act, however, is silent as to the effect of an employee's wilful misrepresentations to a prospective employer; no express provision bars or limits compensation benefits by reason of an employee's misrepresentation with respect to prior injury or physical disability other than an occupational disease.[5]

In *Cooper v. McDevitt & Street Co.*,[6] the South Carolina Supreme Court first considered this statutory silence. Appellant Cooper had previously sustained a serious back injury which had been determined by the Industrial Commission to result in a fourteen per cent partial permanent disability to the lumbar spine. Three years after his initial injury, Cooper obtained employment as a welder at respondent McDevitt's construction site in Charleston, South Carolina. In a pre-employment questionnaire, Cooper noted that he suffered from a back problem which

1. S.C. CODE ANN. §§ 72-1 *et seq.* (1962).

2. Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939). The costs of cash-wage benefits and medical care to victims of work connected injuries are ultimately placed upon the consumer through the medium of employer insurance whose premiums are included in the cost of the product.

3. S.C. CODE ANN. § 72-156 (1962) bars payment of benefits when injury or death was occasioned by the intoxication or wilful intention of the employee. This limitation reflects legislative response to public condemnation of both drunkenness and suicide. S.C. CODE ANN. § 72-155 (1962) allows compensation benefits to be reduced by ten per cent when injury or death was caused by an employee's wilful failure to use a safety appliance, to perform a statutory duty, or to follow a rule or regulation adopted by the employer, approved by the Industrial Commission, and known to the employee.

4. *See* Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939).

5. S.C. CODE ANN. § 72-257 (1962) provides:

> If an employee, at the time of his employment, wilfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of disability or death, no compensation shall be payable. If an employee who has previously suffered from an occupational disease desires to continue in an employment to which such a disease is a hazard, he may waive his right to receive further benefits for disablement or disability from such disease by written agreement approved by the Commission in accordance with such rules as it may promulgate.

6. 260 S.C. 463, 196 S.E.2d 833 (1973) (Bussey & Brailsford, JJ., dissenting).

precluded heavy work and lifting. McDevitt terminated Cooper's employment approximately four months later after Cooper returned to work several days late following the Christmas holidays. Cooper, thereafter, left Charleston for Columbia where he subsequently applied for a welder's position with McDevitt which was engaged in enlarging the football stadium at the University of South Carolina. At the Columbia site, Cooper completed another questionnaire but responded in the negative to the inquiry, "Have you now or have you ever had . . . back trouble?" After being hired, Cooper remained in McDevitt's employ for over a month until he sustained an injury to his lower back by an accident arising out of and in the course of his employment. McDevitt denied liability for compensation because Cooper had intentionally misrepresented and concealed his previous back injury and, by reason thereof, was not an employee within the meaning of the Act.[7] The Industrial Commission granted workmen's compensation benefits to Cooper, but the circuit court reversed the award.

In remanding the case to the Industrial Commission for a specific finding on whether or not there was a causal connection between Cooper's misrepresentation and subsequent injury, the South Carolina Supreme Court announced:

> The general rule is that the following must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.[8]

In enunciating this rule, the court relied exclusively on Professor Larson's statement of it as it appears in some jurisdictions.[9] Professor Larson, however, does not indicate that the rule is followed by most jurisdictions; instead, he styles this rule as "[w]hat

7. S.C. CODE ANN. § 72-11 (Cum. Supp. 1973) defines an employee as follows: [E]very person engaged in an employment under any appointment, contract of hire or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excluding a person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer . . . .

8. 260 S.C. at 468, 196 S.E.2d at 835.

9. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 47.53 (1973) [hereinafter cited as LARSON].

seems to be emerging, in place of a conceptual approach relying on purely contractual tests, . . . a common-sense rule made up of a mélange of contract, causation, and estoppel ingredients."[10]

As a general rule, where employment is induced by false and fraudulent representations not going to the factum of the employment contract, the contract is voidable and not void *ab initio*. The relationship of employer and employee exists, even though the misrepresentation may form a just reason for the rescission of the contract, and recovery may be had by the employee guilty of misrepresentation.[11] The view that misrepresentations may bar compensation benefits stems from an early Supreme Court decision in *Minneapolis, St. P. & S. Ste. M. Ry. v. Rock*.[12] There, the Court refused to allow the claimant under the Federal Employers' Liability Act[13] to recover damages for personal injuries sustained by him while employed in employer's railroad yard. Because employee Rock had obtained employment by a series of deceptions and fraudulent representations,[14] the Court determined that his failure to disclose his physical condition

> was a continuing wrong in the nature of a cheat. . . .[H]is status [as an employee] was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recovery may not justly or reasonably be rested on a foundation so abhorent to public policy.[15]

Contemporaneous interpretation of the *Rock* decision does not support the contention that vague notions of public policy would deny benefits to an employee who obtained employment fraudulently.[16] Nevertheless, the dicta of *Rock* caused a great deal of confusion in the federal courts. Ultimately, in *Still v. Norfolk &*

10. *Id.*

11. Annot., 136 A.L.R. 1124 (1942).

12. 279 U.S. 410 (1929).

13. 45 U.S.C.A. §§ 51 *et seq.* (1972).

14. Joe Rock had originally applied for a job in his own name and had been rejected because of his physical condition. A few days later, he reapplied for the same job but used the name *John* Rock to conceal the fact that he had recently been rejected for the position. He then arranged to have an imposter take the railway's physical examination. After the imposter had passed the examination, Rock reported for work and was hired.

15. 279 U.S. at 415.

16. In Minneapolis, St. P. & S. Ste. M. Ry. v. Borum, 286 U.S. 447 (1932), Mr. Justice Butler, who had spoken for the Court in *Rock*, again expressed the Court's reluctance to extend *Rock* to every fraudulent violation of rules or regulations framed by the employer for maintaining a certain standard of safety and efficiency.

Western Ry.,[17] the Court limited *Rock* to its precise facts to insure inclusion of employees under the F.E.L.A.

The *Rock* "doctrine", although largely disregarded in both federal and state jurisdictions when read with the limiting language of *Still*, had a significant—albeit indirect—impact on the formulation of the South Carolina Supreme Court's rule in *Cooper*. Professor Larson, upon whom the court relied in *Cooper*, cites favorably the modern statement of the rule regarding employee misrepresentations found in *Martin Co. v. Carpenter*.[18] In rather lengthy and unnecessary dicta,[19] the Supreme Court of Florida formulated the rule that:

> [A] false representation as to physical condition or health made by an employee in procuring employment will preclude the benefits . . . for an otherwise compensable injury if there is shown to be a causal relationship between the injury and the false representation and if it is also shown that (1) the employee knew the representation to be false; (2) the employer relied upon the false representation; and (3) such reliance resulted in consequent injury to the employee.[20]

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17. 368 U.S. 35 (1961). In *Still* the railroad denied liability under the F.E.L.A. because the petitioner was not employed by it within the meaning of the Act. They alleged that petitioner (1) had made false representations in an employment application with regard to his physical condition, (2) would not have been hired but for these misrepresentations, and (3) that the physical defects, which had been fraudulently concealed, contributed to petitioner's injury. Mr. Justice Black, delivering the opinion of the Court, stated:

> [T]he *Rock* case, properly interpreted, lays down no general rule at all. . . . *Rock* must be limited to its precise facts. In the face of the legislative policy embodied in the Federal Employers' Liability Act that a railroad should pay damages to its workers and their families for personal injuries inflicted by the railroad's negligence . . . considerations of public policy of the general kind relied upon by the court in *Rock* cannot be permitted to encroach further upon the special policy expressed by Congress in the Act . . . . And this conclusion is not affected by the fact that an employee's misrepresentation may have. . . contributed to the injury or even to the accident upon which his action is based.

Id. at 44.

18. 132 So. 2d 400 (Fla. 1961). Employee Carpenter suffered from spondylolesthesis, a congenital condition of the lumbar spine in which there is a lack of fusion in posterior parts of a vertebra with bone being replaced by fibrocartilage. When applying for a job with Martin, Carpenter stated in a pre-employment questionnaire that she suffered from no back ailments. After one year in Martin's employ, she was changed to a job which required standing and bending over a table.This new job aggravated her back condition and necessitated an operation for which Martin denied liability by virtue of Carpenter's misrepresentation.

19. The court held that claimant's injury was not an "accidental injury" upon which a compensation award could be predicated since FLA. STAT. ANN. § 440.02(19) (1966) defined an accident as "an unexpected or unusual event or result, happening suddenly." Resolution of the issue of employee misrepresentation thus became mere surplusage.

20. 132 So. 2d at 406.

To support the soundness of the stated rule, the court in *Martin* cited with approval the rationale of *Rock*[21] but completely ignored the contemporaneous interpretation of *Rock* which severely limited its application.[22] Consequently, reliance upon *Martin* is reliance, in part, upon *Rock* and its unusual and extraordinary factual situation which has no application to the facts of *Cooper*.

The court in *Martin* also supported its rule upon policy considerations. It reasoned that an employer takes the employee as he finds him and assumes the risk of hiring an infirm employee and that, therefore, wisdom and fairness would dictate that an employer be allowed to minimize such risk through inquiries concerning a prospective employee's physical condition. Misrepresentations by an employee would seemingly defeat an employer's attempts at self-protection. This argument, however, is not persuasive. Policy considerations based on the axiomatic premise that a wrongdoer should be precluded from profiting from his fraud or wilful misrepresentation have only limited application to workmen's compensation benefits. While this axiom is true at common law in ordinary civil suits, it is not applicable in most cases involving workmen's compensation claims. Workmen's compensation is fundamentally different from traditional strict tort liability. The right to compensation depends not upon fault but solely upon whether there was a work connected injury. The underlying policy of workmen's compensation seeks to provide social protection for employees and their dependents. It does not seek to right a wrong. Ultimately, the defenses raised in common law civil actions are not available in workmen's compensation claims.[23]

Despite misplaced reliance upon both the *Rock* doctrine and traditional common law notions of fairness, the court in *Martin* discerned a valid basis for its rule in legislative intent. The Florida legislature had not considered the effect of an employee's false

21. 279 U.S. at 415; *see* note 16 *supra*.

22. *Still*, in which the Supreme Court limited *Rock* to its precise facts, was decided several months after the Florida court gave its opinion in *Martin*. In City of Miami v. Ford, 252 So. 2d 228 (Fla. 1971), the Florida Supreme Court had an opportunity to reappraise their rule in light of *Still*. The court however merely restated the *Martin* rule and applied it to the facts of the case without further discussion.

23. 1 LARSON § 2.10. Where wilfulness is a consideration, legislatures have enacted special provisions into their workmen's compensation statutes. In South Carolina, wilfulness bars or limits benefits only in instances of misrepresentation regarding an occupational disease, in death cases caused by drunkenness or suicide, or where an employee has failed to use known safety devices, etc. *See* note 3 *supra*.

representations as to prior physical condition except in instances of pre-existing occupational diseases.[24] The legislature had, however, created a special disability, or second injury fund which allowed employers to be reimbursed for compensation paid an employee for disability resulting from a pre-existing condition.[25] Prior to adoption of second injury provisions, an employer was generally held liable for an employee's entire disability resulting from a combination of a prior disability and a present injury.[26] If, for example, an employer hired someone who had lost his sight in one eye, he became liable for *total* disability if the disabled employee lost sight in his other eye in a subsequent injury. To avoid the harsh impact of this rule of full liability, employers understandably discriminated against disabled job applicants. The creation of a second injury fund was intended to encourage the hiring of handicapped workers.[27] Consistent with this legislative policy, an employer, to qualify for reimbursement, must have had knowledge of the pre-existing condition when he hired the employee or have continued employment after obtaining such knowledge.[28] After reviewing legislative intent which prompted adoption of second injury fund provisions, the court opined that extension of compensation benefits to an employee who misrepresents his physical condition would not only rob employers of the ability to choose employees freely but would deny the employer the ability to resort to the special disability fund.[29]

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24. FLA. STAT. ANN. § 440.151(1)(b) (1966) provides:

> No compensation shall be payable for an occupational disease if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represents himself in writing as not having previously been disabled, laid off or compensated in damages or otherwise, because of such disease.

25. *Id.* § 440.49.

26. 2 LARSON § 59.00.

27. *Id.*

28. FLA. STAT. ANN. § 440.19(h) (1966) specifically provides:

> As used in this subsection [Special Disability Trust Fund], permanent physical impairment means any permanent condition due to previous accident or disease or any congenital condition which is or is likely to be a hindrance or obstacle to employment and *which was known to the employer prior to the occurence of the subsequent injury or occupational disease* (emphasis added).

Contra, Subsequent Injuries Fund v. Industrial Accident Comm'n, 56 Cal. 2d 842, 17 Cal. Rptr. 144, 366 P.2d 496 (1961). California does not require the employer to have prior knowledge of a handicap because the employee seeks compensation directly from the Subsequent Injuries Fund. The employer does not incur full liability for subsequent injuries.

29. Martin Co. v. Carpenter, 132 So. 2d 400, 406 (Fla. 1961).

The South Carolina legislature has recently enacted a comprehensive Second Injury Fund.[30] To prevent discrimination against handicapped workers in hiring practices, the legislature has directed that the costs of successive injuries be apportioned between the employer and the Second Injury Fund. Although the employer initially pays the full amount of compensation to which an injured employee is entitled, he can apply to the Fund for reimbursement of all compensation payable in excess of one hundred and four weeks.[31] Consistent with legislative intent to promote employment of disabled workers, an employer's reimbursement from the Second Injury Fund is conditioned upon his establishing "by written records. . .that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time that the employee was retained in employment after the employer acquired such knowledge."[32] The Second Injury Fund became effective on July 1, 1972, but it was made applicable only to second injuries occurring after that date and to employees having a permanent physical impairment who were employed or retained in employment after that date.[33] The accident in *Cooper* occurred on February 17, 1971.[34] Consequently, McDevitt could not have sought reimbursement from the Second Injury Fund.[35] However, the mere existence of the Fund, irrespective of the applicability of its provisions to the facts in *Cooper*, is significant in determining whether the legislature intended to bar compensation benefits to employees who falsely represented their physical condition.

The rationale of *Martin* has provided other jurisdictions a

30. S.C. CODE ANN. §§ 72-601 *et seq.* (Cum. Supp. 1973). All but four states—Georgia, Louisiana, Nevada, and Virginia—have adopted some type of second injury fund or its equivalent. *See* 2 LARSON § 59.31.

31. S.C. CODE ANN. § 72-601 (Cum. Supp. 1973).

32. *Id.* § 72-601(c).

33. No. 1390, [1972] S.C. Acts & Jt. Res. 2578.

34. Brief for Appellant at 7, Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973).

35. In *Cooper* there are indications that the attorney for Cooper was either not aware of the existence of South Carolina's Second Injury Fund or did not realize its significance:

> In connection with the question here under consideration, it is submitted that the Supreme Court of this State would take notice of past evidence of rehabilitative agencies seeking to urge upon the Legislature of this State an amendment to the Workmen's Compensation Act . . . . The purpose of such legislation is clearly to encourage employers to hire persons who have suffered previous injuries or disabilities. The Legislature of this State has not yet seen fit to pass such legislation.

Id. at 13.

foundation upon which to formulate a similar rule to bar benefits where an employee has misrepresented his physical condition. In *Air Mod Corp. v. Newton,*[36] the Supreme Court of Delaware reversed and remanded an award of the Industrial Accident Board to take evidence on claimant's misrepresentations under its newly formulated rule.[37] The court founded its decision upon the *Rock* "doctrine" and upon "evidence in the [Workmen's Compensation] Statute of a public policy regarding an employee's obligation of truthful pre-employment health disclosure" because Delaware's "Second Injury Fund. . . and the apportionment provision . . . are premised upon an employer's knowledge of an employee's prior injury, disease or infirmity."[38] *Martin* was cited favorably as being considerate of both public policy and principles of fairness and justice. In *Volunteers of America of Madison, Inc. v. Industrial Commission,*[40] the Wisconsin Supreme Court adopted the *Martin* rule despite the non-existence of a second injury fund. The Wisconsin Workmen's Compensation Act did, however, contain a special provision[41] requiring epi-

36. 59 Del. 148, 215 A.2d 434 (1965). Claimant had sustained a back injury in a fall in 1937 but waited almost twenty years before undergoing back surgery. Five months after the surgery, he obtained a job as a welder with Air Mod. Prior to his employment, Newton wrote "no" to the following questions: "Any physical defect or chronic disease?" and "Have you been confined by illness in past year?"

37. The rule formulated by the court is identical with that contained in 1A LARSON § 47.53 and in *Martin. See* note 8 *supra* and accompanying text.

38. 59 Del. at 157, 215 A.2d at 440.

39. *Id.*

40. 30 Wis. 2d 607, 141 N.W.2d 890 (1966) (Fairchild, J., dissenting). Because deceased employee Cusic left no one wholly dependent upon him, the State of Wisconsin filed a claim against Volunteers for death benefits. Cusic had been employed as a counselor at a summer camp and, prior to employment, had been required to complete a health examination form. Although Cusic had a long history of epileptic seizures, he did not indicate such on the form nor did he inform an examining physician of his past history. In the course of his employment, Cusic drowned in an unwitnessed accident with no indication of trauma or other injury. An epileptic seizure could have caused his fall into the camp's lake. The Industrial Commission determined the cause of the fall was immaterial since Wisconsin followed the "positional risk" or "increased hazard" doctrine. This finding was set aside by the circuit court and remanded for determination of the cause of the fall consistent with Wisconsin's special epilepsy provision.

41. WIS. STAT. ANN. § 102.08 (1973) provides:

> Epileptics . . . may elect not to be subject to the provisions of this chapter for injuries resulting because of such epilepsy . . . and still remain subject to its provisions for all other injuries . . . . Such elections shall be made by giving notice to the employer in writing on a form to be furnished by the department, and filing a copy of such notice with the department. An election may be revoked by giving written notice to the employer of revocation, and such notice shall be effective upon filing a copy of such notice with the department.

leptics to disclose their condition to prospective employers who may then require a waiver from liability for injuries caused by an epileptic seizure. The special provision was framed to encourage employers to hire epileptics without fear of liability for subsequent injuries caused by seizures. Citing *Air Mod Corp.* and *Martin,* the court recognized that the special epileptic provision was analagous to a second injury fund which implicitly required an employee not to conceal his epileptic condition.[42] In *Federal Copper & Aluminum Co. v. Dickey,*[43] the Supreme Court of Tennessee adopted the *Martin* rule after finding legislative intent in sections of their act providing for waivers,[44] as in *Volunteers,* and for a second injury fund,[45] as in *Martin.*

Only two jurisdictions, in which the issue of employee misrepresentations as to prior health has been raised, have rejected the *Martin* rule. The Supreme Court of Oklahoma in *H. J. Jeffries Truck Line v. Gresham*[46] awarded compensation benefits to an employee who had falsely represented that he had no heart condition despite the existence of a second injury fund provision.[47] While ignoring a strong dissent which urged adoption of the *Martin* rule, the majority stated:

> Our Workmen's Compensation Act is silent on the effect of

42. *See* 30 Wis. 2d at 616, 141 N.W.2d at 894 (1966).

43. 493 S.W.2d 463 (Tenn. 1973). Dickey had sustained a back injury which required removal of a disc from his back and a subsequent injury which required his wearing a brace. Three years later, Dickey slipped while in Federal's employ and reinjured his back. Federal claimed that Dickey had falsified his application for employment to avoid Federal's policy of not hiring employees with histories of back injuries.

44. TENN. CODE ANN. § 50-1109 (Cum. Supp. 1973).

45. *Id.* § 50-1027.

46. 397 P.2d 637 (Okla. 1964) (5-3 decision). In *Jeffries* claimant denied having a "heart disease" when questioned by a nurse preliminary to his pre-employment physical examination. At the time of the examination, however, claimant was still under medical care from his first heart attack and was taking an anti-coagulant remedy prescribed by a physician.

47. OKLA. STAT. ANN. tit. 85 § 171 *et seq.* (1970). The subsequent injuries provisions of the Oklahoma statutory scheme differ drastically, as to the requirement of prior employer knowledge, from those of South Carolina:

> For the purpose of this Act, the term "physically impaired person" is hereby defined to be a person who as the result of accident, disease, birth, military action, or any other cause, has suffered the loss of the sight of one eye, the loss by amputation of the whole or a part of some member of his body, or the loss of the use, or partial loss of the use, of a specific member such as is obvious and apparent from observation or examination by an ordinary layman, that is, a person who is not skilled in the medical profession, or any disability which previously has been adjudged and determined by the State Industrial Commission.

Id. § 171.

> employee's false representation which does not amount to fraud *in esse contractus* and render the contract absolutely void . . . In the absence of a clear legislative intent, we do not feel at liberty to impose any limitations, forfeitures or abridgements upon the employee's statutory right to recover compensation.[48]

In Georgia, the court in *General Motors Corp. v. Hargis*[49] held an employer liable for benefits upon the doctrine of *inclusio unius est exclusio alterius.*[50] The court discerned legislative intent not to adopt the *Martin* rule since Georgia's statutory scheme specifically barred compensation where a prospective employee misrepresented his physical condition[51] but remained silent as to all other instances of misrepresentation.

In *Cooper,* the majority of the court accepted Professor Larson's statement of the general rule derived from *Martin.* The dissent, in turn, placed heavy reliance upon *Hargis* and *Jeffries* in asserting the absence of legislative intent to bar compensation benefits to employees who misrepresent their physical condition while seeking employment.[53] This reliance is misplaced. The Second Injury Fund with the specific requirement of employer knowledge impliedly places a duty upon handicapped employees to reveal their physical condition or prior injury to an inquiring employer so that the employer can take advantage of the Fund's reimbursement provisions. If such a duty is not placed upon handicapped workers, employers will continue to discriminate in hiring policies contrary to legislative intent. In rejecting the rationale of *Martin* and its progeny, the dissenters were obviously unaware of the existence of South Carolina's Second Injury Fund:

> The second injury fund provision of the Florida statute, relied on by the court in *Martin* in support of the stated rule, has no

48. 397 P.2d 637, 643 (Okla. 1964).

49. 114 Ga. App. 143, 150 S.E.2d 303 (1966). Claimant Hargis had fractured his wrist while playing football several years earlier and had failed to avail himself of proper medical treatment. The fracture had never healed and an injury to the wrist occurred while Hargis was operating an air gun. Although the court would allow claimant to receive an award despite his misrepresentations, the award of the State Board of Workmen's Compensation was reversed and remanded for apportionment.

50. The phrase is defined as "the inclusion of one is the exclusion of another." BLACK'S LAW DICTIONARY 906 (4th rev. ed. 1968). Since the statute in question includes only false representations regarding occupational diseases, other types of misrepresentations not going to the factum of the employment contract will not be included within the statutory scheme to bar compensation.

51. GA. CODE ANN. § 114-804 (1973).

52. Cooper v. McDevitt & Street Co., 260 S.C. at 468, 196 S.E.2d at 835 (1973).

53. *Id.* (Bussey, J., dissenting).

> counterpart in our Workmen's Compensation Act . . . . The Delaware case of *Air Mod Corp. v. Newton* . . . also rests . . . in substantial part upon the second injury fund provision of its Workmen's Compensation statute quite similar to, if not identical with, that of the Florida statute and which again has no counterpart in our Act . . . . When the statutory differences are considered, I do not regard any of the cited cases as being really in point or at all persuasive . . . .[54]

The basic purpose of South Carolina's Workmen's Compensation Act is the inclusion of employees within its terms rather than their exclusion and the Act's presumptions should be directed toward the end of effective coverage rather than noncoverage.[55] In applying the newly enunciated general rule of *Cooper*, the court should be wary of possible employer efforts to avoid liability by requiring employees to complete vague, broad, or complex medical histories prior to employment. Despite mere existence of false statements on a pre-employment application, the statements must have been knowingly falsified. An employee's age, intelligence, educational background, etc., must be considered as well as the possibility of an honest mistake on the employee's part.[56] Additionally, if an employee intentionally misrepresents his physical condition to procure employment and then remains employed over a period of time, the mere passage of time gives the employer an opportunity to observe the employee's job performance and ascertain any pre-existing physical limitations first hand. The longer the employment, the less relevant the misrepresentations become.[57] Application of the general rule in *Cooper* must be consistent with the basic purposes of compensation benefits.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

It is fundamental that an employer-employee relationship must exist before provisions of the Workmen's Compensation Act are applicable.[58] Consequently, an employer might seek to avoid liability for work-connected injuries by contracting or subcontracting work which would normally be done by him. Statutory

54. *Id.* at 472, 196 S.E.2d at 837.
55. Cagle v. Clinton Cotton Mills, 216 S.C. 93, 56 S.E.2d 747 (1949).
56. *See* Aron v. Kirk's Lawn Service, 190 So. 2d 759 (Fla. 1966).
57. Young v. Morris, 475 S.W.2d 505 (Ky. 1972).
58. Marlowe v. E.L. Jones & Son, 248 S.C. 568, 151 S.E.2d 747 (1966).

provisions, however, create a special class of "statutory employees" to extend compensation coverage to employees of contractors, subcontractors and sub-subcontractors.[59] Since the primary purpose of such provisions is to prevent evasion of compensation coverage by contracting of the employer's normal work, the test of applicability is whether the work performed by "statutory employees" is normally part of the trade, business, or occupation of the employer.[60] Although this test seems simple, no formula for the determination of what is normally performed by common-law employees is possible, and existence of a statutory employer-employee relationship is largely determined by the facts of each case.[61]

In *Wilson v. Daniel International Corp.*,[62] the court had to decide whether a statutory employer-employee relationship existed in order to determine whether a suit in tort for negligently inflicted injuries was barred.[63] Wilson was an employee of a ready-mixed concrete supplier. His duties were to deliver concrete, position his truck, and pour the concrete into previously constructed forms. All processing of the concrete after delivery to Daniel's construction site was done by Daniel as a general contractor. Upon one such delivery, Wilson was injured by the negligence of one of Daniel's employees. Wilson sued Daniel in tort but Daniel claimed that Wilson's employer was a subcontractor engaged in the construction business and that Wilson, as a "statutory employee," was restricted to recovery under workmen's compensation. The court noted that ready-mixed concrete is a valuable building material which, because of its nature, cannot be stockpiled. Instead, concrete must be delivered at the purchaser's request and poured into forms at the construction site. After examining the language of the purchase order in which Daniel was termed the purchaser and Wilson's employer the concrete vendor, the court concluded:

> The transaction [supply of ready-mixed concrete to a construction site] is essentially a sale and delivery, and the supplier is

59. S.C. CODE ANN. §§ 72-111 to 72-113 (1962).

60. *Id. See* 1A LARSON § 49.00.

61. *See* Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941).

62. 260 S.C. 548, 197 S.E.2d 686 (1973).

63. S.C. CODE ANN. § 72-121 (1962) makes the Workmen's Compensation Act an exclusive remedy by employees against employers. *Cf.* Mack v. R.C. Motor Lines, Inc., 365 F. Supp. 416 (D.S.C. 1973).

a materialman, not a subcontractor engaged in the execution of part of the work undertaken by the contractor.[64]

III. INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

To be entitled to compensation benefits, a workman must have injuries resulting from an accident "arising out of and in the course of the employment."[65] These statutory words are the crux of the South Carolina Workmen's Compensation Act and, consequently, have been the subject of considerable statutory construction. To ease its burden of construction, courts have reduced the phrase to its essential elements. The words "arising out of employment" refer to the origin or cause of the accident while the words "in the course of employment" refer to the time, place and circumstances under which the accident occurs.[66] The two elements are used conjunctively and must be concurrent and simultaneous. One without the other will not sustain an award. Both phrases, however, are so entwined that they are usually considered together in the reported cases,[67] and a recent decision of the supreme court may have de-emphasized the distinction between these phrases and initiated a trend toward a more simplified "work-connected" test.

In *Carter v. Penney Tire and Recapping Co.*,[68] the sole issue upon appeal was whether Carter's injuries "arose out of" his employment. Carter and another employee of Penney Tire had been involved in an altercation with Crosby, a non-employee who was unknown to Carter but known to his co-worker. Several days later, Carter and his co-worker were repairing a roof on their employer's property when Crosby saw them by chance. Crosby then made threatening gestures and sent threats to them. Carter informed his employer of Crosby's acts and words but was assured of protection and instructed to return to work. Shortly thereafter, Crosby returned to the scene and shot Carter. In affirming an award of compensation benefits, the court held that Carter's injuries arose out of his employment.

As a general rule, when the animosity or dispute that culminates in an assault is imported into the employment from

64. 260 S.C. at 552, 197 S.E.2d at 688. *Accord*, Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958).

65. S.C. CODE ANN. § 72-14 (1962).

66. Thompson v. J.A. Jones Construction Co., 199 S.C. 304, 19 S.E.2d 226, 228 (1942).

67. Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173, 174 (1965).

68. 200 S.E.2d 64 (S.C. 1973).

the claimant's private life, and is not exacerbated by the employment, the assault does not "arise out of" employment.[69] Nevertheless, personal and employment causes often combine to produce an assault, particularly where the employment setting brings a quarrel to fruition. A court should not weigh the relative importance of the two causes, nor look for primary and secondary causes. It should merely inquire whether the employment was a contributing factor.[70] If employment appears to contribute to the assault, the concurrence of the personal cause will not prevent compensation.[71] In *Carter,* the court noted that Carter and Crosby did not know each other, had no long-standing difficulty and, but for the chance sighting, Carter might never have encountered Crosby again, let alone been harmed by him.[72] This situation is contrasted drastically with one in which an employee is stalked by a third person who ultimately commits an assault on the premises of his victim's employer.[73]

Carter may be the initial step towards elimination of the distinction between injuries "arising out of employment" and

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69. 1 LARSON § 11.21.

70. In holding that Carter's injuries arose out of his employment, the court restated its traditional and oft-used definition of the term:

> It [the injury] arises 'out of' employment, when there is apparent to the rational mind upon consideration of all of the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

200 S.E.2d at 65, quoting from Bridges v. Elite, Inc., 212 S.C. 514, 519, 48 S.E.2d 497, 499 (1948).

71. 1 LARSON § 7.40.

72. 200 S.E.2d at 66.

73. In 1 LARSON § 11.21, Professor Larson colorfully describes such a factual situation which was at issue in *Bridges v. Elite, Inc.*, 212 S.C. 514, 48 S.E.2d 497 (1948):

> [T]he deceased employee was shot by her lover in a sort of Frankie-and-Johnnie tragedy. The inevitability of the murder is shown by the assailant's attempt earlier to find her at her boarding house, after having sent word by a friend that he was going to "put five 38's in her," a promise which he carried out with perfect accuracy as to both number and caliber of the shots.

those "in the course of employment."[74] The court, after reviewing several cases which were labeled "strongly persuasive"[75] concluded that compensation awards are justified when an employee is required to perform his duties under circumstances in which he is endangered by a peril from a source outside of and unrelated to his actual work when the peril is known to the employer who afforded the employee no protection or relief.[76] Consequently, sending an employee into a "zone of danger" creates the causal relationship necessary to establish an injury "arising out of" employment.[77]

IV. OCCUPATIONAL DISEASES

Consistent with workmen's compensation's basic purpose of protecting employees from the hazards of their employment, South Carolina provides compensation benefits for occupational diseases.[78] Occupational diseases are treated as though they are

74. "In the course of employment" refers to the time, place, and circumstances under which the accident occurred. For example, in Beam v. State Workmen's Compensation Fund, 200 S.E.2d 83 (S.C. 1973), the court held that where two teachers were killed in an automobile accident while travelling from Gaffney to Columbia to attend a teachers' meeting, death arose out of and in the course of employment. At the time the teachers were hired, their superintendent had told them that attendance at such meetings, although not compulsory, was definitely urged, or expected, rather than merely encouraged.

In Eagles v. Golden Cove, Inc., 260 S.C. 113, 194 S.E.2d 397 (1973), the court held that circumstances may create a presumption, even without medical testimony to satisfy the "most probable" rule, that death arose out of and in the course of employment. In *Eagles*, the employee was pronounced dead on arrival at a hospital after being discovered by his co-workers lying on his back, foaming at the mouth and unable to speak. Minutes before his condition was discovered, the deceased had told one of his co-workers that he had been stung by a bee and had requested his co-worker to get help. Medical testimony of the attending physician was that Eagles was dead on arrival at the hospital and that it was possible for a bee sting to be fatal. The physician did not say that the death was most probably caused by the sting, nor did he give an opinion as to the cause of death. The commission, circuit court, and supreme court all agreed that the circumstances alone provided a causal connection between injury and death.

75. 200 S.E.2d at 66-67.

76. *Id.* at 67.

77. *See* Berresi v. Ryan, 242 App. Div. 279, 275 N.Y.S. 370 (1934). In *Berresi*, a chauffeur had a personal enemy who was also a customer of his employer. The employer had knowledge of the enmity; notwithstanding this knowledge, the employer sent the chauffeur with a load of grain to the enemy's premises where the employee was shot to death. Compensation was awarded because the employer had knowingly sent the employee into a situation of special hazard and danger.

78. S.C. CODE ANN. § 72-251 (1962) provides:

> The words *"occupational disease"* mean a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee

injuries arising out of and in the course of employment,[79] and in view of the gradual development and progressive nature of most occupational diseases, this classification may produce overly harsh results.

In *Gunnells v. Raybestos-Manhattan, Inc.*,[80] the court reversed an award of death benefits to the widow of a deceased workman who died from asbestosis. Gunnells contracted asbestosis in the course of his employment. Raybestos afterwards transferred Gunnells to a watchman's job but on December 29, 1961, Gunnells became totally disabled as a result of asbestosis and was forced to quit. This disablement represents the "injury by accident" which the statutes require.[81] At the time Gunnells became totally disabled, Raybestos' insurance carrier advised him that he had not incurred a compensable disability. Consequently, Gunnells failed to pursue a workmen's compensation claim and accepted pension benefits. On April 30, 1969, Gunnells died as a result of asbestosis and his widow initiated a claim for death benefits.

Gunnells died over seven years after becoming totally disabled by an occupational disease. A widow's claim for benefits is, however, limited to cases in which "death results proximately from an accident and within two years thereafter *or while total disability still continues and within six years after the accident*. . . ."[82] Unlike a statute of limitations which may be waived for a reasonable excuse,[83] this code provision is a statutory mandate from which the court cannot deviate. Continuous, total disability and death within six years after the accident are conditions precedent to the accrual of any right in the widow for compensation benefits.[84] Since Gunnells died after the six year period, the court held that the widow's asserted right never vested.

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is engaged. A disease shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof . . . .

79. *Id.* § 72-253. Disablement or death from occupational disease, rather than contraction of the disease, constitutes the event which is considered as an "injury by accident" for the purposes of the Act. *See* Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960).

80. 261 S.C. 106, 198 S.E.2d 535 (1973).

81. *See* note 79 *supra*.

82. S.C. CODE ANN. § 72-180 (Cum. Supp. 1973).

83. *See* Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962).

84. 261 S.C. at 110, 198 S.E.2d at 536.

In most states, including South Carolina, benefits and conditions controlling compensability for occupational diseases are restricted by a substantial array of statutory provisions. One of the most common types of restrictive provisions bars claims unless death or disability occurs within a specified number of years.[85] These restrictive provisions were originally based upon the fear that industries in which occupational diseases were common could not bear the financial impact of full liability.[86] For example, when Wisconsin introduced full silicosis coverage, it discovered that insurance premiums in some industries promptly soared higher than the payroll itself.[87] States recognized that full compensation coverage might force some industries to cease operation and deter other similar industries from locating in the state. Consequently, state legislatures responded to industry's desires by throwing up a variety of barriers to full coverage. Makeshift provisions were contrived to help employers and their insurance carriers over transitional difficulties. These provisions, however, remained in compensation acts long after their justification had disappeared. The excessive costs of full coverage envisioned by industry can be viewed as merely a temporary problem because industries of the thirties had little understanding of various occupational diseases and practiced poor preventive techniques.[88]

Gunnells represents the harshness of outdated industrial fears and legislative action may be necessary to liberalize South Carolina's statutory provisions. There is, currently, a general trend toward revising occupational disease provisions which require that death or disability occur within specified periods. The most commonly accepted alternative is "to make the period run only from knowledge, real or constructive, of the condition and its relation to employment, at the same time often removing or extending considerably the absolute outside time limits on claims."[89]

In the absence of legislative reform, the restrictive provision of South Carolina's compensation act which bars a widow's claim if made more than six years after her husband's disablement may not be able to pass constitutional muster. To be constitutional, provisions of compensation acts cannot be arbitrary, unreasona-

85. 1A LARSON § 41.80.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

ble, or fundamentally unjust or oppressive.[90] Under South Carolina's statutory provision, compensation awards may differ drastically between two women whose husbands became disabled from an occupational disease on the same day but where one husband dies a day prior to the other. Such results require a rational reason to justify what appears to be an arbitrary classification and unreasonable distinction. With advanced medical knowledge, prevention and treatment of occupational diseases may have made original fears about the financial costs of full coverage unfounded, and the rationale behind such classifications may no longer exist.

At least one jurisdiction has considered the constitutionality of restrictive occupational disease provisions. In *Gauthier v. Campbell, Wyant & Cannon Foundry Co.*,[91] the Supreme Court of Michigan refused to consider differences in compensation rates between victims of silicosis and victims of other injuries unconstitutional as an arbitrary and unreasonable classification. In evaluating the rationale behind Michigan's rate compensation scheme, the court noted:

> Any argument that the scheme is now "obsolete" as to future disabilities must wait consideration on a record which presents some facts from which it might be deduced that the legislative reasoning had lost all value with passage of time and change of circumstances.[92]

Two years later, the court, in *McDaniel v. Campbell, Wyant & Cannon Foundry Co.*,[93] relied upon a 1958 cost study of silicosis to uphold the constitutionality of Michigan's maximum limitation on benefits to victims of silicosis. The study indicated that silicosis was concentrated in relatively few industries and that average compensation costs for silicosis victims run higher than for other injuries. In view of these facts the court found a reasonable basis in the possibility that insurance costs to employers would skyrocket.

A cost study conducted over sixteen years ago cannot accurately reflect current medical advancements in the treatment and prevention of occupational diseases. Moreover, *McDaniel* is read-

90. Marshall v. Drew F. Mahoney Co., 56 F.2d 74, 78 (9th Cir. 1932).

91. 360 Mich. 510, 104 N.W.2d 182 (1960).

92. *Id.* at 523-24, 104 N.W.2d at 188-89. Claimant in *Gauthier* placed no facts in the record to suggest that the classification complained of was obsolete.

93. 367 Mich. 356, 116 N.W.2d 835 (1962).

ily distinguishable from *Gunnells* in which death benefits were denied absolutely rather than merely limited by a different standard. Time limitations which are conditions precedent to extension of coverage and which are not subject to alteration by mitigating circumstances or reasonable excuses may be constitutionally infirm.[94]

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94. *Contra*, Emmons v. Keller, 21 Ohio St. 2d 48, 254 N.E.2d 687 (1970). The South Carolina Legislature has recognized the inherent injustice of barring death benefits in ionizing radiation injuries which are slowly progressive. S.C. CODE ANN. § 72-285(b) (Cum. Supp. 1973) provides:

> The time for filing claims for benefits in the event of death shall not begin to run until the person entitled to file such claims knows, or by the exercise of reasonable diligence should know, the possible relationship of the death to the employment.